(37)

No. 97-829-CFX

Title: MCI Telecommunications Corporation, Petitioner
v.
Iowa Utilities Board, et al.
and
MCI Telecommunications Corporation, Petitioner
v.
California, et al.

Docketed:
November 19, 1997

Vide:
97-826
97-830
97-831
97-1075
97-1087
97-1099
97-1141

Court: United States Court of Appeals for the Eighth Circuit

Entry	Date	Proceedings and Orders
	Nov 18 1997	Petition for writ of certiorari filed. (Response due December 19, 1997)
	Dec 3 1997	Waiver of right of respondent Texas Office of Public Utility Counsel to respond filed.
	Dec 8 1997	Waiver of right of respondent Kentucky Public Service Commission to respond filed.
	Dec 9 1997	Brief of respondent GST Telecom, Inc. in support of petition filed. VIDED.
	Dec 9 1997	LODGING consisting of twelve plastic bound copies of excerpts of amici in the lower court submitted by counsel for the respondent GST Telecom.
	Dec 11 1997	Waiver of right of respondent Natl. Assn. of State Utility Consumer Advocates to respond filed. VIDED.
	Dec 12 1997	Brief of respondent California in opposition filed. VIDED.
	Dec 15 1997	Order extending time to file response to petition until December 19, 1997.
	Dec 17 1997	Waiver of right of respondent Colorado Public Utilities Commission to respond filed.
	Dec 18 1997	Waiver of right of respondents Sprint Spectrum L.P., et al. to respond filed.
	Dec 18 1997	Waiver of right of respondents Cox Communications Inc. and Vanguard Cellular System, Inc. to respond filed.
	Dec 18 1997	Brief of respondent GTE Entities in opposition filed. VIDED.
	Dec 18 1997	Brief of respondents So. New England Telephone Co. and Mid-Sized Local Carriers in opposition filed. VIDED.
	Dec 18 1997	Brief of respondent Regional Bell Companies in opposition filed. VIDED.
	Dec 18 1997	Brief of respondents State Commission Respondents and NARUC in opposition filed. VIDED.
	Dec 19 1997	Brief of respondents United States Telephone Association, et al. in opposition filed. VIDED.
	Dec 23 1997	Reply brief of petitioner MCI Telecommunications Corporation filed.
	Dec 30 1997	Motion of petitioners to expedite consideration of the petition filed.
	Dec 30 1997	Waiver of right of respondent Kansas Corporation Commission to respond filed.

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Entry	Date	Proceedings and Orders
	Dec 31 1997	Waiver of right of respondent Arkansas Public Service Commission to respond filed.
	Jan 5 1998	DISTRIBUTED. January 9, 1998 (Page 41)
	Jan 5 1998	Opposition of Regional Bell Companies and GTE to motion of petitioner to expedite consideration of the petition filed.
	Jan 6 1998	Letter from counsel for MCI Telecommunications Corp. received and distributed. VIDED.
	Jan 8 1998	X Reply memorandum of petitioners in support of motion to expedite filed. VIDED.
	Jan 12 1998	Motion of petitioners to expedite consideration of the petition GRANTED. and the several petitions for writs of certiorari will be considered by the Court at its January 23, 1998 Conference. Justice O'Connor OUT.
	Jan 20 1998	REDISTRIBUTED. January 23, 1998
	Jan 26 1998	Petition GRANTED. Justice O'Connor OUT. SET FOR ARGUMENT October 13, 1998. **********
	Feb 3 1998	Motion of Solicitor General for a consolidated briefing schedule filed.
	Feb 3 1998	response by respondents and cross-petitioners to motion for consolidated briefing schedule.
	Feb 4 1998	Reply of Federal Communications Commissione, et al. in support of motion for consolidated briefing schedule.
	Feb 9 1998	Waiver of right of respondent Mississippi Public Service Commission to respond filed.
	Feb 19 1998	DISTRIBUTED. February 20, 1998 (Page 54)
	Feb 20 1998	The motion of the Solicitor General for a consolidated briefing schedule is granted in part and denied in part.Petitioners may file briefs, not to exceed 50 pages, only on the questions presented in their petitions on orbefore April 3, 1998. Cross-petitioners/respondents may file briefs, not to exceed 75 pages, that both respond to petitioners and address the questions presented in the cross-petitions on or before May 18, 1998. Petitioners may file briefs, not to exceed 50 pages, that both reply on their issues and respond to cross-petitioners' issues on or before June 17, 1998. Cross-petitioners may file briefs,not to exceed 25 pages, that only reply to cross-respondents' briefs on or before July 17, 1998. Justice O'Connor took no part in the consideration or decision of this motion.
	Feb 23 1998	Motion of Solicitor General for a consolidated briefing schedule GRANTED. Justice O'Connor OUT.
	Mar 13 1998	Motion of Local Exchange Carriers regarding oral argument filed.
	Mar 19 1998	Response of the United States, et al. to Motion of the Local Exchange Carriers for divided argument and for additional time for oral argument.
	Mar 23 1998	Response of Califiornia, et al. to motion of Local Exchange Carriers for divided argument and for

Entry	Date	Proceedings and Orders
		additional time for oral argument.
	Mar 23 1998	Motion of respondent California for divided argument and for additional time for oral argument filed.
	Apr 3 1998	Brief amicus curiae of Covad Communicaations Company filed. VIDED.
	Apr 3 1998	Brief of respondent Competition Policy Institute in support of petition filed. VIDED.
	Apr 3 1998	Brief of respondent GST Telecom, Inc. in support of petition filed. VIDED.
	Apr 3 1998	Brief of petitioner MCI Telecommunications Corp. filed. VIDED.
	Apr 3 1998	Brief of petitioners AT&T Corp., et al. filed. VIDED.
	Apr 17 1998	Response of State Commission Respondents, et al. to motion of Local Exchange Carriers for divided argument and for additional time for oral argument.
	Apr 17 1998	Response of the United States, et al. to motion of California for divided argument and for additional time for oral argument.
	Apr 20 1998	Reply of Local Exchange Carriers and response to California's motion regarding oral argument.
	Apr 21 1998	Reply of California regarding oral argument.
	May 7 1998	Motion of respondents California, et al. to defer consideration of motions regarding oral argument filed.
	May 18 1998	Brief of respondent Ameritech Corporation filed. VIDED.
	May 18 1998	Brief of respondents Association for Local Telecommunications Services filed. VIDED.
	May 18 1998	Brief of respondent Mid-Sized Local Exchange Carriers filed. VIDED.
	May 18 1998	Brief of respondents GTE Entities, et al. filed. VIDED.
	May 18 1998	Brief of respondents United States Telephone Assn. and Rural Telephone Coalition filed. VIDED.
	May 18 1998	Brief of respondent U S WEST, Inc. filed. VIDED.
	May 18 1998	Brief of respondents Bell Atlantic Corporation, et al. filed. VIDED.
	May 18 1998	Brief of respondent California filed. VIDED.
	May 18 1998	Brief of respondents State Commission Respondents and NARUC filed. VIDED.
	May 22 1998	LODGING consisting of 11 copies of two FCC Reports submitted by counsel for the respondent
	May 26 1998	Motion of Local Exchange Carriers regarding oral argument GRANTED. Two hours are allotted for oral argument; the first hour is limited to the jurisdictional issue and the second hour is limited to the non-jurisdictional issues. Divided argument is granted with respect to the jurisdictional issue to be divided as follows: 30 minutes - petitioners/cross-respondents; 15 minutes - State respondents/cross-petitioners; 15 minutes - private respondents/cross-petitioners. Justice O'Connor OUT.
	May 26 1998	Motion of respondent California for divided argument and for additional time for oral argument DENIED. Justice

No. 97-829-CFX

Entry	Date	Proceedings and Orders
		O'Connor OUT.
	Jun 15 1998	Motion of Solicitor General for divided argument filed.
	Jun 17 1998	Reply brief of petitioners Assn. for Local Telecommunications Services, et al. filed. VIDED.
	Jun 17 1998	Reply brief of Federal Petitioners filed. VIDED.
	Jun 17 1998	Reply brief of petitioner MCI Telecommunications Corporation filed. VIDED.
	Jun 17 1998	Reply brief of petitioners AT&T, et al. filed. VIDED.
	Jun 26 1998	Motion of Solicitor General for divided argument GRANTED. Justice O'Connor OUT.
	Jul 1 1998	Joint appendix filed. VIDED.
	Jul 1 1998	Joint Appendix in three Volumes.
	Jul 17 1998	Reply brief of petitioners Bell Atlantic Corporation, et al. filed. VIDED.
	Jul 17 1998	Reply brief of petitioner GTE Midwest Incorporated filed. VIDED.
	Jul 17 1998	Reply brief of petitioner U S West, Inc. filed. VIDED.
	Jul 17 1998	Reply brief of petitioner Ameritech Corporation filed. VIDED.
	Jul 21 1998	CIRCULATED.
	Aug 11 1998	Record filed.
	Oct 7 1998	Motion of Covad Communications Company for leave to file supplemental brief as amicus and brief filed.

FILED

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OFFICE OF THE CLERK

No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

MCI TELECOMMUNICATIONS CORPORATION,
Petitioner,

v.

IOWA UTILITIES BOARD, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Eighth Circuit, in disregard of the fundamental postulates of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, improperly invalidated regulations promulgated by the Federal Communications Commission implementing the landmark Telecommunications Act of 1996—in particular, the FCC rule prohibiting incumbent local monopolists from engaging in discriminatory conduct against new entrants seeking to use parts of the existing local network—and thereby thwarted Congress' goal of creating competition in local markets as quickly as possible.

2. Whether, in light of the explicit grants of authority to the FCC to establish regulations to implement the requirements of the local competition provisions of the Telecommunications Act of 1996, the Eighth Circuit improperly held that the FCC exceeded its jurisdiction when it promulgated regulations implementing the pricing and other important requirements of the Act, on the theory that the regulations applied to intrastate matters relegated to the jurisdiction of state public utility commissions.

LIST OF PARTIES AND AFFILIATES

The parties to the proceedings in the Eighth Circuit are listed in the Appendix at 1a-4a, 73a-79a, 92a.

Pursuant to Supreme Court Rule 29.6, petitioners state as follows:

MCI Telecommunications Corporation is a wholly-owned subsidiary of MCI Communications Corporation. MCI has the following non-wholly owned subsidiaries: General Communications, Inc.; IFP Holdings, Inc.; ICS Communications, Inc.; Digital Network Television, Inc.; Genesys Telecommunications, Inc.; Inflight Phone Corp.; Multimedia Medical Systems, Inc.; News T Investments, Inc.; News Triangle Finance, Inc.; Pioneer Holding L.L.C.; and Security Technologies, Inc.

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MCI Telecommunications Corporation ("MCI") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The initial decision of the Eighth Circuit reviewing the First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98 (Aug. 8, 1996) ("*Local Competition Order*"), issued by the Federal Communications Commission ("FCC"), is reported at 120 F.3d 753, and is reprinted in the appendix ("Pet. App.") at 1a.[1] The subsequent decision of the Eighth Circuit granting certain respondents' petitions for rehearing is unreported, and is reprinted at Pet. App. 69a. The FCC's *Local Competition Order* is reported at 11 FCC Rcd. 15499 (1996). Relevant excerpts of that order and the accompanying regulations, codified at 47 C.F.R. §§ 51.1-51.809, are reprinted at Pet. App. 131a-353a.[2] The decision of the Eighth Circuit reviewing the FCC's Second Report and Order in its local competition rulemaking (11 FCC Rcd. 19392 (1996)) is reported at 124 F.3d 934, and is reprinted at Pet. App. 73a.

JURISDICTION

The Eighth Circuit issued its decision on rehearing and its mandate on October 14, 1997. This Court has jurisdiction under 28 U.S.C. § 1254(1).[3]

STATUTORY PROVISIONS INVOLVED

This case involves the Telecommunications Act of 1996 ("1996 Act"), Pub. L. No. 104-104, 110 Stat. 56, codi-

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[1] Pursuant to discussions with the Clerk's Office, petitioner MCI is not filing its own appendix. Citations herein refer to the appendix filed by AT&T *et al.*

[2] Fifteen copies of the *Local Competition Order* have been lodged with the Court.

[3] The Court of Appeals had jurisdiction to review the FCC's regulations pursuant to 28 U.S.C. § 2342(i) and 47 U.S.C. § 402(a).

fied at 47 U.S.C. §§ 151-276. The most relevant provisions are reprinted at Pet. App. 93a-130a.

STATEMENT OF THE CASE

This petition seeks review of Eighth Circuit decisions vacating FCC regulations implementing the 1996 Act, a landmark statute designed "to shift monopoly [local telephone] markets to competition as quickly as possible."[4] In the 1996 Act, Congress asserted federal jurisdiction over local telecommunications matters that had previously been left to the States. Congress did so because historically the States had fostered monopoly provision of local phone service, and Congress desired a uniform national policy "promot[ing] competition in the local telephone service market." *Reno v. American Civil Liberties Union*, 117 S. Ct. 2329, 2338 (1997). To ensure *rapid* execution of that policy, Congress required the FCC to "establish regulations to implement" the Act's requirements within six months of the Act's passage. 47 U.S.C. § 251 (d)(1). The FCC met that deadline. The Eighth Circuit has now invalidated many of those regulations, crippling the prospects for local competition.

The Regulatory Structure Prior to 1996. The Communications Act of 1934 divided responsibility for regulation of telecommunications markets into well-defined (albeit overlapping) spheres: federally-regulated interstate services, and state-regulated intrastate services. 47 U.S.C. § 152. *See Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355 (1986). Under this dual jurisdiction, incumbent local exchange carriers ("LECs") historically have "been protected from competition by State and local government barriers to entry." H. Rep. at 49. In contrast, federal authorities over time promoted the development of competition in interstate markets.

The FCC first introduced competition in the market for the sale and lease of telephones (which are used for

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[4] *See* H.R. Rep. No. 104-204, 104th Cong., 1st Sess. at 89 (July 24, 1995) ("H. Rep.").

both interstate and intrastate calls), and then for other equipment. *See Carterfone*, 13 F.C.C.2d 420 (1968). Local telephone monopolists and state public utility commissions jointly fought those efforts on the ground that the FCC had exceeded its jurisdiction by regulating equipment used for intrastate services. The courts of appeals rejected such challenges because the facilities at issue were used inseparably for both interstate and intrastate service.[5] The FCC also promoted competition in interstate long distance service. In particular, it required incumbent local monopolists to interconnect existing local networks with the facilities of the new competing long distance carriers (such as MCI) so that long distance calls could be originated and terminated.[6]

Incumbents nevertheless continued to use their control over the existing network to discriminate against competitors in ways that evaded regulatory control. To halt that anticompetitive conduct, the Department of Justice brought a landmark antitrust suit which resulted in the consent decree that broke up the Bell System. *See United States v. AT&T*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd*, 460 U.S. 1001 (1983). As a result, there is now vibrant competition in the markets for telephone equipment and interstate long distance service. *See AT&T Reclassification*, 11 FCC Rcd. 3271, 3312 (1995) (noting rapid decline in long distance prices).

Notwithstanding these changes, the States persisted in preventing competition in intrastate markets. The individual telephone companies created by the break-up of the Bell System simply inherited pre-existing local monopoly franchises and continued to operate them as such. It was not until the 1990s that a few states began even to contemplate local competition, and their initiatives produced

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[5] *E.g. North Carolina Util. Comm'n v. FCC*, 537 F.2d 787, 791-94 (4th Cir. 1976); *National Ass'n of Reg. Util. Comm'nrs v. FCC*, 880 F.2d 422, 431 (D.C. Cir. 1989).

[6] *E.g. Specialized Common Carriers*, 29 F.C.C.2d 870 (1971), *aff'd sub nom. Washington Util. Comm'n v. FCC*, 513 F.2d 1142 (9th Cir. 1975).

only very limited competitive entry in seven states.[7] By 1996, incumbent LECs still received over 99% of all local service revenues. *See* NPRM at ¶ 6 & n.13.

The 1996 Act. In the 1996 Act, Congress radically changed the balance between state and federal regulatory authority that had prevailed under the 1934 Communications Act, as well as the substantive policies that had prevailed under the old regime of state regulation. Abandoning its prior acquiesence to state-regulated local monopolies, Congress adopted new uniform *federal* requirements designed to eliminate legal and economic barriers to all forms of local telephone competition—requirements that applied to both intrastate and interstate uses of the local network. Congress expressly preempted any state laws and regulations that had prohibited, or had the effect of prohibiting, new entrants from offering intrastate telephone service. 47 U.S.C. § 253(a). Congress also adopted substantive federal requirements designed to reduce economic and practical barriers to entry by authorizing new entrants to make use of existing local networks.

The 1996 Act establishes three complementary routes new entrants can use to compete in local markets—each providing for the entrants' use of existing local networks. The first is facilities-based competition. "Interconnection" makes such competition possible. 47 U.S.C. § 251(c)(2). Once a new entrant begins constructing its own network facilities, it must be allowed to "interconnect" with the existing network so that its customers can make calls to and receive calls from the LEC's customers. Without interconnection, a new entrant would have to construct a duplicate network able to reach every home and business in a local service area. But even with interconnection, widespread competition will not develop promptly through facilities-based entry alone, because new entrants can

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[7] *See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Notice of Proposed Rulemaking at ¶ 5, CC Docket No. 96-98, FCC 96-182 (rel. Apr. 19, 1996), 11 FCC Rcd. 14171 (1996) ("NPRM").

offer competitive service *only* to customers they reach with their own facilities. As Congress recognized, substantial facilities-based competition will not occur quickly, "because the investment necessary is so significant." *See* H.R. Conf. Rep. No. 104-458, 104th Cong., 2d Sess. at 148 (Jan. 31, 1996) ("Conf. Rep.").[8]

The Act's second route for entry is "resale." § 251 (c)(4). Incumbent LECs must permit new entrants to purchase their retail services at wholesale rates so that new entrants can compete by reselling existing services to retail customers. Resale allows quick entry, but holds the least prospect for genuine, sustained competition. Because the wholesale rate is calculated by subtracting from the retail rate the LEC's "avoided costs"—that is, the costs the LEC will not incur by virtue of not being a retailer (47 U.S.C. § 252(d)(3))—resale presents only limited opportunities for price competition. Wholesale rates will often be significantly above the forward-looking economic cost of providing service, and thus above the rates that would exist in a competitive market. Nor will new entrants be able to use resale to innovate by offering new products and services the LECs do not now provide. New entrants may only resell the exact same services the incumbent LEC offers its local customers.

The third route for entry set forth in the 1996 Act is leasing elements of the existing network. Specifically, § 251(c)(3) imposes on incumbent LECs the duty to provide to new entrants "non-discriminatory access to network elements on an unbundled basis . . . in a manner that allows requesting carriers to combine such elements in order to provide . . . telecommunications service." This method offers a significant prospect for real competitive choices for a large number of customers in the near term.

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[8] The FCC estimated that an investment of more than $29 billion would be required today to construct local networks capable of reaching even 20% of available subscribers. NPRM, ¶ 7 & n.15.

To understand why the use of unbundled elements holds the most promise for immediate local competition, it is necessary to review the nature of the local telephone network. The basic physical architecture of the network consists of (i) the interface box attached to the outside of the home or business connecting the phone line to the wires inside the home or business; (ii) the "local loop," which is the wire that runs from the interface box at the customer's premises to the nearest switching center, known as an "end office"; (iii) the telephone "switches" in the end offices (to which the local loops connect) which are simply large computers that direct calls to their intended destinations; and (iv) "transport" facilities, which are the wires that carry calls between switches. To make the physical network function, there are other processes and capabilities, which Congress has also termed "network elements," including signaling, operator services, and the operations support systems that permit ordering, billing and repairs. 47 U.S.C. § 153(29). Many of these elements are nothing more than computer programs embedded in the switch's software.

By requiring incumbent LECs to make these network elements available on an "unbundled basis," Congress gave new entrants the flexibility to use components of the existing network in innovative ways. A new entrant can use parts of the existing network in combination with its own facilities. For example, a new entrant can install its own switches, and lease local loops and interface boxes from the incumbent LEC to reach customers' homes. Or a new entrant can rely entirely on components of the existing network, but use them to offer services the LEC does not currently offer or to compete in ways that resale does not permit. Furthermore, because the Act requires that the prices for using unbundled network elements be set at cost-based rates (47 U.S.C. §§251(c)(3), 252(d)(1)), new entrants will be able to price their offerings to consumers based on the efficient forward-looking cost of network elements, and thus will be able to drive prices to competitive levels.

In addition, the 1996 Act sets forth a detailed process for translating these substantive federal requirements into working relationships between new entrants and incumbent LECs. Incumbents must negotiate with new entrants over the terms of interconnection, access to network elements and resale. § 251(c)(1). But because monopolists are unlikely to agree to terms that will allow new entrants to take away customers, Congress gave state public utility commissions the authority to convene compulsory "arbitrations" to set terms. Given the complicity of many states in past monopolistic local markets, Congress kept state commissions on a short leash in performing this function. Section 252 specifically dictates that in resolving "any open issues" between the parties in these arbitrations, state commissions are to apply the substantive federal requirements of § 251 and the FCC's implementing regulations. § 252(c)(1). The final terms (both negotiated and arbitrated) are set forth in "interconnection agreements."[9] Congress placed tight time deadlines on this process. States are required to produce final "interconnection agreements" within 9 months of the time a new entrant first requests negotiations. § 252(b)(4)(C). Federal district courts may then review the state commissions' decisions to ensure that they conform to the Act and the FCC's regulations. § 252(e)(6).

Finally, the local competition provisions of the 1996 Act also play a critical role in the process of determining when the Bell Operating Companies (BOCs)—the incumbent LECs created by the break-up of the Bell System—will be allowed to provide long distance service in their regions. Section 271 gives the FCC the responsibility to decide when the BOCs may enter long distance markets from which they are presently barred. In doing so, the FCC must determine whether the access and interconnection provided by the BOC meets a "competitive checklist,"

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[9] These "interconnection agreements" cover more than just "interconnection" provided by § 251(c)(2) of the Act, and include all terms related to access to unbundled elements and resale as well.

which incorporates by reference many of the requirements of §§ 251 and 252. 47 U.S.C. § 271(b)(2)(B).

The FCC Regulations. Congress directed the FCC to "complete all actions necessary to establish regulations to implement the requirements of [§ 251]" within 6 months of passage of the 1996 Act. § 251(d)(1). The need to have federal rules in effect *before* the start of the state arbitration proceedings led Congress to require the FCC to act promptly: "[I]t is important that the Commission rules to implement [the] new section 251 be promulgated within 6 months after the date of enactment, so that potential competitors will have the benefit of being informed of the Commission['s] rules in requesting access and interconnection." Conf. Rep. at 148-49.

The FCC issued regulations on August 8, 1996. Two critical components of those regulations are at issue here. First, the FCC's Order implemented the 1996 Act's requirements concerning the prices competitors pay to interconnect with the LECs network and to lease network elements. The Act requires that these prices be "just, reasonable and nondiscriminatory in accordance with the . . . requirements of this section and section 252." 47 U.S.C. § 251(c)(2), (3). Section 252, which § 251 incorporates by reference, states that rates are to be "based on the cost . . . of providing the interconnection or network element . . . includ[ing] a reasonable profit." 47 U.S.C. § 252(d)(1).[10] The regulations implementing these statutory requirements established basic pricing methodologies for state commissions to follow in establishing rates in light of particular local conditions. *See Local Competition Order* ¶¶ 618-984.[11]

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[10] The FCC's pricing regulations also implement the statutory provisions governing resale prices and prices for transport and termination. 47 U.S.C. §§ 251(c)(4), 252(d)(2), 251(b)(5).

[11] In substance, the FCC determined that prices had to be based on the forward-looking economic cost of each of the leased elements, plus a reasonable profit. It named the pricing theory it adopted

Second, the FCC issued regulations implementing the statutory unbundling requirements of § 251(c)(3), which requires "nondiscriminatory access" to network elements. One of these FCC rules prohibited LECs from responding to a request for elements that were *already connected* in their networks by physically disconnecting those elements solely for the purpose of making it more difficult and expensive for competitors to use them. 47 C.F.R. § 51.315(b). The FCC concluded that this prohibition was compelled by the text of § 251(c)(3). *Local Competition Order* ¶ 293 ("section 251(c)(3) bars incumbent LECs from separating elements that are ordered in combination"). As the FCC explained, absent such a rule, new entrants "would be seriously and unfairly inhibited in their ability to use unbundled elements to enter local markets." *Id.*

Proceedings In the Eighth Circuit. As soon as the regulations were published, the LECs (joined by various state utility commissions on some issues) challenged them. Pursuant to 28 U.S.C. § 1407, the cases were consolidated in the Eighth Circuit. The court stayed the FCC's pricing rules, but left most other rules in place. As a result, the FCC's rules concerning interconnection and access to unbundled network elements governed ongoing arbitrations conducted pursuant to § 252, but its pricing rules did not.

The Eighth Circuit issued a decision on the merits on July 18, 1997, which it modified on rehearing on October 14, 1997. The court first held that the FCC lacked plenary authority to promulgate the regulations implementing the requirements of § 251. Although the 1996 Act expressly required the FCC "[w]ithin 6 months . . . [to] complete all actions necessary to establish regulations to implement the requirements of this section [251]," (47 U.S.C. § 251(d)(1)), the court held that this statutory command was only "a time constraint, directing the Commission to complete expeditiously its rulemaking regard-

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"Total Element Long Run Incremental Cost," or "TELRIC," pricing. Because the Eighth Circuit ruled that the FCC lacked jurisdiction, the substance of those regulations is not at issue.

ing only the areas in section 251 where Congress expressly called for the FCC's involvement." [12]

The court then identified six narrow substantive areas of local telecommunications where, in its view, Congress explicitly authorized the FCC to regulate.[13] Outside these six areas *any* FCC action was *ultra vires*. Pet. App. 12a. Chief among the many areas over which the FCC supposedly lacks jurisdiction is price. The court held that because of "[t]he absence of any direct FCC pricing authority over local telephone service," Pet. App. 13a, the FCC had violated the "plain meaning" of the Act in concluding that it could issue pricing regulations. Pet. App. 14a-15a & n.15.

The court also held that the FCC's pricing rules were barred by § 2(b) of the 1934 Communications Act, 47 U.S.C. § 152(b), which provides that "nothing in this chapter shall be construed to apply or to give the [FCC] jurisdiction with respect to charges, classifications, prac-

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[12] The court also rejected the FCC's reliance on its general authority under § 201(b) of the Communications Act, 47 U.S.C. § 201(b), which authorizes the FCC to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act." In the court's view, this provision (and similar provisions on which the FCC had relied (47 U.S.C. §§ 154(i), 303(r)) only authorized regulation of common carriers "engaged in interstate or foreign communication." Pet. App. 12a. Because, in the court's view, the 1996 Act concerns primarily "the rates of local intrastate phone service," which were outside the FCC's "primary directives," the court concluded the FCC had no authority under these jurisdictional provisions to implement the terms of the 1996 Act. *Id.* For similar reasons, the court also concluded that the FCC could not use its traditional enforcement authority under § 208 of the 1934 Act, 47 U.S.C. § 208, to enforce *any* of the 1996 Act's requirements in administrative complaint proceedings.

[13] Pet. App. 12a & n.10. *See* § 251(b)(2) (number portability), § 251(c)(4)(B) (prevention of discriminatory conditions on resale), § 251(d)(2) (identification of network elements), § 251(e) (numbering administration), § 251(g) (continued enforcement of exchange access), and § 251(h)(2) (treatment of comparable carriers as incumbents).

tices, services, facilities, or regulations for or in connection with intrastate communications service." Holding that Congress needs to set out "an unambiguous grant of intrastate authority to the FCC [for it] either to jump over or pass through section 2(b)'s fence," Pet. App. 17a, the Eighth Circuit concluded that in the 1996 Act Congress acted in "exactly the opposite" manner, because "the Act directly and straightforwardly assigns to the states the authority to set the prices." *Id.* The court also rejected the argument that the FCC had authority to regulate because the network elements were intended to be used inseverably for interstate as well as intrastate service under a unified regime.[14]

The Eighth Circuit then considered the substantive validity of the remaining rules it found to be within the FCC's jurisdiction. The court struck down many of the rules as inconsistent with the Act's plain meaning. In particular, the court invalidated §§ 51.315(c)-(f) of the FCC's rules, which required incumbent LECs to combine network elements in any manner requested by a new entrant, on the ground that the Act unambiguously requires the competitors themselves, not the LECs, to do the combining of network elements. Pet. App. 52a-53a.[15]

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[14] Relying on § 2(b) the court also vacated FCC regulations concerning exemptions for rural carriers, Pet. App. 30a, the FCC's jurisdiction to hear complaints under Section 208, Pet. App. 31a-32a, and the standards for reviewing interconnection agreements entered into before the effective date of the Act, Pet. App. 34a. As to each of these regulations, the court concluded that Congress had intended the states, not the FCC, "to dictate the substantive standards" necessary to implement the Act's requirements. Pet. App. 29a-30a.

[15] The court also vacated as unreasonable or contrary to the Act's plain meaning the FCC's regulations implementing the 1996 Act's "pick and choose" provision, Pet. App. 24a-27a, rules implementing the agency's interpretation of the preemptive effect of its own regulations, Pet. App. 36a-40a, rules implementing the agency's interpretation of "the standards to determine which elements must be unbundled," Pet. App. 46a, and rules implementing the agency's

On rehearing, the court went further, vacating the one "combination" rule it had previously left standing, 47 C.F.R. § 51.315(b), the prophylactic rule against anti-competitive disconnection of requested network elements that are already connected. In the court's view, when a competitor requests two network elements that are already combined, the LEC is to "uncombine" them, and the competitors must then do the "actual [re]combining" of those elements. Pet. App. 52a-53a.

Petitioner now seeks review of the Eighth Circuit's decision denying the FCC the authority to promulgate rules to implement the full range of § 251's requirements (as well as its authority to enforce those requirements), and its decision invalidating § 51.315(b) of the FCC's rules on substantive grounds.

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari because the Eighth Circuit's decision has dealt a crippling blow to the 1996 Act's principal objective: creating competition in local telephone markets "as quickly as possible." H. Rep. at 89. The 1996 Act "was an unusually important legislative enactment." *Reno v. American Civil Liberties Union*, 117 S. Ct. 2329, 2337 (1997). It sets comprehensive national policy for one of the most significant and dynamic parts of the American economy, and is intended to benefit every American home and business. The Eighth Circuit has made achieving the Act's goals all but impossible. For new entrants like MCI, the marketplace effects of the Eighth Circuit's ruling have been devasting.

1. In critical respects, the Eighth Circuit arrogated to itself the role of national telecommunications policy maker, in disregard of the "dominant, well-settled principle of federal law" requiring "[j]udicial deference to reasonable interpretations by an agency of a statute that

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interpretation of the quality of access LECs must provide to competitors, Pet. App. 50a-52a.

it administers." *National Railroad Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 417 (1992). *See Chevron USA, Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). For example, without any understanding of the destructive consequences its ruling would have on the prospects for local competition, the Eighth Circuit struck down § 51.315(b) of the FCC's rules—which proscribes discriminatory conduct the FCC concluded would "seriously and unfairly inhibit[]" new entrants' ability to compete using network elements. Although the court purported to act on the basis of the Act's "plain meaning," in truth the panel reached out to resolve policy issues in a manner utterly at odds with both the statutory text and Congress' goals. This aspect of the Eighth Circuit's decision "effectively has killed off local competition" in much of the local market.[16]

2. In other critical areas, the Eighth Circuit stripped the FCC of the authority to prescribe uniform national rules implementing the 1996 Act's requirements. In particular, the court refused to give effect to § 251(d)(1) of the Act, which authorizes the FCC to "establish regulations to implement the requirements of this section." 47 U.S.C. § 251(d)(1). Again purporting to rely on the Act's "plain meaning" but in fact drawing inferences from legislative silence, as well as relying on an entirely unprecedented construction of § 2(b) of the 1934 Communications Act (47 U.S.C. § 152(b)), the Eighth Circuit

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[16] *Court Ruling May Close Door On Leasing of Network Elements by CLECs*, Communications Today, Oct. 16, 1997, quoting Anna-Maria Kovacs of Janney, Montgomery, Scott. *See also* Seth Schiesel, *Local Bells Win Another Victory To Block Rivals*, The New York Times, Oct. 15, 1997, at 1 ("The plans of long-distance telephone companies to get into local telephone markets were dealt a major blow yesterday as a Federal appeals court threw out regulations that were intended to foster competition with local telephone incumbents."). Indeed, almost 2 years after the Act's passage, incumbent LECs still control 99% of the market. *See* Yankee Group, eds., *The Unbearable Lightness of Local Competition*, White Paper Vol. 14, No. 8, (May 1997) at 1. Excerpts have been lodged with the Court.

ruled that the FCC could not prescribe regulations to implement the pricing requirements of § 251.

3. This case presents precisely the kinds of "important question[s] of federal law that ha[ve] not been, but should be, settled by this Court." Sup. Ct. R. 10(c). The Eighth Circuit's invalidation of § 51.315(b) of the FCC's rules jeopardizes the continued availability of the entry strategy holding the greatest prospect for widespread competition in the near term—unbundled network elements. The Eighth Circuit's decision to strip the FCC of much of its implementing authority is likewise having enormous effects, both in the marketplace and in the courts. Authority to interpret and implement the Act is now haphazardly dispersed: the FCC may prescribe uniform national rules for some of § 251's requirements, while others will be interpreted and applied by 50 state utility commissions, then reviewed by federal district courts in 50 states, and ultimately rationalized (if at all) only after years of appeals.

4. There is a pressing need for immediate review. The Eighth Circuit has effectively set telecommunications policy for the entire nation. Moreover, the Eighth Circuit's interpretations of §§ 251 and 252 have cast doubt on the validity of every existing arbitrated interconnection agreement between an incumbent LEC and a new entrant, and are being used by LECs to challenge those agreements in more than 70 pending cases under § 252(e)(6) of the Act. Similarly, jurisdictional disputes between the FCC and the states have already arisen in proceedings under the companion provisions of § 271 of the Act, and the scope and number of such disputes is certain to increase as the BOCs seek to enter long distance markets. Thus, the questions raised in this petition should be definitively settled now.

I. THE EIGHTH CIRCUIT'S DECISION INVALIDATING § 51.315(b) OF THE FCC'S RULES CONFLICTS WITH *CHEVRON*, AND HAS HAD A DEVASTATING EFFECT ON LOCAL COMPETITION.

Review of the Eighth Circuit's invalidation of 47 C.F.R. § 51.315(b) is urgently needed. The rule states that "except upon request, an incumbent LEC shall not separate requested network elements that the incumbent LEC currently combines." The reason for such a rule is obvious. When a *LEC* signs up a new customer, *it* does not senselessly break apart the constituent parts of its network and then piece them back together prior to providing service for that customer—and thus does not bear any cost of "recombining" the elements into a finished service. Section 51.315(b) simply placed the potential competitor in the same position as the incumbent LEC, preventing the LEC from exploiting its position as a monopoly vendor by imposing discriminatory costs on its rivals. The restriction also prevented the LEC from making interruption of service a necessary consequence of a customer's decision to change from the LEC to a competitor. Thus, § 51.315(b) simply forbade discriminatory and economically wasteful conduct on the part of incumbent LECs.

The Eighth Circuit's decision invalidating this regulation warrants review because it conflicts with this Court's decisions establishing the proper relationship between a reviewing court and an expert administrative agency charged with implementing a federal statute, and because the Eighth Circuit's overreaching has profoundly disrupted progress toward competition in local markets. These are plainly matters of national importance.

1. This was not a case in which a court could properly second-guess the FCC's policy judgment. The Eighth Circuit's decision to invalidate § 51.315(b) would have been justified only if "Congress ha[d] . . . directly addressed the precise question at issue" and if the plain terms of the statute *unambiguously foreclosed* the FCC's rule. *Chevron*, 467 U.S. at 843. *See Smiley v. Citibank*, 116

S. Ct. 1730, 1733-34 (1996). As will be shown, no fair reading of § 251(c)(3) permits such a conclusion.

a. The Eighth Circuit misread § 251(c)(3) when it concluded that the "plain meaning" of that provision barred the FCC from promulgating § 51.315(b). The court interpreted the requirement in the first sentence of § 251(c)(3) that LECs provide elements "on an unbundled basis" as meaning that LECs were to make network elements available in a physically separated form. It then construed the statement in the second sentence of § 251(c)(3) that LECs must "provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide . . . telecommunications service" as meaning that Congress intended for potential competitors (not incumbent LECs) to be responsible for physically reconnecting the elements. Neither term means what the Eighth Circuit thought it meant.

Providing elements of the network on an "unbundled basis" does not mean physically splitting the network into its constituent components and providing those components in that form. Rather, "unbundle" is a pricing term uniformly defined as "to separate the charges for related products and services usually sold as a package." *Random House Dictionary of the English Language*, p. 2005 (2d Ed. Unab. 1981).[17] When Congress required incumbent LECs to offer potential competitors access to network elements "on an unbundled basis," the substance of its command was that individual parts of the network had to be *priced* and offered separately so that competitors could purchase whatever elements or combinations of elements they needed.

Just as the Eighth Circuit misinterpreted the term "unbundled" in the first sentence of § 251(c)(3), it miscon-

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[17] *See also Webster's New Collegiate Dictionary* (Merriam, 1981), p. 1623 ("to give separate prices for equipment and supporting services; to price separately"); *American Heritage Dictionary*, p. 1315 (2d Col. Ed. 1991) ("[t]he separate pricing of goods and services").

strued the command in the second sentence that LECs "provide such unbundled network elements in a manner that allows requesting carriers to combine" them into a "telecommunications service." What the court described as the "plain meaning" of this provision is in truth an *inference* the court drew based on its patently false assumption that "unbundling" and "combining" are antonymous terms connoting physical actions taken by a LEC and a new entrant, respectively, to break apart and put back together the telephone network. The statute's text, however does not purport to allocate responsibilities in this way. It simply forbids LECs from artifically restricting the uses to which new entrants can put network elements. Indeed, the Eighth Circuit has it exactly backwards. As a result of the court's ruling, LECs may "provide such unbundled network elements in a manner that" *does not* "allow requesting carriers to combine them in order to provide . . . telecommunications service," because LECs may impose costly, needless burdens that make it impossible to use network elements in combination.

Consistent prior usage of the term "unbundled" confirms the Eighth Circuit's error. In 20 years of FCC regulations, "unbundled access" uniformly meant separate pricing—not physical separation. When the FCC required "unbundling" of telephone sets from local service, all that meant was the telephone set was priced separately, and the customer had the option of replacing it with a telephone from another source, or continuing to lease it at a separate price from the LEC. The LEC did not go to the customer's home and rip the phone set from the wall, forcing the customer to reconnect it.[18] And this was the uniform interpretation given the term when the FCC unbundled the features used to provide enhanced services,[19] and other aspects of the network used to provide

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[18] *Second Computer Inquiry*, 77 F.C.C.2d 384, 388, 443-44 (1980), *aff'd sub nom., Computer and Communications Industry Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982).

[19] *Third Computer Inquiry*, 104 F.C.C.2d 958, 1064-66 (1986) ("unbundling" means that "competitors will pay only for Basic

exchange access service. *See, e.g., California v. FCC*, 39 F.3d 919, 927 (9th Cir. 1994).

The Eighth Circuit's reading of the term "unbundled" is also irreconcilably in conflict with the 1996 Act's definition of "network elements." (47 U.S.C. § 153(29)). As the court recognized elsewhere in its opinion, network elements consist not only of the "physical parts" of an incumbent's network, but also of "features, functions, and capabilities" that do not correspond to individual, physically separate parts of the network. Pet. App. 42a-43a. For example, Congress expressly identified "signaling" as a network element. But signaling is not a physically separate part of the network; signaling is simply a network function provided through a combination of separate physical parts, including switches and transport facilities that carry signaling information. Other elements are nothing more than software instructions in a computer. When Congress commanded unbundling of such elements, it cannot possibly have intended that they be provided in physically separate form.

Thus, this was not a case in which the "plain meaning" of the statute foreclosed the agency's policy choice. Even if the Eighth Circuit's reading of the statutory text were consistent with some dictionary definitions (and the court cited none), the existence of multiple alternative dictionary definitions supporting the FCC's interpretation is enough by itself to prove that the FCC had discretion to interpret the statute as it did. *National R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 418-19 (1992); *Sullivan v. Everhart*, 494 U.S. 83, 91-92 (1990).

b. The Eighth Circuit's reading of the second sentence of § 251(c)(3) also crashes head-on into the first sentence of that provision, which requires "non-discriminatory access" to network elements. Forcing competitors to take network elements on a disassembled basis when they are

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Service Elements that they use") *vacated on other grounds by, California v. FCC*, 905 F.2d 1217 (9th Cir. 1990).

already combined in an incumbent's network "would impose costs on competitive carriers that incumbent LECs would not incur, and thus would violate the requirement under section 251(c)(3) that incumbent LECs provide nondiscriminatory access to unbundled network elements." [20]

c. Finally, there is no plausible policy justification for the Eighth Circuit's decision. The Eighth Circuit explained that its version of "unbundling" would serve to raise the cost of using unbundled elements, so that relying entirely on network elements would not become a less costly way to enter local markets than resale. *See* Pet. App. 71a (leasing of "combined" elements without additional costs associated with "recombining" would "obliterate the careful distinctions Congress has drawn" between leasing unbundled elements and purchasing local telephone service at wholesale rates for "resale" to customers).

The very articulation of such a policy rationale makes plain that the court was not simply following an unambiguous statutory text. It was instead attempting to reconcile what it perceived as conflicting statutory commands: the opportunity in § 251(c)(3) to rely entirely on unbundled elements to provide local service and the opportunity in § 251(c)(4) to resell LEC services. Even if it were the court's job to resolve such a conflict (and it is not), the conflict here is entirely manufactured. The FCC determined (once again in findings ignored by the Eighth Circuit) that there was no risk that the distinction between these two different methods of entry would be "obliterated" by its rule prohibiting discrimination in element provisioning, because the two routes of entry are quite distinct. *Local Competition Order* ¶¶ 332-334. Providers of service through combinations of elements face

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[20] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Third Order on Reconsideration, at ¶ 44, CC Docket No. 96-98, FCC 97-295, (rel. Aug. 18, 1997), *petitions for judicial review pending, U S West, Inc. et al. v. FCC*, Nos. 97-3576 et al. (8th Cir. filed Sept. 5, 1997).

risks that resellers do not. A reseller has a guaranteed margin that can be calculated in advance, since it simply purchases services its customers request, at a discounted rate. A competitor that provides service through combinations of unbundled network elements, in contrast, bears the risk that it will purchase elements to provide service, while its customers "will not demand a sufficient number of services using that facility for the carrier to recoup its costs." *Id.* ¶ 334.[21] As the FCC explained, Congress' purpose was not to "express[] a preference for one particular entry strategy," but to create alternative paths new entrants could employ "as market conditions and access to capital permit." *Local Competition Order* ¶ 12.

d. Although the Eighth Circuit's decision would appear to be clearly wrong, at the very least it is sufficiently open to question that it should not be allowed to stand as the last word in national telecommunications policy on a matter so central to implementation of the 1996 Act.

2. The consequences of the Eighth Circuit's decision invalidating § 51.315(b) vividly illustrate the wisdom of *Chevron*. The Eighth Circuit blithely ignored a specific FCC finding that "new entrants . . . would be seriously and unfairly inhibited in their ability to use unbundled network elements" absent a prohibition of the kind contained in § 51.315(b). *See Local Competition Order* ¶ 293. In so doing, the court gave incumbent LECs a ready means to shut down local competition in much of the market.

The LECs have pounced on this opportunity. Many have simply refused to process orders from potential com-

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[21] For example, any decision by a potential competitor to provide service entirely through network elements requires the purchase of switching capabilities, including the capability to provide vertical features (such as call forwarding) that must be paid for by the potential competitor whether or not it is able to sell those capabilities to its customers.

petitors for elements in combination.[22] Others have insisted that potential competitors must now go through a costly process whenever they seek to order a combination of the local loop and a switch. Even though those elements are already connected in the existing LEC network, the LECs are insisting on disconnecting the elements from each other and forcing MCI to (1) construct a so-called "collocation cage" (with all the attendant costs of upkeep such as heating, ventilation and air conditioning) in the LEC end office containing the switch, (2) run wires from the end of the local loop and from the switch into the cage, (3) install equipment within the cage to connect the loop to the switch, and (4) employ technicians to perform that function—all to hook together wires that the incumbent arbitrarily disconnected.[23] Still other LECs have insisted that, instead of allowing MCI to perform this work, they would simply charge MCI the imputed value of what it would cost MCI to do so. All of these stratagems increase the cost to potential competitors of using unbundled elements well past the point at which it is profitable for competitors to use them to provide service.

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[22] For example, US WEST (the monopolist serving most Western States other than California and Nevada) informed the Minnesota Public Service Commission that MCI "is precluded by the [Eighth Circuit] Court's orders and mandate from placing further orders for network elements on a combined basis." US WEST letter to Minnesota Public Utilities Commission (Oct. 24, 1997). These and other documents referred to in this paragraph have been lodged with the Clerk of the Court.

[23] For example, in filings before the New York Public Service Commission, Bell Atlantic has taken the position that in light of the Eighth Circuit's ruling a potential competitor seeking to order combinations of unbundled network elements would have to lease space and install equipment to recombine the elements. Supplemental Petition in Case No. 97-C-0271 (Nov. 6, 1997) at 26 n.29.

The 1996 Act does give new entrants a right to collocate in LEC end offices, 47 U.S.C. § 251(c)(6), but new entrants were given that right for the very different purpose of allowing new entrants to integrate their own facilities efficiently with the LECs' facilities.

The FCC predicted—again in findings ignored by the Eighth Circuit—that new entrants would be "denied a meaningful opportunity to compete" if LECS were permitted to impose these kinds of added costs. *Local Competition Order* ¶ 312. In practice the use of unbundled elements was likely the only economically feasible means of competing for major segments of the local market in the near term. The Eighth Circuit now has assured that fledgling competitors seeking to use unbundled elements in any manner will face an insurmountable competitive disadvantage.[24]

The Eighth Circuit badly miscalculated these potential consequences. The court assumed the additional costs faced by the new entrant would be those associated with gaining physical access to the existing network to put back together elements the LEC had disassembled. Bad as this is, the FCC had previously determined that incumbent LECs would never grant potential competitors access to their networks, and that "it [is] impossible for potential competitors that lack facilities and information about the incumbent's network to combine unbundled elements from the incumbents." *Local Competition Order* ¶ 293. The Eighth Circuit simply dismissed those findings, stating that the very fact of the incumbent LECs' challenge to § 51.315(b) "indicates . . . that they would rather allow entrants access to their networks than have to rebundle the elements for them." Pet. App. 53a. Just as the expert agency predicted, however, no LEC has agreed to allow MCI or other potential competitors access to its network.[25] This is precisely why the judiciary should

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[24] Competition through *resold* services will not be enough to pry open local monopoly markets. The wholesale price of such service is simply too high, which is why, nearly two years after the 1996 Act made resale possible, few competitors are entering the market on a wide scale with resold products.

[25] For example, Southwestern Bell, the LEC serving Texas and other states in the Southwest, has recently indicated to the Texas

not second guess an expert agency on a technical policy judgment.

In view of these consequences, review is plainly warranted.

II. THE EIGHTH CIRCUIT IMPERMISSIBLY STRIPPED THE FCC OF JURISDICTION CONGRESS GAVE IT TO IMPLEMENT THE 1996 ACT.

The Court should also grant certiorari on a second, equally important question: whether the Eighth Circuit has improperly stripped the FCC of the authority Congress gave it to interpret and enforce critical requirements of the 1996 Act. In particular, the Eighth Circuit denied the FCC authority to implement the pricing requirements of § 251(c), the dialing parity requirements set forth in § 251(b)(3), the exemptions for rural carriers set forth in § 251(f), and the requirement of § 252(a)(1) that carriers submit preexisting agreements to state commissions for review. The Eighth Circuit also divested the FCC of its well-established authority under § 208 of the Act—which expressly authorizes the FCC to adjudicate complaints by "[a]ny person . . . complaining of anything done or omitted to be done by any common carrier subject to this [Act]"—to decide any issue arising under the local competition provisions of the 1996 Act, and gave that authority to state commissions despite the absence of any textual basis for doing so.

This Court should review the Eighth Circuit's jurisdictional ruling for two reasons. *First*, it conflicts with the statute and with decisions of other courts of appeals. *Second*, unless the decision is reversed, there is virtually no prospect for coherent administration of the local competition provisions of the 1996 Act.

Commission in declining to provide such access that "it has grave concerns regarding the implications of such an order on the security, integrity and reliability of its network; the quality of its service, and the privacy of its customers." Texas PUC Docket Nos. 16189 *et al.*, Brief on Eighth Circuit Alternatives, (Oct. 27, 1997) at 11, lodged with the Court.

1. a. The "plain meaning" of §§ 251 and 252 does not confine the FCC to the six narrow areas the Eighth Circuit specified. *See supra* n.13. Section 251(d)(1) expressly authorizes the FCC to "complete all actions necessary to establish regulations *to implement the requirements of this section*" within 6 months of the date of enactment. 47 U.S.C. § 251(d)(1) (emphasis added). Chief among § 251's requirements is that rates for interconnection and access to unbundled elements be "just, reasonable, and nondiscriminatory in accordance with . . . the requirements of this section and Section 252." 47 U.S.C. § 251(c)(2), (c)(3). Section 251(d)(1) does not include the qualifying language the Eighth Circuit read into it—*i.e.*, that the FCC may implement only those requirements of § 251 that the 1996 Act elsewhere gives the FCC the explicit responsibility to implement.

The Eighth Circuit went to great lengths to explain away this express grant of rulemaking authority. First and foremost, it concluded that § 251(d)(1) is merely "a time constraint," Pet. App. 12a, and not a grant of authority.[26] But it is simply not plausible to claim that § 251(d)(1) is only a time limit and not a grant of authority, when it is literally both.

Moreover, having discarded the express grant of authority supporting the FCC's issuance of implementing regulations, the Eighth Circuit faced a dilemma. Several provisions of § 251 plainly presuppose that the FCC *does* have the authority to issue rules—indicating that such authority must have been conferred by other provisions. For example, § 251(d)(2) states that "[i]n determining what network elements should be made available for pur-

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[26] Similarly, the court held that § 201(b) of the Act merely authorizes regulations implementing the interstate requirements of federal law. But the plain language of § 201(b) authorizes the FCC to issue regulations implementing all provisions of the Act, not just those provisions dealing with interstate matters. 47 U.S.C. § 201(b) ("The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this [Act.]").

poses of subsection (c)(3) of this section, the Commission shall consider" certain particular issues. The Eighth Circuit sought to work its way out of this dilemma by interpreting these provisions *alluding* to FCC rules as though they were express grants of authority to promulgate these particular rules. But these provisions do not use language granting rulemaking authority.

Equally suspect is the court's conclusion that § 252 of the Act divests the FCC of pricing authority. The Eighth Circuit found it significant that § 252 authorizes state commissions to "establish . . . rates" and that there is no "reference whatsoever to the FCC in the sections of the Act that directly authorize the state commissions to establish prices." Pet. App. 13a. But there is no inconsistency between authorizing the FCC to promulgate a uniform national regulation prescribing a rate setting methodology, and instructing state commissions to establish rates consistent with that methodology.[27]

The Eighth Circuit's contrary conclusion rests not on the "plain meaning" of the statutory text, but on a negative inference drawn from alleged legislative silence. This is not sufficient. Under *Chevron*, when a statutory provision is "silent or ambiguous with respect to [a] specific issue," reviewing courts must defer to the agency. 467 U.S. at 843. In any event, § 252 is not silent: it expressly instructs state commissions to resolve any "open issue" in arbitrations in accordance with "the requirements of section 251 of this title, including the regulations prescribed by the Commission pursuant to section 251." 47 U.S.C. § 252(c)(1). Congress did not need to repeat that instruction when, in the immediately following subsection, it

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[27] Similarly, Congress plainly assumed the FCC would have the authority to issue *pricing* rules because 47 U.S.C. § 160 expressly gives the FCC the authority to forbear from enforcing regulations regarding "charges" issued pursuant to § 251(c). Obviously, Congress would not so carefully have given the FCC authority to forbear from *enforcing* regulations if Congress believed the FCC would not have authority to *issue* such regulations.

instructed state commissions to "establish any rates." 47 U.S.C. § 252(c)(2).

Finally, if the Eighth Circuit's interpretation of §§ 251 and 252 of the Act were correct, the 1996 Act's constitutionality would be called into question. In the Eighth Circuit's view, Congress delegated to state commissions not only the power to apply federal law to the particular facts in their states (that is, the power to adjudicate or "establish rates") but also the power to *make* federal law by "dictat[ing] the substantive standards" not established by Congress. Pet. App. 29a-30a.

That cannot be a proper reading of the Act. Congress may delegate lawmaking power to *federal* agencies, but only because federal agencies are supervised by the President and are thus accountable to the national electorate. But the Constitution does not authorize Congress to delegate federal lawmaking authority to *state agencies. See Printz v. United States*, 117 S. Ct. 2365, 2378, 2581 (1997) (unlawful to transfer federal executive power to "the 50 States, who are left to implement the program without meaningful Presidential control"). And, the role the Eighth Circuit gives to the states to "dictate the substantive standard[s]" of the 1996 Act would appear to be an executive function subject to this constitutional rule. *See Bowsher v. Synar*, 478 U.S. 714, 733 (1986) ("[i]nterpreting a law enacted by Congress to implement the legislative mandate is the very essence of 'execution' of the law"). This constitutional infirmity is itself a powerful reason to review the Eighth Circuit's interpretation.

b. The Eighth Circuit also has interpreted § 2(b) far more broadly than any other court has ever found appropriate, thereby drastically constricting the scope of the FCC's authority under the 1996 Act. The Eighth Circuit held that "in order to qualify for the 'unambiguous' exception to § 2(b), a statute must *both* unambiguously apply to intrastate telecommunications matters *and* unambiguously direct the FCC to implement its provisions." Pet. App. 19a (emphasis in original). The Eighth Circuit thus concluded that § 2(b) denies the FCC jurisdiction even

in areas that are expressly the subject of *federal* substantive requirements.

That reading of § 2(b) is not supported by any prior decision of any court. If left undisturbed, it would drastically curtail the FCC's ability to implement and enforce the requirements of § 251 of the Act because it forecloses the FCC from issuing interpretive regulations respecting *anything in* § 251 other than those few topics as to which the Act specifically mentions FCC regulations. *See supra* n.13. Nor is there any sense to such a restriction. Section 2(b) prevents the FCC, in the guise of exercising its *ancillary* jurisdiction, from regulating beyond the substantive reach of federal law. It has never before been interpreted to mean that the FCC's regulatory authority stops short of the substantive reach of federal law. Moreover, applying the Eighth Circuit's novel understanding of § 2(b) here converts Congress' allocation of authority between federal and state authorities under the 1996 Act into a nonsensical game of chance. Where the 1996 Act happens to make a passing reference to a particular topic of FCC regulations, the FCC may regulate. Where the Act does not, the FCC is stripped of jurisdiction—this in a statute that expressly directs the FCC to issue plenary regulations.

The Eighth Circuit's reading of § 2(b) also conflicts with numerous court of appeals' decisions holding that § 2(b) does not bar the FCC from regulating facilities inseverably used for both interstate and intrastate service. *See NARUC v. FCC*, 746 F.2d 1492, 1496-1500 (D.C. Cir. 1984); *California v. FCC*, 4 F.3d 1505, 1513-14 (9th Cir. 1993); *Puerto Rico Tel. Co. v. FCC*, 553 F.2d 694, 700 (1st Cir. 1977). Applying this previously well-accepted rule, the FCC had the authority, for example, to break the monopoly over the lease of telephone equipment, since telephones, though used predominantly for local calls, are also used for long-distance calls. The network elements that LECs must make available pursuant to § 251 are in this respect just like telephones: they are

indisputably used inseparably both for intrastate service (local service and intrastate toll service) and for originating and terminating interstate long distance calls.

The Eighth Circuit rejected the "inseverability" test used by every other circuit and created a completely different test. In its view, if a service is "fundamentally intrastate [in] nature," having only a "tangential impact on interstate service," that impact is "not sufficient to overcome the operation of section 2(b)." Pet. App. 23a. The Eighth Circuit thought it could depart from the prevailing inseverability rule because a separations process would allow the FCC to set rates for interstate uses of the local network. But Congress contemplated a single rate for *all* uses—intrastate and interstate—of the existing local network by potential competitors. § 252(d)(1). Therefore, when the Eighth Circuit denied the FCC the power to make rules, it effectively stripped the FCC of its traditional and undisputed authority over *interstate* services.

2. The local competition provisions of the 1996 Act stand at a critical juncture. The question is whether an enactment of sweeping national importance will be interpreted and administered in a coherent manner that holds some prospect of achieving Congress' purposes, or whether authority for implementing the Act will instead be dispersed haphazardly among the FCC, state commissions, and federal district courts. The Eighth Circuit's ruling has committed the nation to the latter course. It has left in place FCC rules uniformly implementing certain of the Act's requirements, while giving state commissions the authority "to dictate the substantive standards" necessary to implement other requirements, with the result that the 1996 Act now means different things in different states. Dozens of cases have been brought in federal district courts across the country pursuant to § 252(e)(6) challenging "interconnection agreements" containing these state commission decisions. In the large majority of those cases, either the prospective competitor or the incumbent

LEC has raised a challenge to the pricing methodology adopted by the state commission. Thus, the question of what pricing methodology §§ 251 and 252 allows or requires will be litigated in fora across the country, and then appealed, and the question may well remain unsettled for many years.

Far from settling the respective roles of the FCC, state utility commissions, and the federal courts, the Eighth Circuit's unprecedented analysis will lead to constant warfare over the proper scope of the FCC's authority under the 1996 Act. That is most obviously true with respect to any future regulations the FCC promulgates to implement the specific requirements of § 251. Turmoil will also reign over the FCC's authority under § 271 of the Act, the provision governing whether Bell Operating Companies will be permitted to provide interstate long-distance service to customers in their regions. Congress specifically vested the FCC with the power to decide when a Bell Company should receive such authority. Section 271 requires the FCC to decide whether a Bell Company applying for long distance authority has met the requirements of a "competitive checklist." The checklist expressly incorporates by reference many of the requirements of § 251, including its pricing requirements and other requirements the Eighth Circuit concluded the FCC lacked authority to implement. The text of § 271 plainly contemplates that the FCC will render an independent judgment whether the checklist is met in deciding whether to grant a BOC application. Yet when it does so it will necessarily have to evaluate precisely the same issues the Eighth Circuit said were committed to state commissions. Thus, every application under § 271 will trigger a fight over jurisdiction. Indeed, that is already occurring. Several states and incumbent LECs have sought mandamus from the Eighth Circuit because the FCC made an independent determination in a § 271 application as to whether the prices at issue complied with § 252(d) of the Act. That mandamus petition is still pending.

Similar jurisdictional conflicts could arise when the FCC exercises its authority under § 253(d) of the 1996 Act to preempt state actions that stand as a barrier to competition in the intrastate market. If a state adopts a pricing methodology pursuant to § 252 that prices network elements so high as to constitute a barrier to entry, the FCC could act under § 253(d) to preempt the state's decision.

These results would be antithetical to Congress' goals. The 1996 Act demanded FCC regulations within 6 months of the Act's passage precisely because Congress believed that local competition stood the best chance of developing quickly with enunciated rules in place upon which the regulated community could rely. The Eighth Circuit's decision to oust the FCC from its customary role in enforcing uniform federal policy and to substitute enforcement by a crazy quilt of competing policymakers disserves that legislative strategy. Congress' manifest intention to resolve speedily the foreseen regulatory issues is another reason strongly counseling review by this Court now.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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Nos. 97-829, 97-830, 97-831

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

MCI TELECOMMUNICATIONS CORPORATION,
Petitioner,

v.

IOWA UTILITIES BOARD, *et al.*,
Respondents.

ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES, *et al.*,
Petitioners,

v.

IOWA UTILITIES BOARD, *et al.*,
Respondents.

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA,
Petitioners,

v.

IOWA UTILITIES BOARD, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF RESPONDENT GST TELECOM, INC. IN SUPPORT OF PETITIONS FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The questions presented are identified in the Petitions for Writ of Certiorari filed by Petitioners MCI Telecommunications Corporation; Association for Local Telecommunications Services, et al.; and Federal Communications Commission and United States of America.

LIST OF PARTIES AND AFFILIATES

The parties to the proceedings in the Eighth Circuit are identified in the Petitions for Writ of Certiorari filed by Petitioners MCI Telecommunications Corporation; Association for Local Telecommunications Services, et al.; and Federal Communications Commission and United States of America.

Pursuant to Supreme Court Rule 29.6, Respondent states as follows:

GST Telecom, Inc., is wholly owned by GST USA, Inc., which is wholly owned by GST Telecommunications, Inc., a publicly held Canadian Corporation, whose common stock is traded over the American and Toronto Stock Exchanges.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF RESPONDENT GST TELECOM, INC. IN SUPPORT OF PETITIONS FOR WRIT OF CERTIORARI

Respondent GST Telecom, Inc., respectfully submits this Brief in Support of the Petitions for Writ of Certiorari filed by Petitioners MCI Telecommunications Corporation; Association for Local Telecommunications Services, et al.; and Federal Communications Commission and United States of America.

OPINIONS BELOW

The opinions below are identified in the Petitions for Writ of Certiorari filed by Petitioners MCI Telecommunications Corporation; Association for Local Telecommunications Services, et al.; and Federal Communications Commission and United States of America. They are reproduced in the Petitioners' Appendix.[1]

JURISDICTION

The basis for this Court's jurisdiction is set forth in the Petitions for Writ of Certiorari filed by Petitioners MCI Telecommunications Corporation; Association for Local Telecommunications Services, et al.; and Federal Communications Commission and United States of America.

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are identified in the Petitions for Writ of Certiorari filed by Petitioners MCI Telecommunications Corporation; Association for Local Telecommunications Services, et al.; and Federal Communications Commission and United States of America. They are reproduced in the Petitioners' Appendix.

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[1] Petitioners' Appendix (hereinafter "Pet. App.") refers to the appendix to the petition for a writ of certiorari in *AT&T Corp., et al. v. Iowa Utilities Board, et al.*, Docket No. 97-827, which seeks review of the same judgment as Petitions for Writ of Certiorari filed by Petitioners MCI Telecommunications Corporation; Association for Local Telecommunications Services, et al.; and Federal Communications Commission and United States of America, and which has been adopted by said petitioners.

STATEMENT OF THE CASE

Respondent GST Telecom, Inc. (GST), vigorously supports the various petitioners, especially the Federal Communications Commission (FCC), who have filed petitions for a writ of certiorari to undo the Eighth Circuit Court of Appeals' policy foray into the joyously dynamic and utterly technical world of competitive telecommunications. In essence, the Court of Appeals stepped into the vortex of telecommunications reform set into motion by the Telecommunications Act of 1996 (Act), Pub. L. No. 104-104, 110 Stat. 56, and, seizing upon disparate statutory elements that might have appeared comfortably traditional, apparently engaged in an act of interpretation without regard to the 1996 Act's design as a whole. Unfortunately, the Court of Appeals failed to recognize that this heavily brokered body of reform legislation more closely compares to a grand mosaic where the whole masterfully exceeds the sum of its parts.[2] *Iowa Utilities Board v. FCC*, 120 F.3d 753 (8th Cir. 1997).[3]

Consistent with Congress's general desire to "encourage the rapid deployment of new telecommunications technologies" and "secure lower prices and higher quality services for American telecommunications consumers," 110 Stat. 56, 56 (1996), the overall legislation constitutes a comprehensive plan for displacing local telephone monopolies with competition and choice. Without a doubt, the legislation also constitutes a no-nonsense ap-

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[2] Indeed, in an *amici* filing submitted to the Court of Appeals to counterbalance a prior *amici* filing by four members of the House, six members of the House and Senate confirmed that "the Act was the product of many successful compromises among a variety of competing views and interests, and reflects the customary give and take of the legislative process." Brief of Amici Curiae Bliley, *et al.* at 3, *Iowa Utilities Board v. FCC*, 120 F.3d 753 (8th Cir. 1997) (No. 96-3321). Excerpts of the Brief have been lodged with the Court.

[3] The text of the Court of Appeals' decision has been submitted to the Court in Pet. App. at 1a-67a.

proach to catapulting a new class of telecommunications providers—competitive local exchange carriers (CLECs) —into the local exchange marketplace. Thus, Congress dramatically altered the national telecommunications landscape: it redefined the status quo through four key provisions that ended more than six decades of the old guard's co-dependence on captive rate-payers in the non-competitive local exchange environment.

The Act's key provisions (1) conferred explicit authority on the FCC to complete all actions necessary to establish regulations that would govern interconnection agreements between incumbent local exchange carriers (ILECs) and CLECs; (2) established a procedural framework requiring state public utility commissions (PUCs) to arbitrate failed interconnection negotiations between ILECs and potential competitors; (3) conferred jurisdiction on the FCC to preempt enforcement of any legal requirement that would interfere with the ability of any telecommunications service provider to provide any interstate or intrastate telecommunications service; and (4) established a basis for permitting the Bell operating companies (BOCs)—who presently qualify as the nation's preeminent ILECs—to petition the FCC for authority to provide long distance telephone services. *See, generally*, 47 U.S.C. §§ 251, 251(d)(1), 252, 253, and 271.

As the FCC and the other various petitioners have demonstrated in their petitions for certiorari, the Court of Appeals—at the behest of a consortium of ILECs and state PUCs—invalidated a number of central rules the FCC adopted pursuant to its congressional mandate to establish implementation regulations governing interconnection. Looking backwards to pre-Act rulings governed by the question of whether telephone service amounted to interstate or intrastate service, the Court of Appeals was somehow persuaded that the FCC's pricing methodology governing interconnection qualified as purely intrastate

regulation beyond the FCC's jurisdictional limits.[4] (Pet. App. at 8a-24a.) In another surprising instance, the Court of Appeals substituted its policy judgment for the FCC in vacating the so-called "pick and choose" rule, which entitled CLECs to select the more favorable terms an ILEC may have extended to other parties in prior interconnection agreements. (Pet. App. at 24a-27a.) Finally, on rehearing, the Court of Appeals vacated an FCC rule that prohibited ILECs from separating preexisting combined network elements. (Pet. App. at 70a-71a.) As a result of this most recent ruling, competitors providing service through purchased combinations of an ILEC's unbundled network elements can no longer obtain these elements on a less costly combined basis.

To avoid belaboring this Court with overly redundant briefings, respondent GST adopts and incorporates by reference the citations, arguments, and statutory and case analyses submitted in the petitions for review on certiorari by the FCC and the various other petitioners. As a respondent to the various petitions, GST mainly wishes to support and supplement the petitioners' compelling filings with a ground-level CLEC perspective as to what the Act means and why the Court of Appeals' decision warrants this Court's review.[5]

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[4] Prior to the Act, the notion of FCC interstate jurisdiction related to long distance toll traffic that crossed state lines, while intrastate jurisdiction applied to in-state long distance toll traffic and local exchange service. On its face, the Act has blurred this "traditional" jurisdictional dividing line into extinction, as it expressly places the FCC at the helm of establishing interconnection rules to implement local exchange competition.

[5] Conducting business as a CLEC throughout the Western United States and Hawaii, GST has relied upon the dictates of the Act to deploy local exchange switches and fiber optic networks in states ranging from Idaho, to New Mexico, to California, to Hawaii, and in cities from Boise and Spokane, to Tucson and Honolulu, to name but a few. More significantly, GST epitomizes what the future of telecommunications is all about, as it integrates a full panoply of services into a "one-stop shop," where consumers obtain their local,

REASONS FOR GRANTING THE PETITIONS

The decision below presents important questions of federal law, in that the rulings of the Court of Appeals threaten to undermine congressional intent as it relates to key issues of national telecommunications policy.

I. THE COURT OF APPEALS' DECISION THWARTS CONGRESS'S LEGISLATIVE IMPERATIVE THAT THE FCC ASSUME THE CENTRAL ROLE IN IMPLEMENTING THE ACT.

First and foremost, the Court of Appeals' opinion frustrates section 251's fundamental purpose of advancing the Act's goals. Section 251—as a matter of federal law—establishes a mandatory duty requiring the ILECs to (1) provide competing carriers with nondiscriminatory network interconnection; (2) provide unbundled network elements at just, reasonable, and nondiscriminatory prices; and (3) resell services to other carriers at wholesale rates on a non-discriminatory basis. *See generally* 47 U.S.C. §§ 251(c)(2), 251(c)(3), and 251(c)(4). Even more significantly, section 251(d)(1) directs the FCC to "complete all actions necessary to establish regulations to implement the requirements" of section 251 within six months of enactment.

The plain language of section 251(d)(1), in particular, gives rise to three critical policy inferences germane to the petitions for certiorari. First, this provision imposes a no-nonsense, six-month time line that confirms Congress's commitment to fast-track implementation. For all intents and purposes, Congress ordered the FCC to embark upon an all-out, light-speed mission to promulgate a sweeping body of revolutionary regulations grounded in

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long distance, and data services from the same carrier over the same network facilities. CLECs like GST, however, still require dominant carriers to provide reasonably priced, nondiscriminatory interconnection and unbundled network elements, so GST's customers can place phone calls to customers who subscribe to competing carriers.

technical requirements and anti-trust considerations.[6] Secondly, in commissioning the FCC, a federal agency, to promulgate the interconnection rules, Congress ordained that interconnection in the local exchange constitutes a matter of compelling national interest.

Finally, and most pertinent of all, the plain language of section 251(d)(1) unambiguously establishes the FCC as *the* regulatory body broadly empowered to complete "all actions necessary" to establish the regulations envisioned under section 251, including, presumably, the express requirements set forth at sections 251(c)(2) and 251(c)(3). Among other things, these subsections require that the ILECs provide interconnection and unbundled network elements "on rates, terms, and conditions that are just, reasonable and nondiscriminatory"—especially as they relate to the requirements set forth in sections 251 *and* 252. Thus, the Court of Appeals should not have held that the FCC exceeded its jurisdiction in establishing pricing principles relating to interconnection, as the plain language of sections 251(c)(2) and 251(c)(3), when read in conjunction with section 251(d)(1), compels the FCC to adopt such pricing standards.

For any new CLEC having to contend with unyielding ILECs and uncertain state PUCs, section 251(d)(1) presents distinctively straightforward policy implications that help to explain why Congress looked to the FCC to establish the Act's interconnection rules. Aside from its obvious goal of achieving national coherence and uniformity—and thereby avoiding regulatory fragmentation

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[6] The six-month deadline also demolished any illusions or natural inclinations the ILECs may have had that they might somehow slow roll or otherwise retard the work of the FCC, which, in a monumental display of government alacrity and efficiency, rose to the occasion in enlightened and decisive fashion. See *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd. 15,499 (1996) (First Report and Order) (excerpts printed at Pet. App. 131a-337a).

—in the interconnection process, the overall legislation diplomatically takes into account the likely reality that, in the wake of the Act, too many state PUCs would face capability issues that would retard the process. As it turned out, following enactment, many state PUCs found themselves underbudgeted, understaffed, uncertain and even unwilling to contend with the "paradigm shift" wrought by the Act.[7] Others made their way to the Court of Appeals to defend both their "turf" and a largely meaningless pre-Act intrastate "tradition" that no longer prevails in the post-Act era of federally imposed local competition—to say nothing of integrated telephony service providers.

Significantly, by its terms, the Act authorizes the FCC to preempt any state access or interconnection order that is inconsistent with section 251 or substantially prevents section 251's implementation. In this regard, the Act establishes a minimum federal standard relating to interconnection-related issues, which dovetails with the FCC's jurisdiction and its authority under the Act to preempt any state or local law or rule that imposes a requirement that may prohibit or have the effect of prohibiting the ability of any entity to provide interstate *or* intrastate telecommunications service. 47 U.S.C. §§ 251(d)(3), 253(a) and 253(d). Again, taken as a whole, the Act underscores the FCC's agency expertise and broad powers

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[7] After nearly two years since enactment, some state PUCs have only fairly recently opened costs dockets relating to pricing and interconnection issues. Though such regulatory delays hardly qualify as extraordinary in a context accustomed to monopoly precepts, they are frustrating to investors and murderous to the business case of competitive companies. The Act as a whole, however, contains critical short-term deadlines, demonstrating that Congress meant business in tearing down the time barriers to entry that might impede competitive intrastate telecommunications service. Thus, instead of leaving the job to 50 state PUCs of varying degrees of commitment and ability to wrangle with it, Congress assigned the fast-track interconnection rule-making to the single federal agency with the expertise and wherewithal to ensure timely compliance.

to construe and implement the Act's interconnection requirements—whether they relate to interconnection pricing policies or to conditions surrounding unbundled access—and to construe and preempt legal and economic barriers to entry.

II. THE COURT OF APPEALS' DECISION DRAMATICALLY MISCONSTRUES THE STATES' ROLE IN IMPLEMENTING INTERCONNECTION.

While the Act at section 251 places the FCC in the central role of fashioning federal regulations and enforcing congressional intent as it relates to interconnection in both the interstate *and* intrastate contexts, Congress also saw fit to transform dramatically the role of the state PUCs. Under the old monopoly paradigm, the state PUCs served as public interest watchdogs ensuring that the ILECs spent their money prudently and enjoyed a reasonable and fair rate of return. Thus, in subjecting the monopolists to cost justification and analyzing their requests for rate increases, the state PUCs sought to keep the ILECs solvent while at the same time protecting consumers from unreasonable pricing. Over the years, under the auspices of federal regulations that established elaborate accounting procedures and cost allocation methods, the whole system evolved into a complex game of cat and mouse where the ILECs hid the cheese among reams of accounting data and an onslaught of "expert" testimony that promoted intricate and outcome-determinative methodologies for computing the desired result. One way or another, either the consumer or the taxpayer paid for this costly exercise, while the reviewing courts astutely left the whole mess to the regulators to set pricing policies and cross-examine the numbers.

Under the Act, however, the state PUCs now preside over the procedural framework that subjects the ILECs to an arbitration process if the parties fail to reach an interconnection agreement within less than six months of initiating interconnection negotiations. 47 U.S.C. § 252(b).

Still serving as public interest watchdogs, the state PUCs must now ensure that the ILECs, who enjoy lopsided bargaining power and control the local loops, do not engage in anti-competitive behavior and abuse their bottleneck control over the local exchange market.[8] As the FCC rightly contends in its petition for certiorari, the Act has linked the FCC and state PUCs in "concurrent and complementary pricing roles in fostering competition in local telephone markets." FCC Pet. at 15. In this relationship, the state PUCs must consider specific facts and issues presented for arbitration, and ensure that, in resolving any open issues and imposing conditions upon the parties to the agreement, "such resolution and conditions meet the requirements of section 251, *including the regulations prescribed by the [FCC] pursuant to section 251.*" 47 U.S.C. § 252(c)(1) (emphasis added) Thus, as other parties aptly argued to the Court of Appeals, the FCC and the state PUCs share significant collaborative partnership responsibilities in achieving the Act's goals—with the FCC establishing the overall principles that the state PUCs must apply to ensure that ILEC rates are "just, reasonable, and nondiscriminatory."

Accordingly, the Court of Appeals had no basis to limit the FCC's jurisdictional authority to fashion rules relating to the interconnection process, and should have rejected the jurisdictional issue as an unfounded collateral attack on substantive and well-grounded telecommunications policy that was squarely within both the mandate of the Act and the ambit of the agency's expertise. By convincing the Court of Appeals that the FCC's "pricing" policies jurisdictionally belonged on the "traditional" side of the intrastate equation, the ILECs and state PUCs effectively blocked the FCC from implementing interconnection and unbundling rates based on a forward-looking cost standard that represented the most just, rea-

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[8] "Local loop" refers to the wires that extend from the carrier's switch to the customer's telephone.

sonable and nondiscriminatory basis for developing competitive markets consistent with the purposes of the Act in general, and section 251 in particular.

Even more disconcertingly, if the Eighth Circuit's decision escapes review, the ILECs will have opened the door to the historical abuses associated with playing the numbers and advocating stacked methodologies that will support the recovery of their "embedded costs"—in each and every state PUC. Many state PUCs have already adopted the FCC's forward-looking cost approach, and others will be expected to follow, but the issue will not go away, bringing about more delays and endless litigation. Thus, while the Court of Appeals may have viewed the case presented as a turf battle, its decision derailed a substantive interconnection policy, thereby impeding the Act's momentum and the nation's prospects for effective long-term competition.

III. THE COURT OF APPEALS' DECISION UNDERMINES THE BALANCE OF INTERESTS THAT CONGRESS ESTABLISHED TO ENSURE A RAPID TRANSITION TO COMPETITION.

To be sure, as part of the compromise process that surrounded the give and take of the Act's legislative genesis, the BOCs, who dominate the nation's local exchange service areas, hardly walked away from the table with hat in hand expressing melancholy regrets of Paradise Lost. To the contrary, in exchange for their cooperation in opening long-established networks and local loops to potential competitors, the Act allows the BOCs to enter the lucrative long distance business upon demonstrating compliance with the Act's competitive checklist at section 271(c)(2)(A). Given the BOCs' long-standing dominance in the local exchange market, generations of loyal local service customers will be expected to sign on as BOC long distance customers as well, giving the BOCs an extraordinary incentive to slow roll any CLEC desiring both interconnection and a slight head start in developing

market share. This provision warrants mention and the Court's consideration for two compelling reasons: first, given that the Act sets the stage for the integration of local and long distance services through the nation's dominant carrier facilities, it dispels any lingering doubt on the question of whether the Court of Appeals erred in hanging its hat on pre-Act notions of intrastate turf; second, it reinforces, once again, the time-sensitive exigencies structured into the Act and demonstrates why Congress was uncompromising in giving the FCC broad powers to get the job done.

IV. IN VACATING THE FCC'S "PICK AND CHOOSE" RULE, THE COURT OF APPEALS FRUSTRATED CONGRESSIONAL INTENT EMBODIED IN THE PLAIN LANGUAGE OF SECTION 252(i).

Finally, in throwing out the FCC's "pick and choose" rule, the Court of Appeals, responding to what it perceived as the probable carrier behavior in negotiating interconnection agreements, simply substituted its own uninformed policy judgment for Congress's due deliberation. Section 252(i) provided the FCC with the statutory basis to establish a requirement permitting CLECs to select the more favorable terms an ILEC has extended to other parties in prior interconnection agreements, but—remarkably—the Court of Appeals concerned itself with whether such an approach would "discourage the give-and-take process that is essential to successful negotiations." Pet. App. at 26a.

Section 252(i), however, plainly requires the ILECs to "make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement." 47 U.S.C. 252(i). Petitioners have cogently explained why the Court of Appeals' interpretation constitutes a patent violation of the doctrines established by this Court in *Chevron*

U.S.A., Inc. v. NRDC, 467 U.S. 837 (1984). From a CLEC perspective, given the ILECs' superior bargaining power, bottleneck control, and consistent tendency to discriminate against new entrants, the FCC reasonably construed Section 252(i) to give new entrants the right to obtain "any interconnection, service, or network element provided under an [existing] agreement" without having to accept all other terms of such an agreement. Pet. App. at 261a-268a. Moreover, in a legislative discussion of an earlier version of section 252(i), Congress confirmed that such a requirement was, among other things, necessary to "prevent discrimination among carriers." *See* S. Rep. No. 104-23 at 21-22 (1995). Thus, to the extent that the Court of Appeals' view rests on the assumption that ILECs negotiate fairly, it reflects contextual inexperience at odds with congressional intent, the FCC's agency expertise, and this CLEC's day-to-day reality. It does lend itself, however, to the ILECs' friendly but ponderous foot-dragging—which, given their motive to delay competition, they have raised to the level of performance art.

CONCLUSION

For the reasons stated, Respondent GST Telecom, Inc., requests that the Petitions for Writ of Certiorari filed by Petitioners MCI Telecommunications Corporation; Association for Local Telecommunications Services, et al.; and Federal Communications Commission and United States of America be granted.

Respectfully submitted,

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Nos. 97-826, 97-829, 97-830 and 97-831

In the Supreme Court of the United States

OCTOBER TERM, 1997

AT&T CORP., ET AL.,

Petitioners,

v.

IOWA UTILITIES BOARD, ET AL.,

Respondents.

AT&T CORP., ET AL.,

Petitioners,

v.

CALIFORNIA, ET AL.,

Respondents.

AND RELATED PETITIONS

On Petitions For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

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BRIEF FOR CALIFORNIA IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Eighth Circuit correctly concluded, in light of the mandatory rules of statutory construction contained in Section 2(b) of the Communications Act of 1934, as amended, and Section 601(c)(1) of the Telecommunications Act of 1996, that Congress intended to preserve the role of the States and the dual jurisdictional scheme for telecommunications regulation by conferring on the States authority over intrastate pricing, dialing parity and other requirements of the 1996 Act, except where the Act expressly confers authority over such intrastate requirements on the FCC.

2. Whether the Eighth Circuit correctly concluded that the FCC's "pick and choose" rule, which was stayed and later vacated by the Eighth Circuit because it impeded free and unfettered negotiation between incumbent local exchange carriers and competitive local exchange carriers concerning the terms and conditions of interconnection, is inconsistent with the language, purposes and structure of the 1996 Act.

3. Whether the Eighth Circuit correctly concluded that the FCC rule which would in all cases have required incumbent local exchange carriers to recombine on request unbundled network elements purchased by competitive local exchange carriers is inconsistent with the language, purposes and structure of the 1996 Act, where the rule would have permitted competitive local exchange carriers engaging in resale to avoid paying resale prices and where there exist numerous remedies under the Act to redress specific instances in which an incumbent local exchange carrier takes action which impedes competitive entry.

QUESTIONS PRESENTED – Continued

4. Whether when Congress enacts a dual jurisdictional scheme establishing separate spheres of authority for "expert" Federal and State regulatory agencies, the Federal agency is entitled to *Chevron* deference with respect to determinations it makes that are within the State agency's sphere of authority or that address the line between the two spheres of authority.

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STATEMENT OF CALIFORNIA

The People of the State of California and the Public Utilities Commission of the State of California (hereinafter collectively "California") are the sole State parties that challenged both the FCC's *First Report and Order*[1] and its *Second Report and Order*[2] and hence are the sole State respondents who prevailed in both Eighth Circuit cases below. California, which initiated its transition to local telephone competition in 1993, has an immense interest in bringing fair and effective local competition to its 32 million citizens as soon as possible. In addition, in California virtually *every* telephone call which is subject to the dialing parity rules contained in the *Second Report and Order* is intrastate in nature. California files this separate brief in opposition in both cases because of its unique interest and perspective.

STATEMENT OF THE CASE

Congress enacted the Telecommunications Act of 1996[3] to open all local telecommunications markets to competition. The Act established a set of duties with which incumbent local exchange carriers were required to comply and identified the functions, features and services that incumbent local exchange carriers were required to make available to competing local exchange carriers, as well as the mutual duties of carriers to each

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[1] Pet. App. 131a, *et seq.*

[2] Pet. App. 338a, *et seq.*

[3] Pub. L. No. 104-104, 110 Stat. 56 (Feb. 8, 1996), *codified at and amending* the Communications Act of 1934, 47 U.S.C. §§ 151, *et seq.*

other. 47 U.S.C. § 251.[4] It authorized carriers to negotiate agreements relating to the terms and conditions upon which interconnection, resale and the purchase of unbundled network elements would occur in order to allow the competing carrier access to the incumbent's network. § 252. To the extent that such negotiations were unsuccessful, it authorized State commissions to arbitrate and resolve disputes, and it permitted aggrieved carriers to appeal State commission determinations to Federal district courts. *Id.* Only if a State commission failed to carry out its responsibility under § 252 was the FCC empowered to "assume the responsibility of the State commission. . . . " § 252(e)(5).

The 1996 Act did not fundamentally alter the dual State/Federal jurisdictional scheme established by Section 2(b) of the 1934 Act, 47 U.S.C. § 152(b). By leaving § 2(b) intact when it passed the 1996 Act (with narrow and limited exceptions), Congress preserved the FCC's broad authority over "interstate" matters but also continued to fence off from FCC reach and regulation "intrastate" matters which fall within the exclusive authority of the States.

Nevertheless, with the enactment of the new law, the FCC saw opportunity. It issued its epic *First Report and Order* which tore asunder the dual jurisdictional scheme wrought by Congress by asserting FCC jurisdiction over intrastate matters that Congress reserved to the States, dictated a single methodology for the intrastate (and interstate) pricing of local competition services

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[4] Unless otherwise stated, statutory references are to the 1934 Act, as amended by the 1996 Act. *See* Note 3, *supra*.

nationally which it required the States to employ,[5] deputized the States to carry out its policies, and appointed itself the court of review of all State actions.[6] It simultaneously issued its similarly lengthy *Second Report and Order* which arrogated to itself the power to dictate to the States the standards for intraLATA dialing parity, even though almost every telephone call in the United States which is subject to those standards is intrastate in nature.[7]

Thirty-three States, along with other parties, challenged the FCC's opportunistic seizure of authority in the United States Court of Appeals for the Eighth Circuit. Some sought a stay of the FCC's pricing and "pick and choose" rules pending decision on the merits, and the Eighth Circuit granted the stay. *Iowa Utils. Bd. v. FCC*, 109 F.3d 418 (8th Cir. 1996). On motions to vacate the stay filed by the petitioners herein, which raised the very same arguments which they now raise in their petitions for certiorari (in many cases those arguments

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[5] It did so despite significant differences in evolving local markets and network investment, and in derogation of proceedings in numerous States, including California, which had begun the process of transitioning to local telephone competition several years before the 1996 Act was conceived.

[6] Pet. App. 30a-34a.

[7] The rules for interLATA or long distance dialing parity were established more than a decade ago following the AT&T divestiture, leaving the sole question the appropriate dialing parity rules for intraLATA calls (both local and toll). It was undisputed below that *no* measurable percentage of intraLATA calls (local and toll) associated with California LATAs is interstate in nature, and that nationally .002, or approximately 2 out of every 1000 intraLATA calls (local and toll), are interstate in nature. Moreover, a scant two per cent of intraLATA *toll* calls are interstate in nature.

are taken verbatim from their applications to vacate the stay), this Court unanimously declined to disturb the ruling, rejecting petitioners' claims that there was a "reasonable probability" that four members of the Court would vote to grant certiorari, a "significant possibility" of reversal of the Eighth Circuit's decision and "a likelihood" of irreparable harm arising from the decision. *See FCC v. Iowa Utils. Bd.*, 117 S. Ct. 378 (No. A-299 Oct. 31, 1996) (Thomas, J., in chambers), 117 S. Ct. 429 (No. A-299 Nov. 12, 1996) (per curiam).

After full briefing and argument, the Eighth Circuit rendered its final decision, fully consistent with its earlier stay ruling, vacating portions of the *First Report and Order* and associated FCC regulations. *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997). Shortly thereafter, the Eighth Circuit rendered its final decision vacating portions of the *Second Report and Order* and associated FCC regulations. *California v. FCC*, 124 F.3d 934 (8th Cir. 1997). The court of appeals decisions restored the dual jurisdictional scheme, upholding State authority over intrastate pricing and dialing parity standards, and vacated the FCC's "pick and choose" rule. On rehearing in the *Iowa Utils. Bd.* case, the court of appeals also vacated the FCC's regulation requiring incumbent local exchange carriers to recombine unbundled network elements on the request of a competing local exchange carrier. Pet. App. 69a.

The decisions of the court of appeals cure the jurisdictional maladies of the FCC's orders, effectuate clear congressional intent, and engender a workable blueprint for the ongoing transition from regulation to local telephone competition.

These petitions for certiorari follow.

REASONS FOR DENYING THE PETITIONS

The Telecommunications Act of 1996 may be "an unusually important legislative enactment," *Reno v. ACLU*, 117 S. Ct. 2329, 2337 (1997), but that observation does not address the standards for this Court's exercise of its certiorari jurisdiction. In attempting to address those standards, the petitioners argue that certiorari should be granted because the Eighth Circuit's decisions are incorrect, there is a conflict between the circuits, and there may never be another opportunity for any court to address the issues presented.

a. The claim that the court of appeals' decisions are incorrect is unmeritorious. It was the FCC's *First Report and Order* and *Second Report and Order*, both of which usurped State authority over intrastate matters by reading § 2(b) out of the Act, that erred. Indeed, Congress considered including provisions that would have made § 2(b) inapplicable to the local competition portions of the Act but affirmatively deleted those provisions from the final version of the statute. *See* Pet. App. 18a n. 17. There is, however, no necessity for this Court's advertence to legislative history. Section 2(b) itself, which Congress left intact, is unambiguous in providing that "*nothing* in this chapter shall be construed to apply or to give the [FCC] jurisdiction with respect to . . . charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communications service" (emphasis added). Thus, as the court of appeals correctly found, in the absence of clear statutory language overriding § 2(b) with respect to particular provisions of the 1996 Act, the section applies.

A further pronouncement of Congress also compels this view. In § 601(c)(1) of the 1996 Act (enacted and

signed into law but not codified), Congress provided: "This Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments." This provision, which like § 2(b) is a mandatory rule of statutory construction, demonstrates that § 2(b), except where *expressly* modified, impaired, or superseded, remains in full force and effect. It also demonstrates that State authority to regulate intrastate telecommunications under *State* law, except where *expressly* modified, impaired, or superseded, similarly remains in full force and effect. The facial language of the statute accordingly supports the Eighth Circuit's conclusions. *Accord, Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 368-370, 374 (1986).

The petitioners press their claim that the so-called impossibility or inseverability exception to § 2(b), *see Louisiana*, 476 U.S. at 375-376 n. 4, precludes the applicability of § 2(b) to the local competition provisions of the Act. This argument is patently without merit. Not only was it *not* a stated basis for the FCC's decisions below, *see SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1943); *Burlington Truck Lines v. United States*, 371 U.S. 156, 168-169 (1962), but it is flatly refuted by the FCC's *ONA Reconsideration Order*, 5 FCC Rcd 3084 (1990), *reversed on other grounds sub nom. California v. FCC*, 4 F.3d 1505 (9th Cir. 1993), in which the FCC required, and the Ninth Circuit upheld, dual Federal/State tariffing of basic network elements, the very sort of network elements at issue in this case. 4 F.3d at 1513, 1515. The *ONA Tariffing* decision flies in the face of the new-found assertion by the FCC that Federal regulation of the intrastate component of unbundled network elements is compelled by necessity. Indeed, as noted by the

court of appeals below, ratemaking is inherently severable. Pet. App. 20a. This Court has agreed. *Louisiana*, 476 U.S. at 375.

Nor is there an inseverability issue with respect to dialing parity requirements, even though dialing parity does not involve rates. Again, the FCC did not rely on inseverability in the *Second Report and Order*. Moreover, the *Second Report and Order*, at ¶ 37,[8] itself acknowledges that dialing parity rules can be separated into interstate and intrastate components. In addition, the FCC's interest in imposing dialing parity rules which would apply to intraLATA calls which are 99.8 per cent intrastate in nature (100 per cent in California) is obviously *de minimis*. *See* Note 7, *supra*. Notably, in other contexts, the FCC itself has held that the Federal interest in regulating service which involves less than ten per cent interstate traffic is *de minimis*.[9] *Decision and Order, In the Matter of MTS and WATS Market Structure*, 4 FCC Rcd 5660 (1989), at ¶ 2, *adopting Recommended Decision and Order, In the Matter of MTS and WATS Market Structure*, 4 FCC Rcd 1352 (1989).

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[8] Paragraphs 31-96 of the *Second Report and Order*, which deal directly with the FCC's dialing parity requirements and the jurisdictional issue they implicate, are conspicuously absent from the Petitioners' Appendix. For the Court's convenience, California reproduces ¶ 37, which it has cited, in the appendix to this brief at App. 1-2.

[9] Approximately 92 per cent of all telephone calls made nationally are intrastate in nature. Statistics of Communications Common Carriers (FCC, 1994), at p. 22. Indeed, in 1993 there were nearly twice as many intrastate telephone calls made in California (68+ billion) as there were interstate calls made in the entire United States (38+ billion). *Id.* Thus the FCC's construction of the Act would leave a very thin interstate tail wagging a very substantial intrastate dog.

Finally, the FCC's inseverability claim ignores repeated holdings that the exception to § 2(b) is "a limited one." *California v. FCC*, 905 F.2d 1217, 1243 (9th Cir. 1990). Where such a claim is properly asserted, the FCC bears the burden, plainly not satisfied here, "of justifying its *entire* preemption order by demonstrating that the order is narrowly tailored to preempt *only* such state regulations as would negate valid FCC regulatory goals." *Id.* (emphasis in original); *accord, California v. FCC*, 75 F.3d 1350, 1359 (9th Cir.), *cert. denied*, 116 S. Ct. 1841 (1996) (FCC bears burden of demonstrating negation); *NARUC v. FCC*, 880 F.2d 422, 430 (D.C. Cir. 1989) ("The FCC has the burden . . . of showing with some specificity that [state regulation] . . . would negate the federal policy. . . . "). As noted, the FCC never even addressed inseverability in its orders below.

Nor is there merit to the claim that the Eighth Circuit erred in invalidating the FCC's "pick and choose" rule. The Court has already implicitly rejected that claim in upholding the court of appeals' stay of the rule. *Iowa Utils. Bd. v. FCC, supra*, 109 F.3d at 423. The Eighth Circuit correctly concluded below that by "discourag[ing] the give-and-take process that is essential to successful negotiations," Pet. App. 26a, the "pick and choose" rule "would thwart the negotiation process and preclude the attainment of binding negotiated agreements." *Id.* This commonsense proposition is obviously correct and hardly presents a weighty question worthy of the Court's review.

Nor is there merit to the claim that the Court should grant certiorari because the Eighth Circuit erred in invalidating the FCC's rule requiring incumbent local exchange carriers to recombine unbundled network elements on request. Pet. App. 70a-71a. The FCC regulation

invalidated by the Eighth Circuit would *in all cases* have permitted competitive exchange carriers engaging in resale to avoid resale prices and to purchase services for resale at unbundled network element prices, a possibility that could have severely undermined State pricing determinations under the Act. This, the Eighth Circuit concluded, "would obliterate the careful distinctions Congress has drawn in subsections 251(c)(3) and (4) between access to unbundled network elements on the one hand and the purchase at wholesale rates of an incumbent's telecommunications retail services for resale on the other." Pet. App. 71a. While the Eighth Circuit's invalidation of the FCC's regulation plainly has a well-reasoned basis, the question presented to this Court is merely whether the broad mandatory requirement of the FCC's regulation was valid, not whether States, under their authority to impose and enforce competitive cost-based pricing of access to unbundled network elements and resale, might permissibly impose a similar requirement in generic proceedings or individual adjudications. Indeed, long before the Eighth Circuit invalidated the FCC's regulation, the California Public Utilities Commission noted the issue and preserved the possibility of addressing it, should the Eighth Circuit so rule and this Court deny certiorari. *See Rulemaking on the Commission's Own Motion to Govern Open Access to Bottleneck Services and Establish a Framework for Network Architecture Development of Dominant Carrier Networks,* CPUC Rulemaking No. 93-04-003, ALJ Ruling (Mar. 4, 1997), at 9-12.[10] The State of Connecticut is presently considering the same issue. *See Application of*

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[10] *See* App. 3-7.

MCI Telecommunications Corp. for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996, Connecticut Dept. of Pub. Util. Control Docket No. 96-0909, Reply Letter of MCI dated Nov. 21, 1997.[11] In fact, MCI has represented to the Connecticut commission that the States of Ohio and Texas have already addressed the issue as a matter of State law. *Id.*

The methods which States may devise to deal with the two countervailing problems of a reseller's evading resale prices and an incumbent's provision of network access in a way that imposes undue costs on competitive entry are not yet before the Court. While it is hard to see how the Eighth Circuit's invalidation of the FCC's insufficiently considered regulation presents a question of monumental public concern, related issues which have in fact arisen in State commission arbitration and other proceedings may at some time present questions worthy of this Court's review. In any event, contrary to the petitioners' puffed arguments, it can hardly be said that the FCC's blunderbuss regulation is the *sine qua non* of local telephone competition.

Indeed, from the perspective of the States, the court of appeals gave the FCC far more than it deserved by according the agency's interpretation of the statute *Chevron* deference.[12] Pet. App. 8a. In the first place, *Chevron* deference is inappropriate where, as here, the statutory language is clear on its face. Even more importantly, however, when Congress enacts a dual jurisdictional scheme establishing separate spheres of authority for

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[11] *See* App. 8-13.

[12] *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984).

"expert" Federal and State regulatory agencies, the Federal agency must not be accorded *Chevron* deference with respect to determinations it makes that are within the State agency's sphere of authority or that address the line between the two spheres of authority. In such circumstances, according the Federal agency *Chevron* deference may give it a license to expand its authority beyond the limit intended by Congress.

That was precisely the situation in *Louisiana*, 476 U.S. at 374-375, where *Chevron* deference was *not* accorded to the FCC. The Court simply stated: "An agency may not confer power upon itself. To permit an agency to expand its power in the face of a congressional limitation on its jurisdiction would be to grant to the agency power to override Congress. This we are both unwilling and unable to do." This case, more than most, demonstrates that where a dual scheme is involved, *Chevron* deference is never appropriate because the agency receiving the deference may use it to upset the statutory balance established by Congress. *See, e.g., Northwest Central Pipeline Corp. v. Kansas Corp. Comm'n*, 489 U.S. 493, 512, 515-516 n. 12 (1989); *Altamont Gas Transmission Co. v. FERC*, 92 F.3d 1239, 1246-1248 (D.C. Cir. 1996), *cert. denied sub nom. Indicated Expansion Shippers v. FERC*, 117 S. Ct. 1568 (1997); *Clark v. Alexander*, 85 F.3d 146, 152 (4th Cir. 1996); *but see Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 380-381 (1988) (Scalia, J., concurring in the judgment) (suggesting that *Chevron* deference should extend to an agency's determination of the scope of its own authority). Stated another way, by retaining § 2(b) in the Act, Congress

legislatively determined that *Chevron* deference is inapplicable to the FCC's expansive determination of its own jurisdiction.

b. With respect to a purported conflict between the circuits, there is none. The Solicitor General effectively concedes this point by arguing that the Eighth Circuit's decisions "conflict *in principle* with the decisions of other federal circuits." FCC Pet. 11 (emphasis added). Indeed, the only cited court of appeals case which construes the 1996 Act is *Illinois Pub. Telecommunications Ass'n v. FCC*, 117 F.3d 555, 561-562, *clarified on other grounds on reh'g*, 123 F.3d 693 (D.C. Cir. 1997). FCC Pet. 17. That case holds that a provision of the 1996 Act "should not be read to confer upon the FCC jurisdiction over [intrastate matters] unless [the provision] is 'so unambiguous or straightforward so as to override the command of § 152(b).' " The jurisdictional rulings below are completely in harmony with this formulation, *compare id. with* Pet. App. 16a, and fully consistent with *Louisiana* and its progeny. There is simply no conflict.

c. Finally, the petitioners argue that certiorari should be granted because the Court will likely have no future opportunity to address the scope of the FCC's statutory authority. First, this assertion is speculative; there must be a *current* necessity for the Court's exercise of its certiorari power. Second, this Court has *already* looked at these questions and has rejected the very arguments raised in the petitions for certiorari in ruling on the applications to vacate the Eighth Circuit's stay of the pricing and "pick and choose" rules. Third, issues of preemption and jurisdiction under the 1996 Act have persistently arisen in appeals of FCC decisions, and there is no reason to suppose they will not continue to do so. *See, e.g., Iowa Utils. Bd. v. FCC, supra*, Pet. App.

1a-67a (appeal of FCC's *First Report and Order* under the 1996 Act); *California v. FCC, supra*, Pet. App. 73a-91a (appeal of FCC's *Second Report and Order* under the 1996 Act); *Illinois Pub. Telecommunications Ass'n v. FCC, supra*, 117 F.3d 555 (appeal of FCC's pay phone order under the 1996 Act); *Texas Office of Public Utility Counsel, et al. v. FCC* (5th Cir. Nos. 97-60421, *et al.* Pet. for Review filed June 25, 1997) (appeal of FCC's universal service order under the 1996 Act). Fourth, appeals from the rulings of the district courts on arbitration appeals pursuant to § 252(e)(6) will reach the courts of appeals, permitting unfettered review of jurisdictional issues raised in those proceedings despite the Hobbs Act, 28 U.S.C. § 2342(1).[13] And fifth, there is no reason to suppose that district courts will not defer to the Eighth Circuit's decisions if certiorari is denied. The question is not whether a denial of certiorari will deprive the Court of a future opportunity to address the issues in this case, but whether a grant of certiorari is presently necessary to settle those issues. It is not.

In the final analysis, this case is fundamentally the same as *Louisiana*. There, the FCC argued that "federal displacement of state regulation is justified under the Act when necessary 'to avoid frustration of validly adopted federal policies.' " 476 U.S. at 362, 363. In the face of this argument, the Court observed that "it goes without saying that we do not assess the wisdom of the asserted

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[13] Although AT&T attempts to bloat the importance of the issues by arguing that Federal district courts reviewing State commission arbitration decisions "should stay proceedings pending this Court's decision," AT&T Pet. 11, California is unaware of AT&T, MCI or the FCC requesting that *any* district court do so. Moreover, all three of those parties have appeared in numerous such district court cases and have filed pleadings *relying* on the Eighth Circuit's decisions on various issues.

federal policy of encouraging competition within the telecommunications industry. Nor do we consider whether the FCC should have authority to enforce, as it sees fit, practices which it believes would best effectuate this purpose." *Id.* at 359. The Court then rejected the FCC's argument, stating: "As we so often admonish, only Congress can rewrite this statute." *Id.* at 376.

Similarly here, the petitioners seek to justify the FCC's usurpation of State authority over intrastate matters based on the assertion that a construction of the statute displacing the role of the States is necessary to avoid the frustration of competition. FCC Pet. 24, 29-30. The petitioners' assertion is both false and irrelevant. It is false because, as the FCC acknowledged in both of its orders below, the States pioneered the shift from regulation to local competition long before the 1996 Act was conceived. Moreover, the States have consistently met and continue to meet their responsibilities under the Act. Thus, if "[i]ncumbent monopolists benefit enormously from any delay in opening their markets to competition," FCC Pet. 30, it is the FCC's overreaching, not any action or inaction by the States, that has spawned that result. Finally, the petitioners' assertion is irrelevant because here, as in *Louisiana*, and as correctly found by the court of appeals, the FCC's remedy lies with Congress, not this Court.

CONCLUSION

While the 1996 Act may be "an unusually important legislative enactment," the questions presented by these cases are half as important and twice as easy as petitioners would have the Court believe. The Court has previously rejected the same hyperbolic arguments in

ruling on the same petitioners' applications to vacate the Eighth Circuit's stay of the FCC's orders. Moreover, the Eighth Circuit's decisions are correct, they are fully consistent with congressional intent, and they provide a workable blueprint for the transition from regulation to local telephone competition under the 1996 Act. There is no conflict between the decisions below and the decisions of this Court or other circuits. Additionally, there is no necessity for this Court to address the jurisdictional questions, which it has already addressed in *Louisiana* and in its order denying the applications to vacate the stay. Finally, as competition moves forward, after the delay engendered by the FCC's jurisdictionally defective reading of the Act, this Court and other courts will have opportunities to address the 1996 Act, if and when the need arises.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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December 12, 1997

APPENDIX

Second Report and Order, FCC 96-333, 11 FCC Rcd 19392, 19414 ¶ 37 (1996) (footnotes omitted.)

c. Discussion

37. With respect to toll service, we conclude that section 251(b)(3) requires, at a minimum, that customers be entitled to choose presubscribed carriers for their intraLATA and interLATA toll calls. Because of the variations that exist among LATA boundaries and toll traffic within, and among, the various states, we have also concluded that each state should have the opportunity to determine whether customers should be able to presubscribe to carriers for intrastate toll service and for interstate toll service in lieu of the intraLATA and interLATA toll presubscription dichotomy that we have established as a minimum nationwide standard at this time. Although toll dialing parity typically has been based on LATA boundaries in multi-LATA states where it has been implemented, we do not impose a requirement that toll dialing parity be based only on LATA boundaries given our expectation that implementation of the 1996 Act eventually will diminish the significance of LATA boundaries. We are aware that BOCs remain subject to certain LATA boundary restrictions for at least the near-term and that some BOCs may find it technically infeasible, or otherwise undesirable, to implement toll dialing parity based on state boundaries. We thus conclude that states should be able to take the relevance of those factors into account, where applicable, and have the flexibility to require that toll dialing parity implementation be based on state boundaries where they determine that implementing toll dialing parity on the basis of state

boundaries would be pro-competitive and otherwise in the public interest. In Alaska and Hawaii, states with no LATAs, toll dialing parity will continue to be based on state boundaries.

Excerpt from ALJ Ruling, Rulemaking No. 93-04-003 (Cal. Pub. Utils. Comm'n Mar. 4, 1997)

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Rulemaking on the Commission's Own Motion to Govern Open Access to Bottleneck Services and Establish a Framework for Network Architecture Development of Dominant Carrier Networks.	)	(Filed Mar. 4, 1997) SAN FRANCISCO OFFICE No. R.93-04-003
Investigation on the Commission's Own Motion into Open Access and Network Architecture Development of Dominant Carrier Networks.	)	I.93-04-002

ADMINISTRATIVE LAW JUDGE'S RULING DECIDING ISSUES RAISED AT JANUARY 28, 1997 PREHEARING CONFERENCE, GRANTING ONE-WEEK EXTENSION OF TIME FOR FILING OPENING COMMENTS, AND SETTING SCHEDULE FOR PROCEEDING

* * *

Should The Issue of "Arbitrage" Between Rates For Rebundled Network Elements And Rates For Wholesale Service Be Considered In the Pricing Hearings?

A second important question at the PHC [pre-hearing conference], which counsel for GTEC characterized

as "separate, although related" to the issue of "actual costs" (id. at 268), was whether hearing time should be allotted to the issue of rate "arbitrage." Pacific described the issue as follows on pages 2-3 of its January 22 PHC statement:

> "The FCC has ordered that CLCs be allowed to purchase and combine unbundled network elements together. In some instances, the combination of [unbundled network elements, or UNEs] can be used to create the same retail services which we offer for resale at a discount . . . In these situations, there is an opportunity for arbitrage if there is a difference between the price for the combined UNEs and the resale price for the retail service. This arbitrage has potentially large financial impacts, since key services vulnerable to this arbitrage include our basic exchange services, and our switched access services provided to interexchange carriers."

At the PHC, counsel for AT&T argued that since the potential for such arbitrage is inherent in the Telecommunications Act of 1996 (Act), the issue is "not legitimate" and a "red herring." Counsel for MCI explained how the potential for arbitrage arises from the different pricing standards for UNEs and wholesale service contained in the Act:

> "The Act clearly contemplates the kind of bottom-up TELRIC analysis, or some version of that, that the FCC and this Commission have pursued, [f]or what the FCC calls UNEs and what this Commission has called BNFs.

> "Conversely, the Act also clearly contemplates that the determination of an appropriate wholesale discount looks at the retail rate – the rate[,] not the cost – and then takes away from that avoided cost.
>
> "So if there is an [arbitrage] issue to be addressed . . . it may well be that that is what the Act itself contemplates." (1/28 PHC Tr. at 255.)

Counsel for GTEC responded with the observation that the Act's differing pricing standards cannot be considered the end of the debate:

> "Contrary to the comments of one of the parties, we're not seeking to change the pricing standards that have been set up under the Act. We recognize that there's two distinct standards.
>
> "However, I think that the Act as well as the FCC Order were silent when you came to the issue of how those two pricing standards interact.
>
> "And I agree with [counsel for Pacific] that if you have a situation where somebody can purchase the little [unbundled] pieces and combine them up at a lower price than the resale rate, essentially you're making [the wholesale] section of the statute meaningless; and I think that's not the way statutes are intended to be read." (**Id.** at 269.)

Upon reflection, I agree with Pacific and GTEC that the arbitrage issue is not necessarily inherent in the Act's two pricing standards, but arises out of the way in which

the FCC has interpreted § 251(c)(3) of the Act in its First Report and Order. This issue is hotly contested and is squarely before the Eighth Circuit in *Iowa Utilities Board*.[10] If the Eighth Circuit concludes that the FCC's interpretation of § 251(c)(3) is erroneous, then it seems likely that this Commission will have to deal with the arbitrage issue. If the Eighth Circuit concludes that the FCC's interpretation of § 251(c)(3) is correct, then barring an appeal to the Supreme Court, the arbitrage issue will presumably become moot. Either way, the prudent

---

[10] The issue is framed as follows at pages 64-65 of the Brief of the Regional Bell Companies and GTE (Large LEC Brief) in *Iowa Utilities Board*:

> "Under section 251(c)(4), Congress imposed a distinct duty on incumbent LECs to provide retail services to requesting carriers at wholesale rates so that those carriers can resell the services to subscribers. Congress defined a distinct pricing standard for resold services, *see* § 252(d)(3), and expressly restricted the uses that can be made of them, *see* § 271(e)(1). The Order would nullify these provisions by construing section 251(c)(3) to give requesting carriers an entirely different avenue for reselling the incumbent LEC's own finished service, solely through the imaginary process of 'unbundling' the LEC's entire network and 'reassembling' the pieces. . . . The FCC's 'rebundle' rule in effect adds to the two options enacted by Congress (unbundled elements and resale) a third option that does not appear in the statute (rebundled elements). These rebundled elements can be exactly the same, in every respect, as the LECs' resold services, but they must be priced at rates much lower than those derived from the wholesale discount for resold services. This is not only contrary to the terms of section 251(c)(3), but also flatly contradicts the specific pricing standards and other restrictions that Congress crafted for limiting the reselling of services under the Act."

For a full discussion of this issue, see the following portions of the briefs in *Iowa Utilities Board*: Large LEC Brief at 64-69, FCC Brief at 99-106, Brief of AT&T et al. at 72-77, Large LEC Reply Brief at 42-45.

course of action is to allot hearing time on a provisional basis to consider the arbitrage issue, and then await developments. Accordingly, the revised procedural schedule attached to this Ruling as Appendix A includes an extra week of hearing time to deal with the arbitrage question.

* * *

/s/ A. Kirk McKenzie
A. Kirk McKenzie
Administrative Law Judge

Reply Letter Brief of MCI, *Application of MCI Telecommunications Corporation for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996,* Connecticut Dept. of Pub. Util. Control Docket No. 96-09-09 (Filed Nov. 24, 1997)

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November 21, 1997

(Received Nov. 24, 1997)

Via Federal Express

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Executive Secretary
Department of Public Utility Control
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Re: Docket No. 96-09-09 – Application of MCI Telecommunications Corporation for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996

Dear Secretary Murphy:

MCI Telecommunications Corporation ("MCI") submits this letter in response to the November 14, 1997 letter of the Southern New England Telephone Company ("SNET") in the above-referenced docket. SNET, in its letter, seeks to reopen the arbitration between the parties in order to modify certain provisions contained in the Agreement for Network Interconnection and Resale between SNET and MCImetro ("Agreement"). In particular, SNET requests that the Department of Public Utility Control ("Department") reopen the proceeding to modify the Warranties section (April 23, 1997 Errata, Section 13) as well as the provision regarding combinations of unbundled network elements (Agreement, Issue 16). SNET claims that the October 14, 1997 Eighth Circuit Court decision invalidates these provisions of the Agreement and therefore under the Regulatory Approvals section as well as the Governmental Compliance section[1] they should be renegotiated. MCI emphatically disagrees with SNET's position with respect to these provisions and believes that the provisions should not be modified and should remain in full force and effect. MCI requests that the Department deny SNET's request to reopen the arbitration proceeding and instead enforce the relevant provisions of the Agreement.

On October 21, 1997, SNET sent a letter to MCI requesting an opportunity to "renegotiate" the sections of the Agreement relating to combinations of unbundled elements and warranties due to the recent decision of the Eighth Circuit. SNET requested that MCI respond to its request by October 31, 1997. SNET indicated that if it

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[1] April 23, 1997 Errata at Section 2.2., Agreement, Governmental Compliance at p. 71.

did not receive a response from MCI by October 31, 1997, it would petition the Department to reopen the proceeding. MCI, by letter dated November 3, 1997, responded to SNET by stating that it was always available to discuss the parties relationship, but that the provisions of the Eighth Circuit decision cited by SNET do not require renegotiation of the Agreement.[2] On November 14, 1997, SNET filed its request with the Department to reopen the Agreement between the parties for the limited purpose described above.

SNET's request to renegotiate the Warranties section of the Agreement in light of the recent Eighth Circuit decision makes no sense. The Eighth Circuit decision has no bearing on the Warranties section contained in the Agreement and therefore should not be used as grounds to alter the provision. The Warranties section should stand as issued by the Department.

SNET provides no credible support for its request to renegotiate the provision of the Agreement pertaining to the combination of unbundled network elements.[3] SNET's legal argument in support of its request, that the

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[2] SNET in its November 14, 1997 letter to the Department, grossly mischaracterizes MCI's position by stating that MCI refused to negotiate "based on its position that the Eighth Circuit Court's Opinion *does not allow* for the reopening of the Agreement." (Emphasis added.) A quick reading of MCI's November 3, 1997 response shows that MCI took no such position. Rather, MCI stated that the Eighth Circuit decision *does not require* the Agreement to be renegotiated. MCI did, however, indicate to SNET in its November 3, 1997 response that it was available to discuss the parties relationship. SNET did not contact MCI.

[3] Issue 16 – Combinations of Unbundled Elements – provides in pertinent part "SNET shall provide MCIm, at MCIm's request, additional combinations of the unbundled elements which SNET has agreed to make available pursuant to this Agreement."

Eighth Circuit decision has interpreted Section 251(c)(3) of the Telecommunications Act of 1996 ("Act") to prohibit the incumbent local exchange carrier ("ILEC") from combining network elements upon request is patently incorrect. The Eighth Circuit found and held that the FCC's regulation that required ILECs to perform the combinations was inconsistent with the Act. The Act *does not* prohibit ILECs from voluntarily agreeing to perform element combinations – as SNET did[4] – and it likewise *does not* prohibit the state commissions from requiring the ILEC to do so as a matter of state law and policy. The limited legal effect of the Eighth Circuit opinion is the invalidation of the FCC's regulations mandating that ILECs perform the combinations.

Other state commissions have recently ruled on this issue. In Ohio, the Public Utilities Commission noted that the Eighth Circuit's October 14 decision "did not address state action under Federal Law or state action under state law." Further, the Ohio Commission found that the "Eighth Circuit's Order on rehearing notwithstanding, Ameritech's agreement through the give and take of an arm's length negotiation process, ***establishes an independent basis*** upon which to enforce the terms of the interconnection agreements. . . . " (emphasis added). Similarly, the Texas Public Utilities Commission has

---

[4] On December 23, 1996, SNET submitted Revised Best and Final Offer language to the Arbitrator regarding the combination of unbundled elements (Issue 16). SNET's language did not object to the combination of unbundled elements instead, SNET agreed to provide such combinations of unbundled network elements and agreed to work with MCI to define the agreed upon time frame in which a combination would be made available and the priority in which a combination would be made available. SNET's December 23, 1996 Revised Best and Final Offers at p. 16. A majority of SNET's Best and Final Offer language is contained in the Agreement.

recently found that Southwestern Bell may not now refuse to provide combinations of elements even after the Eighth Circuit's order because Southwestern Bell had voluntarily agreed to provide such combinations in its interconnection agreement.[5]

In addition, the portions of the Agreement that SNET bases its request for renegotiation on, in particular; the Regulatory Approvals section and the Governmental Compliance section[6], do not support or justify its request. These provisions of the Agreement condone renegotiation when a provision is rendered unlawful or is invalidated by a subsequent court order or other legislative, regulatory or legal action. As noted above, the Eighth Circuit's invalidation of the FCC's regulation does not make the provision of the Agreement pertaining to combinations of unbundled elements unlawful nor does it invalidate that provision.

---

[5] Similarly, in an earlier decision, not on the issue of combinations of elements, the New York Public Service Commission concluded that it would not interfere with those provisions arrived at through negotiations by the parties and that there is no legal requirement that the Commission amend those portions of an agreement. October 1, 1997 Order Approving Interconnection Agreement, Rejecting Portions Thereof, and Granting Reconsideration at pp. 5-6.

[6] Regulatory Approvals, Section 2.2 states in pertinent part "In the event . . . a court with appropriate jurisdiction issues orders, which make *unlawful* any provision of the Agreement, the parties shall negotiate promptly and in good faith . . . " (Emphasis added.) Governmental Compliance states in pertinent part "[I]n the event that legislative, regulatory, other legal action or changes in laws *invalidate* a material term(s) of this Agreement . . . the Parties shall attempt to renegotiate a new term(s) as may be required to allow this Agreement to continue." (Emphasis added.)

In conclusion, MCI requests that the Department deny SNET's request to reopen the arbitration in light of the recent Eighth Circuit Court decision for the purpose of renegotiating the Warranties provision and the provision regarding combinations of unbundled network elements. These provisions should not be modified and should remain in full force and effect.

Sincerely,

/s/ Kimberly A. Wild
Kimberly A. Wild

cc: Kathleen Carrigan

Supreme Court, U.S.
FILED
DEC 18 1997
CLERK

(4) (4) (4) (4)

Nos. 97-826, 97-829, 97-830, 97-831

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

AT&T CORP., *et al.*,

Petitioners,

vs.

IOWA UTILITIES BOARD, *et al.*,

Respondents.

AT&T CORP., *et al.*,

Petitioners,

vs.

CALIFORNIA, *et al.*,

Respondents.

ON PETITIONS FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE MID-SIZED LOCAL EXCHANGE CARRIERS IN OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Court of Appeals err in concluding that the plain terms of the provisions of the Telecommunications Act of 1996 ("Act") governing competition in local telephone markets leave pricing and other determinations exclusively to the state public utility commissions, which have historically made those determinations, and not to the Federal Communications Commission ("FCC")?

2. Did the Court of Appeals err in vacating an FCC rule that, as petitioners themselves acknowledge, would allow new entrants to obtain from incumbent local telephone carriers an already combined platform of network elements at cost-based prices, when the Act allows entrants to obtain only *unbundled* network elements at cost-based prices?

3. Did the Court of Appeals err in vacating the FCC's rule implementing 47 U.S.C. § 252(i) as improperly subverting the system of private negotiation established by Congress?

LIST OF PARTIES AND AFFILIATES

Aliant Communications Company is a wholly owned subsidiary of Aliant Communications Inc., a publicly traded company. It has no non-wholly owned subsidiaries.

ALLTEL Telephone Services Corporation is a wholly owned subsidiary of ALLTEL Corporation, a publicly traded company. It has no non-wholly owned subsidiaries, but does have investment interests in the following publicly traded companies: Applied Global Internet, Champaign Telephone, Conestoga Telephone, Conneaut Telephone, Horizon Telecom, Inc., SPRINT and WorldCom, Inc.

Cincinnati Bell Telephone Company is a wholly owned subsidiary of Cincinnati Bell Inc., a publicly traded company. It has no non-wholly owned subsidiaries.

The Concord Telephone Company is a wholly owned subsidiary of CT Communications, Inc., a publicly traded company. It has no non-wholly owned subsidiaries.

North State Telephone Company is a wholly owned subsidiary of North State Telecommunications Corporation, which is not a publicly traded company. It has no non-wholly owned subsidiaries.

Pacific Telecom, Inc. is a wholly owned subsidiary of Century Telephone Enterprises, Inc., a publicly traded company. Pacific Telecom, Inc. has the following non-wholly owned subsidiaries: Gem State Utilities Corporation; Northwestern Telecom Systems, Inc.; Pacific Telecom Cable, Inc.; and STU Partnership.

Rock Hill Telephone Company has no parents or non-wholly owned subsidiaries.

Roseville Telephone Company is a wholly owned subsidiary of Roseville Communications Company. With regard to non-wholly owned subsidiaries, Roseville Telephone Company holds a minority equity interest in the Sacramento Valley Limited Partnership and a majority equity interest in West Coast PCS LLC.

The Southern New England Telephone Company ("SNET") is a wholly owned subsidiary of Southern New England Telecommunications Corporation, a publicly traded company. SNET has no other parents, non-wholly owned subsidiaries or affiliates that issue stock or debt securities to the public.

The Independent Telephone & Telecommunications Alliance ("ITTA") is a non-profit trade association representing 15 mid-sized independent telephone companies providing local exchange and exchange access telephone service in 41 states. ITTA has no parent companies or subsidiaries.

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Nos. 97-826, 97-829, 97-830, 97-831

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

AT&T CORP., *et al.*,

Petitioners,

vs.

IOWA UTILITIES BOARD, *et al.*,

Respondents.

AT&T CORP., *et al.*,

Petitioners,

vs.

CALIFORNIA, *et al.*,

Respondents.

ON PETITIONS FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE MID-SIZED LOCAL EXCHANGE CARRIERS IN OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI

This brief in opposition to the petitions for a writ of certiorari is filed on behalf of nine telecommunications companies that are based in virtually every part of the country and a trade association. Each of the respondent companies is an incumbent local exchange carrier ("LEC"), as that term is defined in

47 U.S.C. §§ 153(26) and 251(h)(1), as added by the Telecommunications Act of 1996 ("Act"), Pub. L. No. 104-104, 110 Stat. 56 (1996).[1] The nine companies actively participated as petitioners and intervenors in the briefing and argument before the United States Court of Appeals for the Eighth Circuit and were collectively referred to as the "Mid-Sized LECs."[2] In contrast to the "large LECs," *i.e.*, the Bell Operating Companies ("BOCs") and GTE Service Corporation ("GTE"), each of the Mid-Sized LECs individually controls fewer than two percent of the nation's telephone access lines. The Independent Telephone & Telecommunications Alliance is a non-profit trade association representing 15 mid-sized LECs providing local exchange and exchange access telephone service in 41 states. Respondents have endeavored in this brief not to repeat the arguments set forth in the briefs in opposition filed by GTE and the BOCs; the Mid-Sized LECs fully support their arguments and incorporate them by reference in this brief.

STATEMENT

The petitions are built upon three themes, each of which is essential to petitioners' arguments on the merits, as well as to their asserted reasons for granting a writ of certiorari: (1) the states have been at best slow and at worst obstructionist in the

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[1] The Act amended the Communications Act of 1934, 47 U.S.C. § 151 *et seq.*; relevant excerpts from the Act are reproduced in the Appendix to the petition in *AT&T Corp., et al. v. Iowa Utilities Bd., et al.*, No. 97-826 ("Pet. App."). Sections 2 and 3 of the Communications Act of 1934 are codified at 47 U.S.C. §§ 152 and 153.

[2] The "Mid-Sized LECs," and their principal places of business, are as follows: Aliant Communications Co. (Lincoln, Nebraska); ALLTEL Telephone Services Corp. (Little Rock, Arkansas); Cincinnati Bell Telephone Co. (Cincinnati, Ohio); The Concord Telephone Co. (Concord, North Carolina); North State Telephone Co. (High Point, North Carolina); Pacific Telecom, Inc. (Vancouver, Washington); Rock Hill Telephone Co. (Rock Hill, South Carolina); Roseville Telephone Co. (Roseville, California); and The Southern New England Telephone Co. ("SNET") (New Haven, Connecticut).

move toward competition in local telephone markets, and state commissions are either unable or unwilling to regulate interconnection among competing local carriers in accordance with the Act; (2) all telephone carriers are virtually identical national or international giants, and all local telephone markets are uniform; therefore, "one-size-fits-all" national rules on pricing and other aspects of local competition, all determined by the Federal Communications Commission ("FCC"), are necessary to achieve Congress's goals in enacting the Act; and (3) the Eighth Circuit's decision has derailed the competition that the Act seeks to foster. None of these assertions is true. These themes that so permeate petitioners' arguments reflect the "Washington-knows-best" attitude that the 104th Congress explicitly rejected in crafting the Act.

1. Local telephone service has traditionally been provided by a single company operating in a defined territory. At present, there are over 1,000 LECs of a wide variety of sizes that provide local exchange service in the numerous local markets throughout the Nation.[3] See H.R. Rep. No. 104-204, at 49-50, *reprinted in* 1996 U.S.C.C.A.N. 10, 12-13 (1995) (the "*House Report*"). Those local markets differ dramatically in geography, demographics, infrastructures, and population densities, all of which affect the structure, cost and pricing of local service. Historically, state utility commissions have strictly regulated the price and service offerings of intrastate telephone service and imposed "universal service" obligations on the LECs serving those markets, requiring those carriers to serve their entire service areas, the densely populated as well as the remote, and all of their citizens, business and residential customers alike. By law, the FCC has no jurisdiction over local telecommunications markets; its jurisdiction is limited to

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[3] For example, the Mid-Sized LECs range in size from approximately 90,000 to 2 million access lines as of December 1, 1995, while by comparison, the BOCs and GTE range from approximately 14 to 21 million access lines. United States Telephone Ass'n, *Phone Facts* (1996) (App. A-213) (all citations to "App. A-_" are to the Appendix of the Mid-Sized LECs filed in the Eighth Circuit on Nov. 18, 1996).

interstate matters only. *See Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 372-73 (1986); 47 U.S.C. § 152(b).

Because virtually every state is served by more than one LEC, state commissions also have for decades regulated interconnection in local telephone markets. For example, 150 LECs serve Iowa alone. App. A-212. Without interconnection, a family served by one LEC in a particular town in Iowa would be unable to place a local telephone call to another family served by a different LEC in a neighboring town. Most state commissions have thus developed considerable familiarity with the technical and economic issues that arise when more than one telephone company provides service – albeit, non-overlapping service – in the same state.

Competition began developing in the 1970s in the markets for telephone equipment, information services and long-distance services. S. Rep. No. 104-23, at 2 (1995) (the "*Senate Report*"). In view of the increasing success of competition in the long-distance market, and with cable companies in particular recognizing that they were well positioned to offer local telephone service, many states began to investigate the prospects of bringing competition to the local exchange market before Congress enacted the Act. Beginning in earnest in 1993 and 1994, numerous state legislatures and regulatory commissions introduced competition in their local telephone markets, thereby setting the stage for the widespread competition in the local market that Congress sought to extend to all states in the Act. For example, as early as 1994 the Connecticut legislature had acted to open all telecommunications markets in Connecticut to competition. *See* Conn. Gen. Stat. § 16-247a *et seq*. Further, that state's principal local exchange carrier had already signed a comprehensive agreement with governmental agencies and with numerous competitors (including petitioners AT&T, MCI and MFS) governing many aspects of interconnection, network unbundling and physical collocation, leading the state utility commission to comment in approving the agreement that it constituted "irrefutable evidence of the ability to achieve reasonable agreement on issues of common concern to the

industry and the public." *In Re The Southern New England Telephone Company*, Docket No. 94-10-02, 1995 WL 807764 (Conn.D.P.U.C. Sept. 22, 1995).[4] Thus, as the FCC itself recognized in its notice of proposed rulemaking in this matter, as of 1996, 19 states had already taken action to open local exchange markets to competition, including seven states in which competing firms had already begun to offer switched local service. *See In Re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Notice of Proposed Rulemaking, 61 Fed. Reg. 18311, 18314 (1996) (App. A-81,84).

2. With knowledge of this progress toward deregulation of the local exchange market, Congress in February 1996 passed the Act to ensure that the citizens of all states shared in the benefits of competition in all sectors of the telecommunications industry.[5] The local competition provi-

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[4] App. A-140-41; A-169-86. *See also Order adopting a telecommunications price regulation and local competition plan*, 164 P.U.R. 4th 324, 1995 WL 627739 (Ala.P.S.C. Sept. 20, 1995); *Interim Order*, 167 P.U.R. 4th 349, 1995 WL 767890 (Cal.P.U.C. Dec. 20, 1995) (order of California Commission certifying 31 carriers to offer facilities-based local exchange services); *Order re: Competition for Local Exchange Service*, 163 P.U.R. 4th 155, 1995 WL 467996 (Cal.P.U.C. July 24, 1995); *Interim Opinion*, 1996 WL 223624 (Cal.P.U.C. April 10, 1996) (California Commission holding that state regulations concerning number portability are consistent with the Act); *In Re The Southern New England Telephone Company's Cost of Providing Service*, Docket No. 94-10-01, 1995 WL 509180 (Conn.D.P.U.C. June 15, 1995) (order of Connecticut commission certifying 15 companies to provide local exchange service); *In Re The Southern New England Telephone Company*, Docket No. 94-10-02, 1995 WL 807764 (Conn.D.P.U.C. Sept. 22, 1995) (approving comprehensive accord on interconnection, network unbundling and other aspects of local competition); *Order Setting Out Regulatory Structure for Competing Local Providers and Promulgating Rules*, Dkt. P-100, Sub 133, 1996 WL 593672 (N.C.U.C. Sept. 18, 1996) (North Carolina Utility Commission docket implementing North Carolina legislation on local competition.)

[5] Congress quite clearly recognized that "[s]everal States (such as New York, California, and Illinois) have taken steps to open the local networks of telephone companies." *Senate Report* at 5.

sions of the Act that are the focus of the petitions – 47 U.S.C. §§ 251-261 – are among many portions of the Act that were broadly intended to "open all telecommunications markets to competition." Joint Explanatory Statement of the Committee of Conference, H.R. Rep. No. 104-438, S. Rep. No. 104-230, at 1 (1996), *reprinted in part in* 1996 U.S.C.C.A.N. 124 (the "*Conference Report*"); *see House Report* at 202.

While one would never know it from the petitions, Congress's avowed goal in enacting the Act was to promote competition in local telecommunications markets through "a pro-competitive, *de-regulatory* national policy framework." *Conference Report* at 1, 113 (emphasis added). Congress thus sought to "reduc[e] regulation of the telecommunications industry . . . [in order to] spur the development of new technologies and increase investment in these industries." *Senate Report* at 9; *see id.* at 10 ("By reducing regulation and barriers to competition, the bill will help ensure the future growth of these industries"). The Act, therefore, reflects Congress's "belief that more competition, rather than more regulation, will benefit all consumers," a belief that petitioners clearly do not share. *House Report* at 50.

Consistent with its deregulatory approach, Congress provided new entrants with access to the incumbent carrier's existing network and then relied principally upon private freely negotiated agreements between new entrants and incumbents to determine the precise extent and terms of that access. 47 U.S.C. §§ 251(c)(1), 252(a)(1).[6] In recognition of the fact that the local exchange market is, in the words of the FCC to this Court, the "*paradigmatic intrastate market*,"[7] and in keeping

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[6] This emphasis on private negotiation is also evident in the regulatory portions of the Act, which provide that if after *several months* of negotiation the parties are at an impasse on some or all issues, a party *may* petition a state commission to arbitrate open issues in their agreement. 47 U.S.C. § 252(b).

[7] Application to Vacate Stay, *FCC v. Iowa Utilities Bd.*, No. A-299, at 22 (Oct. 24, 1996) (emphasis added); *see* Pet. App. 15a n.16, 22a.

with the states' historical jurisdiction over, and experience with, that local market, Congress made the state utility commissions the principal governmental actors in carrying out the federal mandates. Thus, while other parts of the Act dealing with interstate telecommunications assign a paramount regulatory role to the FCC (*see, e.g.*, § 271(d)), the local competition provisions of the Act respect the traditional preeminent role of the states in regulating local telephone service and, in particular, their expertise in local rate and pricing issues.[8] *See* Pet. App. 10a-16a.

The Act prescribes broad standards that Congress intended state commissions would apply to the specific local facts and circumstances presented by the arbitrating parties. In a clear rejection of the FCC's plea for a centralized bureaucratic structure that would "more efficiently" implement the Act, Congress explicitly: allowed parties to negotiate and enter into interconnection agreements "without regard to the standards" set forth in the Act (§ 252(a)(1)); gave *state commissions* the exclusive authority to approve or reject those agreements and to "[d]etermin[e]" and "establish any rates for interconnection, services or network elements" (§ 252(c), (d)(1), (e)); allowed *state commissions* to suspend or modify provisions of the Act for mid-sized and small LECs (§ 251(f)(2)); and expressly barred the FCC from preempting state commission rules and policies on interconnection and access unless those rules "*substantially* prevent implementation of the Act" (§ 251(d)(3) (emphasis added)). Thus, Congress enacted specific provisions that expressly contemplated different, state-by-state and even company-by-company approaches to implementing the congressional mandate for competition in local telephone markets, recognizing, as petitioners refuse to do, that each local market and each of the

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[8] The legislative history confirms what the language and structure of sections 251 and 252 show—that Congress made a conscious choice to reserve exclusive control over pricing issues to state commissions. *See* S.652, 104th Cong., 1st Sess. §101(c) (1995); H.R. 1555, 104th Cong., 1st Sess. § 101(e)(1) (1995).

over 1,000 local carriers are not identical – that solutions that might work in New York City or Washington, D.C. might be disastrous in Des Moines or Fargo and that requirements that might merely annoy a large national LEC might threaten the very existence of a mid-sized or smaller LEC.

The extent of the FCC's role under this statutory scheme is clear: only "if a State Commission fails to act to carry out its responsibility under this section [252] in any proceeding or other matter under this section," may the FCC "issue an order preempting the State commission's jurisdiction of that proceeding or matter." 47 U.S.C. § 252(e)(5). In that circumstance alone may the FCC "act for the State commission." *Id.* The structure and express terms of the Act, therefore, reflect Congress's intent not to override the efforts of state commissions that were working to open their local markets to competition.

Yet, in its nearly 700-page, single-spaced First Report & Order,[9] the FCC did not see fit to live by these clear rules of the road established by Congress. Instead, the FCC consistently bridled at Congress's deregulatory, negotiation-focused framework and sought to impose its own national, "one-size-fits-all" rules over every aspect of every local telephone market in the Nation. As the Eighth Circuit recognized, the FCC sought "to preempt any state pricing regulation that would employ a different methodology" from the FCC's. Pet. App. 21a n.19. Moreover, under the FCC's "command and control" approach, state commissions would no longer implement their own regulatory policies on interconnection and access in the intrastate telephone market, even when those policies are consistent with the terms of the Act and would "not substantially prevent" achievement of the competition that Congress sought to encourage in the Act. Indeed, in a preemptive act of

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[9] *In Re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 61 Fed. Reg. 45476 (1996) (to be codified at 47 C.F.R. pt. 51) ("First Report & Order"). Excerpts from the First Report & Order are reprinted at Pet. App. 131a-337a.

unprecedented scope, the FCC issued a blanket order prohibiting state commissions from issuing *any* requirements or applying *any* policy that differed in any way from the FCC's own rules – in a stroke of a pen relegating state commissions to the hapless task of merely administering the FCC's rules.

3. Perhaps the most regrettable aspect of petitioners' statement of the case is their claim that the Eighth Circuit's decisions, including its earlier stay of the pricing rules, are somehow responsible for delays in the achievement of full competition in the local markets. *See, e.g.*, AT&T Pet. 12. Nothing could be further from the truth. Indeed, to the extent that there has been any undue delay in accomplishing what Congress recognized would be the difficult, complex and time-consuming task of opening all telecommunications markets to full competition,[10] such delay is attributable, in large measure, to the FCC's own misguided attempts to displa the pro-competition efforts of various states and to the well publicized preoccupation of petitioners such as AT&T, MCI and WorldCom with mergers and acquisitions among themselves, as well as their singular focus on trying to pick off only lucrative business customers of the local telephone carriers instead of investing in the facilities or services necessary to provide quality local service to *all* local customers—residential and commercial alike.[11]

Thus, in the months after Congress passed the Act many state commissions had already moved to adopt rules and

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[10] *See House Report* at 72; *see also* Statement of FCC Chairman Reed Hundt on S.1822, the Communications Act of 1994, United States Senate (Feb. 23, 1994).

[11] *See, e.g.*, J. Keller, *AT&T's New Chief Plans Bold Agenda*, Wall Street J., Dec. 3, 1997, at A3 (reporting that AT&T's new CEO is laying groundwork for possible mega-merger); M. Mills, *WorldCom Would Shift MCI's Focus*, Washington Post, Oct. 3, 1997, at A1 (quoting WorldCom's Vice Chairman; "Our strategy is not in the consumer business"); *WorldCom Makes Unsolicited $29 Billion Stock Bid For MCI*, Communication Daily, Oct. 2, 1997 (reporting on WorldCom's $29 billion bid for MCI).

policies designed to foster interconnection and access in the manner envisioned by Congress, and many parties were in the process of negotiating agreements to provide interconnection and access. *See supra* at note 4 and accompanying text. However, as the Eighth Circuit found, the adoption of the FCC's rules, and its attempt at blanket preemption of any state rules on pricing and other aspects of interconnection, had the "direct effect" of stopping pending negotiations, arbitrations and state dockets in their tracks, until the Eighth Circuit issued its stay of the pricing provisions which permitted negotiations and arbitrations to proceed. Pet. App. 10a n.9; *see Iowa Utilities Bd. v. FCC*, 109 F.3d 418 (8th Cir. 1996).

Proceed they did. Once again, while the Court will not find any mention of this in the petitions, the fact is that nearly 200 interconnection agreements had been signed by February 1997, within four months of the Eighth Circuit's stay opinion. By November 1997, just 20 months after passage of the Act, over 280 companies had signed over 1,700 interconnection agreements to provide local service of some kind in over 450 cities through the country![12] Not only have companies negotiated and signed interconnection agreements, but they have also begun to offer local telephone service under the watchful oversight of state commissions, precisely in the manner envisioned by Congress.

For example, in Connecticut – one of the first states targeted by petitioners such as AT&T, MCI and others, for local competition[13] – the state utility commission has certified over

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[12] United States Telephone Association, Competition Report (Nov. 3, 1997) (the "*USTA Competition Report*") (an excerpt from which is attached in the appendix to this brief); New Paradigm Resources Group, Inc. and Connecticut Research Group, Inc., 1997 Annual Report on Local Telecommunications Competition (8th ed. 1997).

[13] *See* K. Donnelly, *MCI Celebrates the Anniversary of Connecticut Local Telecommunications*, Business Times – New Haven, Connecticut, May 1997, at 1; S. Higgins, *AT&T Goes Local With Service Today*, New Haven Register, Mar. 1, 1997, at A1 (reporting that "AT&T chose Connecticut for its first major thrust" into local markets); B. Keveney, *TCI Service to*

(Footnote continued)

36 companies to provide local exchange service and over 200 companies to offer intra-state toll services, and it has ruled that beginning in January 1999 every residential and small business customer of respondent SNET, the incumbent local carrier, will be required to select by ballot which of the many certified carriers they wish to use for local telephone service. *In Re Investigation of The Southern New England Telephone Company*, Docket No. 94-10-05 (Conn.D.P.U.C. June 25, 1997), *as revised by*, Draft Decision (Conn.D.P.U.C. Dec. 1, 1997) (not available on West Law). Nine of the 36 certified local exchange carriers are currently offering local telephone service in Connecticut, including petitioners AT&T and MCI. Similar competition is occurring in other states' markets.[14]

REASONS FOR DENYING THE PETITIONS

Petitioners essentially advance only two reasons for granting a writ of certiorari in these cases: first, the Eighth Circuit's decision is wrong on the issues presented; and second, the Eighth Circuit's decision has permitted state utility commissions and LECs (presumably in some grand conspiracy with one another) to obstruct the movement toward local competition. As shown below and in the briefs in opposition filed by GTE and the BOCs, neither argument has merit.

The Eighth Circuit carefully considered the concerns and extensive arguments from literally hundreds of petitioners,

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Expand Next Month, Hartford Courant, Dec. 20, 1995, at A3 (reporting that TCI chose Hartford for one of its first forays into local telephone competition).

[14] For example, respondent Cincinnati Bell Telephone Co. has voluntarily negotiated and entered into, and has arbitrated, numerous interconnection agreements in Ohio, Kentucky and Indiana. Time Warner is already providing facilities–based service in Cincinnati; MCI is expected to be operational there in January; and other companies are already reselling services in that market or are authorized to do so. The Nebraska Public Service Commission has certified 13 companies as Local Competition carriers and approved 19 interconnection agreements. *See USTA Competition Report.*

respondents and intervenors on dozens of issues; it heard more than six hours of legal argument from the parties at hearings on the stay and on the merits; and, after seven months of deliberation, the court issued a detailed, thoughtful and balanced opinion that vacated some FCC rules but affirmed many others. In vacating the FCC rules, the court adhered strictly to the language and structure of the Act, as buttressed by its legislative history; by contrast to the FCC, the court did not substitute its own policy views for those enacted by Congress. As a result, the "pro-competitive, deregulatory national policy" that Congress intended when it passed the Act has been restored, and the movement toward achieving competition in local telephone service in the manner envisioned by Congress is proceeding apace. There is, therefore, no reason to grant a writ of certiorari.

I.

THE EIGHTH CIRCUIT'S DECISION IS CONSISTENT WITH THE LANGUAGE AND STRUCTURE OF THE ACT AND THIS COURT'S PRECEDENTS

The Eighth Circuit's decision faithfully adhered to the terms of the Act, proper principles of statutory construction and deference to administrative agencies, and this Court's precedents governing the scope of the FCC's jurisdiction over intrastate telecommunications. Contrary to petitioners' claims, the Eighth Circuit did not purport to, nor did it, announce any new legal principles or call into question the principles that this Court has applied when construing federal legislation, including the Communications Act.

The FCC and other petitioners devote much of their petitions to arguing that the Eighth Circuit supposedly erred in rejecting the FCC's assertion of jurisdiction to regulate pricing in the local telephone markets. The briefs in opposition filed by GTE and the BOCs provide this Court with the principles of statutory analysis supporting the Eighth Circuit's decision on pricing jurisdiction. The Mid-Sized LECs fully endorse and incorporate herein those briefs in opposition.

A. This brief therefore focuses on parts of the Act *other* than those specifically governing whether the FCC has jurisdiction to regulate pricing. The FCC, in the First Report & Order, wrote out of the Act three provisions expressly preserving the paramount role of state commissions over local telephone service, including non-pricing issues. *See* 47 U.S.C. §§ 251(d)(3); 251(f); 252(e)(6). The Eighth Circuit decided that the FCC overstepped its bounds in construing those parts of the Act. Although petitioners include that decision within the questions presented,[15] no petitioner squarely discusses the decision below on those statutory provisions. Petitioners only obliquely suggest that the FCC's supposed jurisdiction over these non-pricing issues provides added support to their pricing jurisdiction arguments.[16]

As shown below, the Eighth Circuit's decision regarding §§ 251(d)(3), 251(f) and 252(e)(6) was legally correct and based on sound principles of statutory interpretation. Thus, contrary to petitioners' suggestion, the Act's clear limitations on FCC authority over these non-pricing issues undermines, rather than supports, the FCC's grab for jurisdiction over pricing in local telephone markets.

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[15] All petitioners include in their questions presented both pricing and non-pricing issues. For example, in its first question presented, the FCC requests review of its statutory authority to issue rules on "the core provisions" of the local competition provisions of the Act, "including, *inter alia*, the provisions governing dialing parity and the standards for the prices" that incumbent LECs may charge. FCC Pet. I; *See* AT&T Pet. (i).

[16] Despite the FCC's reliance on the phrase "*inter alia*" in its first question presented, its reasons for granting the petition are limited to the statutory provisions in the Act governing pricing and the restrictions placed on the FCC's jurisdiction over intrastate telecommunications in § 2(b) of the Communications Act, 47 U.S.C. § 152(b). FCC Pet. 11-22. The FCC and other petitioners include only the briefest mention of the Eighth Circuit's decision on aspects of the Act other than those governing pricing jurisdiction. *See* FCC Pet. 9, 11 (citation to decision on § 251(f)), 14 n.5 (brief mention of decision on §§ 208 and 251(d)(3)). *See also* MCI Pet. 23 (brief mention of §§ 208 and 251(f)).

1. Preemption. 47 U.S.C. § 251(d)(3) is an "anti-preemption" clause entitled "Preservation of State access regulations." That provision prohibits the FCC, when either prescribing or enforcing rules to implement § 251, from preempting a state commission's regulations, orders or policies governing interconnection and access obligations in the local telephone markets unless those regulations, orders or policies are inconsistent with the requirements of § 251 or "substantially prevent implementation" of those requirements and the purposes of the local competition provisions of the Act. Nothing in § 251(d)(3) requires a state commission to conform its policies to the letter of the FCC's rules for those subject matters where the FCC *does* have jurisdiction to issue rules under § 251. The text of the statute quite clearly demonstrates Congress's intent that there is more than one way to implement the statutory requirements of § 251 without "substantially prevent[ing] implementation" of those requirements.

Nevertheless, the FCC unlawfully issued a blanket preemption order of *all* state commission regulations, orders and policies to the extent they do not implement § 251 in the precise manner as the FCC's detailed rules. *See* First Report & Order ¶¶ 101-03, 177-79 (Pet. App. 201a-202a; AT&T Lodging Materials).[17] As the FCC's then-Chairman publicly stated, the FCC's rules sought to consign state regulation of local exchange markets to the "trash can of history." Interview with Reed Hundt, *in* Telecommunications Report, Supp. at 10 (July 9, 1996). The FCC accomplished this unprecedented task with little analysis of the text of § 251(d)(3), and without developing *any* record in the rulemaking proceeding concerning whether a particular state commission's interconnection or access policy conflicted with the terms or purposes

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[17] For example, the FCC ruled that "state requirements must be consistent with the FCC's implementing regulations," and that new entrants need not "comply with a multiplicity of state variations" in interconnection requirements. First Report & Order ¶¶ 103, 177 (Pet. App. 202a; AT&T Lodging Materials).

of the Act, as § 251(d)(3) requires before that policy may be preempted.[18] In one fell swoop, therefore, the FCC sought to wipe from the books the sound, lawful policies of even those state commissions that are widely acknowledged to be in the forefront of opening up local telephone markets to competition, despite Congress's expressed desire in § 251(d)(3) to "Preserv[e] . . . State access regulations."

The Eighth Circuit overturned the FCC's blanket preemption order, holding as follows:

> Even when the FCC issues rules pursuant to its valid rulemaking authority under section 251, subsection 251(d)(3) prevents the FCC from *preempting* a state commission order that establishes access and interconnection obligations so long as the state commission order (i) is consistent with the requirements of section 251 and (ii) does not substantially prevent the implementation of the requirements of section 251 and the purposes of Part II, which consists of sections 251 through 261. This provision does not require all state commission orders to be consistent with all of the FCC's regulations promulgated under section 251. . . . It is entirely possible for a state interconnection or access regulation, order, or policy to vary from a specific FCC regulation and yet be consistent with the overarching terms of section 251 and not substantially prevent the implementation of section 251 or Part II. In this

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[18] Without a record concerning specific state regulatory policies, the FCC could have preempted state commissions in the present rulemaking under § 251(d)(3) only if it had found that there is *no possible* set of circumstances under which a state commission's actions that varied from the FCC's rules would satisfy the requirements of § 251(d)(3). *See California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 580, 588-89 (1987). The FCC made no such finding, nor could it on this record. The Eighth Circuit's decision left the FCC free in appropriate circumstances and on an appropriate record to exercise its preemptive power in accordance with Congress's statutory restrictions. Pet. App. 40a & n.28.

> circumstance, subsection 251(d)(3) would prevent the FCC from preempting such a state rule, even though it differed from an FCC regulation.

Pet. App. 37a-38a (emphasis in original). This holding is nothing more than a straightforward application of the statutory language of § 251(d)(3), which expressly limits the preemptive scope of those FCC rules governing § 251 that are properly within its jurisdiction.

If Congress had intended in § 251(d)(3) that state commissions conforming their policies to the requirements "of this section" could do so only by strict adherence to the FCC's rules, then it would have said so. By contrast to other provisions in the same part of the Act, *see* 47 U.S.C. §§ 251(c)(4)(B), 252(c)(1), 252(e)(6), 261(c), which expressly require state commissions to adhere to FCC rules, the omission of any reference to FCC rules in § 251(d)(3) is consistent with Congress's treatment of state commission regulations elsewhere in that part of the Act. *See id.* §§ 252(d), 261(b). The FCC cannot minimize the import of Congress's omission of any reference to FCC rules in the anti-preemption provision of § 251(d)(3). *See Russello v. United States*, 464 U.S. 16, 23 (1983).[19] The FCC's reading of the statute is also

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[19] The FCC's reading of § 251(d)(3) is plainly an effort to reverse a legislative defeat. While the Senate bill had no counterpart to § 251(d)(3), the House amended H.R. 1555 on the day it passed that bill to add § 242(b)(4)(B), the precursor to § 251(d)(3). The House version was identical in every respect to the final text of § 251(d)(3), except that it required that state commission regulations, orders and policies "not substantially prevent *the [FCC] from fulfilling* the requirements of this section and the purposes of this part." 141 Cong. Rec. H8444, cols. 2-3 (daily ed. Aug. 4, 1995) (inserting new subparagraph (B) in House Commerce Committee version of § 242(b)(4), reprinted in 141 Cong. Rec. H8427, col. 1) (emphasis added). The Conference, however, changed the House's phrase – "not substantially prevent the [FCC] from fulfilling the requirements of this section and the purposes of this part" – to the phrase as now found in § 251(d)(3) – "not substantially prevent implementation of the requirements of this section and the purposes of this part." The Conference also changed the caption from "accommodation" of state access

(Footnote continued)

illogical, because if state commissions could not adopt rules or policies different from the FCC's rules, no purpose would be served by the clause in § 251(d)(3) permitting preemption only if a state commission policy that otherwise is consistent with "this section" "substantially prevent[s] implementation of the requirements of this section and the purposes of this part."[20]

In sum, the FCC's argument that only uniform, national interconnection and access rules can advance the goals of the Act rests not on the language and structure of the Act, but on the FCC's own policy view of how best to implement competition. However, whether a single set of national rules might, as a policy matter, be preferable to state-by-state rules consistent with the Act is an issue that Congress has already decided in the anti-preemption provision of § 251(d)(3).

2. Review of State Commission Decisions. 47 U.S.C. § 252(e)(6) provides for federal district court review of a state commission decision to accept or reject a negotiated or arbitrated interconnection agreement between an incumbent LEC and its competitors.[21] Congress could not have made its intent

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regulations to the more strongly-worded caption in § 251(d)(3), "preservation" of state access regulations.

[20] The FCC's blanket preemption order effectively grants the FCC exclusive jurisdiction to establish regulatory policies under § 251. Yet, it was only in § 251(e)(1) that Congress granted the FCC "exclusive" jurisdiction over certain aspects of numbering administration. That statutory reference to "exclusive" FCC jurisdiction – the only such reference in §§ 251 and 252 – would be superfluous unless Congress intended to preserve the right of state commissions to prescribe and enforce their own regulations implementing the remaining local competition provisions of the Act. *See* § 601 of the Act (uncodified) ("This Act . . . shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided . . ."). *See Conference Report* at 91.

[21] In § 252, Congress placed each state commission – not the FCC – at the center of responsibility for overseeing the efforts of private parties to enter into agreements for interconnection, purchase of network elements, and reselling of services. If parties cannot initially come to terms through voluntary negotiation, then the state commission has sole authority to

(Footnote continued)

clearer. Thus, § 252(e)(6) – entitled "Review of State commission actions," states:

> In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section.

Congress provided only one venue, "an appropriate Federal district court," for the parties aggrieved by state commission determinations.

Despite this straightforward provision governing judicial review, the FCC ruled that the FCC itself has authority to review a state commission decision to ensure its consistency with the Act and the FCC's rules. *See* First Report & Order ¶¶ 121-29 (Pet. App. 215a-220a). The FCC did so under the guise of its authority under 47 U.S.C. § 208 to hear complaints filed against a common carrier, even though § 208 nowhere authorizes the FCC to overturn decisions of a state commission. By this action, the FCC again revealed a mistrust of state regulators not shared by Congress, by seeking the review authority over state commission decisions that Congress expressly vested in the courts.

The Eighth Circuit overturned the FCC's ruling regarding the scope of its complaint jurisdiction under § 208. The Court of Appeals held that traditional rules of statutory construction require interpreting Congress's choice of federal district court review of state commission decisions as the exclusive means of review. Pet. App. 31a-32a (citing cases). The absence of any reference in § 252 to FCC review reinforced the court's

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mediate or arbitrate disputes over remaining terms. 47 U.S.C. § 252(a), (b). Any agreement, whether reached through negotiation or arbitration, must then be submitted to the state commission for final approval before it can be implemented. *Id.* § 252(e).

conclusion in this regard. *See id.* 33a. The Court of Appeals correctly noted:

> The only grant of any review or enforcement authority to the FCC is contained in subsection 252(e)(5), and this provision authorizes the FCC to act only if a state commission fails to fulfill its duties under the Act. The FCC's expansive view of its authority under section 208 is thus contradicted by the language, structure, and design of the Act.

Id. Only after rendering its conclusion based on "the language, structure, and design of the Act," did the Court of Appeals separately and independently hold that § 2(b) of the Communications Act *also* precludes the FCC from exercising authority under § 208 to review state commission decisions on interconnection agreements, because many aspects of those agreements, such as pricing, are outside the FCC's jurisdiction. *See id.* 33a-34a.

It is particularly important for the Mid-Sized and smaller LECs that Congress's expressed desire for reduced regulatory burdens be followed. These LECs are especially vulnerable to efforts by large well-financed entrants to grind them down through multiple and duplicative regulatory proceedings. The FCC cannot ignore Congress's plainly expressed intention that parties to an interconnection agreement need only pass *one* regulatory hurdle – the state commission (with federal district court review, if necessary) – to approve their agreement. The Court of Appeals was therefore correct to reject the FCC's effort to rewrite § 252 by placing review of state commission determinations within the FCC's jurisdiction.

3. Two-percent waiver. Further underscoring Congress's confidence in the states, 47 U.S.C. § 251(f)(2) gives to state commissions alone the authority to suspend or modify the requirements of § 251(b) or (c) in certain circumstances for LECs in their state that serve fewer than two percent of the

nation's subscriber lines.[22] Those circumstances are when the LEC can demonstrate in a petition filed with the state commission that § 251(b) or (c) imposes "a requirement that is unduly economically burdensome."[23] In purporting to apply § 251(f)(2), the FCC issued Rule 405(d), which impermissibly narrows the circumstances under which Congress intended that a smaller LEC may obtain relief from the requirements of § 251. The rule does so by requiring smaller LECs to prove that § 251 requirements "would be likely to cause undue economic burden *beyond the economic burden that is typically associated with efficient competitive entry.*" 47 C.F.R. § 51.405(d) (emphasis added).

In other words, if "efficient competitive entry" – the FCC's concocted phrase – would "typically" cause the demise of the smaller LEC with a strong historical tie to its service area, due to the entry of a multinational competitor with no long-term commitment to that area, the FCC's rule would disable the state commission from even temporarily suspending or modifying any of the requirements of § 251. Yet, that scenario is precisely what Congress intended would satisfy the test of a requirement that is "unduly economically burdensome."[24]

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[22] Under § 251(f)(2), only LECs with fewer than two percent of the nation's subscriber lines in the aggregate qualify for this "2% waiver" provision. That definition excludes the BOCs and GTE, but includes all of the Mid-Sized LECs. The Mid-Sized LECs have a unique interest in the application of this provision because, unlike smaller, rural LECs that make up the vast majority of LECs in this country, many of the Mid-Sized LECs do not qualify for the automatic rural exemption of 47 U.S.C. § 251(f)(1) – a provision addressed at length in the Brief in Opposition filed by the United States Telephone Association and the Rural Telephone Coalition, which brief the Mid-Sized LECs fully endorse.

[23] The "unduly economically burdensome" test is just one of three alternative tests in § 251(f)(2) for justifying a waiver, but the FCC conceded below that its rules neither address nor purport to limit a LEC's right to resort to the other two tests.

[24] *See Senate Report* at 22 (Senate Committee, in drafting provision that became § 251(f)(2), intended that the "State shall, consistent with the protection of consumers and allowing for competition, use this authority to provide a level playing field, particularly when a company or carrier to

(Footnote continued)

That statutory phrase, and not the one made up by the FCC, governs when a state commission may tailor a requirement to the uniquely local situation, and thereby *enhance* competition by ensuring the local company's survival.

The Eighth Circuit thus vacated the FCC's rule as beyond the FCC's jurisdiction. It did so by applying the plain meaning of § 251(f)(2) as well as by reference to clear legislative history consistent with that meaning. *See* Pet. App. 28a. In enacting the two percent waiver provision, Congress recognized that not all LECs or telephone markets are the same, and that state commissions, not the FCC, had the local knowledge and experience to decide when the Mid-Sized or smaller LECs need relief from particular obligations imposed by the Act. Yet, the FCC arrogated to itself the power to restrict the state commissions' exercise of authority given by Congress, even though the statute gives the FCC *no* role to play in that purely local decision. The FCC also ignored Congress's rejection of earlier versions of § 251(f)(2) that would have created dual FCC/state commission jurisdiction over waivers. *See Senate Report* at 22, 93 (§ 251(i)); *House Report* at 74, 144 (§ 242(e)). In the bill enacted into law, Congress deleted any reference to FCC jurisdiction in § 251(f)(2) and decided instead that waiver decisions requiring a thorough knowledge of the Mid-Sized and smaller LECs should be handled only by state commissions, which are best equipped to make such determinations on a company-by-company basis.[25] The Court of Appeals' reliance on the express statutory text and clear

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which this subsection applies faces competition from a telecommunications carrier that is a large global or nationwide entity that has financial or technological resources that are significantly greater than the resources of the company or carrier").

[25] Thus, on the day that the Senate passed the Act, Senator Daschle remarked: "The bill before us also recognizes the important role that must be played by Public Utilities Commissions (PUC's) in rural States. PUC's are the best entities to judge whether a given market within their State can support competition. *That's not a judgment we should make from Washington.*" 142 Cong. Rec. S709 (daily ed. Feb. 1, 1996) (emphasis added).

legislative history of § 251(f)(2), as independently supported by § 2(b) of the Communications Act, was clearly correct, and there is, therefore, no reason to disturb that ruling.

4. In the First Report & Order, the FCC paid little attention to the text of the statutory provisions just discussed. That same blindspot is apparent from the FCC's analysis of the pricing provisions of the Act. All of these provisions, both in the statutory language and when viewed as a whole, confirm that Congress did not strip regulatory authority over local telephone service from state utility commissions and hand it over to the FCC. There is, therefore, no reason for this Court to accept petitioners' invitation to grant plenary review of the Eighth Circuit's well-reasoned and balanced decision on these numerous statutory issues.

B. In its second question presented, the FCC separately takes issue with the Eighth Circuit's decision on rehearing regarding the sale of unbundled network elements. Other petitioners present the same question. The briefs in opposition filed by the BOCs and GTE fully address why this Court should not grant review of this question, and the Mid-Sized LECs adopt the arguments in those briefs.[26] This issue is of particular concern to the Mid-Sized and smaller LECs, many of whom depend heavily on the revenues earned from serving a few large companies in their service areas in order to stay in business and serve residences at the lower subsidized retail rate set by their utility commissions. If a new entrant could obtain the incumbent LEC's telephone service at the cost-based rates reserved for unbundled network elements, rather than at the wholesale rate based on the higher retail rate charged to business customers, the new entrant could "cherry pick" the important business customer base and leave the incumbent LEC only with residential customers. This type of

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[26] Similarly, the Mid-Sized LECs adopt the arguments made by the BOCs and GTE regarding why this Court should not review the question presented by petitioners concerning the FCC's "pick and choose rule."

"cream skimming" would be especially devastating to the Mid-Sized and smaller LECs.

The Eighth Circuit, therefore, correctly decided to vacate FCC Rule 315, 47 C.F.R. § 51.315. Only if new entrants incur the cost attendant to combining network elements purchased on an unbundled basis can "resale" – *i.e.*, the purchase of finished telephone service at wholesale rates – remain a "distinct and attractive option" for new entrants. Pet App. 57a. By preserving the Act's purposeful distinction between the sale of unbundled network elements at cost-based prices and the sale of an incumbent LEC's telephone services at wholesale prices, the Court of Appeals upheld Congress's intent that incumbent LECs not "lose all of the customers to whom they charge higher prices in order to fulfill their current universal service obligations." *Id.*[27]

This Court should therefore decline to review the Court of Appeals' decision on rehearing, which was based on the plain language of the Act and clear legislative intent to ensure that large global concerns cannot skim off the best customers of smaller local telephone companies. If AT&T or other new entrants wish to offer local telephone service through the purchase of unbundled network elements *at cost-based rates*, rather than by purchasing the incumbent LEC's own telephone service *at wholesale rates* and offering it for resale, the new entrant is required by the Act to design and assemble its own transmission network by selecting and purchasing from

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[27] The House specifically amended its bill going into Conference to ensure that LECs need only provide resale at "wholesale rates" rather than "at economically feasible rates to the reseller." *Compare* 141 Cong. Rec. H8426 (§ 242(a)(3)) (daily ed. Aug. 4, 1995) *with id.* at H8444, col. 2 ("resale" amendment). Representative Dingell explained that the amendment was necessary to eliminate the requirement that "local telephone companies . . . subsidize the long distance competitors," by "requir[ing] service which cost $25 to be sold to AT&T for $6; something which would have caused the necessity of subsidizing, then, AT&T at the expense of small business and local [residential] phone user, an outrageous situation." *Id.* at H8452 (also noting that Reps. Bliley and Fields worked to correct "this failure" in the bill).

the LEC the individual elements and facilities that make up an interoffice transmission network. Anything less would "require the incumbent LECs to do *all* of the work" of new entrants, in violation of the Act. Pet. App. 53a (emphasis in original).

II.

THE EIGHTH CIRCUIT'S DECISION IS NOT IMPEDING THE DEVELOPMENT OF COMPETITION IN LOCAL MARKETS

Each petition argues that certiorari is warranted because the Eighth Circuit's decision stands as an impediment to achieving competitive local telephone markets. Petitioners made identical arguments to this Court over a year ago in seeking to vacate the Eighth Circuit's stay of the pricing provisions of the First Report & Order. FCC Application to Vacate Stay, *Iowa Utilities Bd. v. FCC*, No A-299, at 27 (Oct. 24, 1996); ALTS Application to Vacate Stay, *Iowa Utilities Bd. v. FCC*, No. A-300, at 27-32 (Oct. 24, 1996).

As the facts described in the Statement show, these arguments are even less credible now than they were a year ago. Private negotiations and state commission arbitrations are working as Congress planned to open local telephone markets to competition far more rapidly than has happened with other markets or industries that have been opened to competition after decades as regulated monopolies. It should hardly be surprising that with over 1,700 interconnection agreements and numerous arbitrations, there should be, as petitioners claim, 70-100 review proceedings pending in the federal district courts. *See* AT&T Pet. 10; FCC Pet. 24. Certainly, there is no reason to believe that there would be fewer such proceedings if the Eighth Circuit had, as petitioners argue, upheld the FCC's pricing and other rules, and given the financial stakes, there is also little reason to believe that consideration of the issues presented by the petitions would likely reduce the number of contested arbitrations. Indeed, granting the petitions would only serve to create greater uncertainty in the marketplace, not less. Moreover, as decisions are rendered in

those cases and issues of concern in those local marketplaces are resolved by the local federal courts, as Congress intended, even the relatively small number of federal court review petitions that have been filed to date can be expected to diminish.

All of this progress toward competition in local markets has occurred, and can continue to occur, *without* the FCC dictating pricing methodologies to the state commissions and competing carriers and *without* the FCC preempting every state policy or rule on interconnection and access that differs from the FCC's own rules. As the Eighth Circuit found at the stay stage on the basis of the uncontroverted record before it, petitioners' claims of the calamitous consequences that would supposedly occur if private negotiations and state commission arbitrations are allowed to proceed as Congress envisioned "ignore[ ] the *empirical* success that private parties and the state commissions have had in implementing the local competition provisions of the Act," ignore the fact that this system "has initially proved to be successful," and "denigrate[ ] the proven ability of the state commissions to prevent incumbent LECs from charging excessive rates for their services." *Iowa Utilities Bd.*, 109 F.3d at 427 (emphasis added). *See* excerpt from the *USTA Competition Report* in the appendix to this brief. Respondents urge this Court to allow that "successful" implementation of Congress's plan to continue to proceed without further delay or uncertainty.

CONCLUSION

For the reasons set forth above, the petitions for a writ of certiorari should be denied.

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Dated: December 18, 1997

APPENDIX

Appendix

EXCERPT FROM UNITED STATES TELEPHONE ASSOCIATION, COMPETITION REPORT
Nov. 3, 1997

STATE	INTERCONNECTION AGREEMENTS	ARBITRATIONS
ALABAMA	92	0
ALASKA	3	0
ARIZONA	22	1
ARKANSAS	22	0
CALIFORNIA	39	0
COLORADO	13	0
CONNECTICUT	9	2
DELAWARE	20	0
DC	23	0
FLORIDA	114	0
GEORGIA	97	0
HAWAII	6	1
IDAHO	8	2
ILLINOIS	38	0
INDIANA	29	1
IOWA	8	0
KANSAS	22	1
KENTUCKY	84	1
LOUISIANA	87	0

MAINE	16	0
MARYLAND	29	0
MASSACHUSETTS	30	0
MICHIGAN	26	0
MINNESOTA	20	1
MISSISSIPPI	85	0
MISSOURI	25	0
MONTANA	8	1
NEBRASKA	9	0
NEVADA	12	1
NEW HAMPSHIRE	16	0
NEW JERSEY	32	0
NEW MEXICO	8	2
NEW YORK	27	0
NORTH CAROLINA	90	0
NORTH DAKOTA	4	1
OHIO	36	2
OKLAHOMA	29	2
OREGON	21	1
PENNSYLVANIA	42	0
PUERTO RICO	5	0
RHODE ISLAND	7	0
SOUTH CAROLINA	83	0

SOUTH DAKOTA	3	1
TENNESSEE	94	0
TEXAS	82	6
UTAH	7	3
VERMONT	9	0
VIRGINIA	42	0
VIRGIN ISLANDS	1	0
WASHINGTON	24	2
WEST VIRGINIA	14	0
WISCONSIN	25	1
WYOMING	4	1
TOTAL	1701	34

Supreme Court, U.S.
FILED
DEC 18 1997
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Nos. 97-826, 97-829, 97-830, 97-831

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

AT&T CORP., *et al.*,
Petitioners,
v.
IOWA UTILITIES BOARD, *et al.*,
Respondents.

AT&T CORP., *et al.*,
Petitioners,
v.
PEOPLE OF THE STATE OF CALIFORNIA, *et al.*,
Respondents.

And Related Cases

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

OPPOSITION OF THE REGIONAL BELL COMPANIES TO PETITIONS FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, in giving States authority to "establish" and "determin[e]" the rates for local interconnection arrangements (47 U.S.C. § 252(c), (d)) and in providing that "nothing in this Act shall be construed . . . to give the [Federal Communications] Commission jurisdiction" with respect to intrastate matters (*id.* § 152(b)), Congress foreclosed the FCC's claim of jurisdiction to regulate the rates and certain other terms of local interconnection arrangements.

2. Whether the court of appeals correctly applied *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984), in holding that FCC rules requiring incumbent telephone companies to provide their competitors with preassembled combinations of "unbundled network elements" that amount to a finished telecommunications service could not be reconciled with statutory text providing that unbundled network elements must be provided "in a manner that allows *requesting carriers* to combine such elements" (47 U.S.C. § 251(c)(3) (emphasis added)) and with separate statutory provisions governing the resale of finished telecommunications services (*id.* § 251(c)(4)).

3. Whether the court of appeals correctly applied *Chevron* in holding that FCC rules allowing a competitor to force upon an incumbent carrier any isolated provision from any of the incumbent's approved interconnection agreements could not be reconciled with the Act's reliance on voluntary private negotiations and with statutory text providing that incumbent carriers must make such provisions available to other carriers only "upon the same terms and conditions" as in the original agreement (47 U.S.C. § 252(i)).

LIST OF PARTIES AND AFFILIATES

The parties to the proceedings in the United States Court of Appeals for the Eighth Circuit are reproduced at Pet. App. 1a-4a, 73a-78a, and 92a.

Pursuant to Supreme Court Rule 29.6, the parties to this brief submit the following statement concerning parent companies and non-wholly owned subsidiaries:

Ameritech Corporation has no parent companies and no non-wholly owned subsidiaries.

Bell Atlantic Corporation has no parent companies. It owns the following subsidiaries having securities in the hands of the public: Bell Atlantic-Delaware, Inc., Bell Atlantic-Maryland, Inc., Bell Atlantic-New Jersey, Inc., Bell Atlantic-Pennsylvania, Inc., Bell Atlantic-Virginia, Inc., Bell Atlantic-Washington, Inc., Bell Atlantic-West Virginia, Inc., Bell Atlantic Financial Services, Inc., New York Telephone Company, New England Telephone and Telegraph Company, NYNEX Credit Company, NYNEX Capital Funding Company. In addition Bell Atlantic has the following non-wholly owned subsidiaries: One Parkway, Inc., ICA Foreign Financial, Inc., Chesapeake Directory Sales Company, Atlantic West B.V., Grupo Iusacell, S.A. de C.V., Bell Atlantic New Zealand Holdings, Inc., PrimeCo Personal Communications, L.P., Washington, D.C. SMSA Limited Partnership, New York SMSA Limited Partnership, Upstate Cellular Network, Orange County Poughkeepsie MSA Limited Partnership, Pittsfield Cellular Telephone Company, Allentown SMSA Limited Partnership, Reading SMSA Limited Partnership, Pittsburgh SMSA Limited Partnership, Pennsylvania RSA No. 6(II) Limited Partnership, Columbia Cellular Telephone Company, Anderson Cellular Telephone Company, Las Cruces Cellular Company, TELE-TV, TELE-TV Media, L.P., TELE-TV Systems, L.P., NYNEX Master Lease Partners, Global Directory Services Company, MEDIATEL spol. s.r.o., Zlate Stranky MEDIATEL spol. s.r.o., Greek Directory Services Company, NIMCO Commercial

Societe Anonyme of Publication of Directories and of Information Services, Polish Directory Services Company, NYNEX Worldwide Directories Company, Kipling Associates L.L.C., NYNEX International (Asia) Ltd., and Gibraltar NYNEX Communications Limited.

BellSouth Corporation has no parent companies. BellSouth Corporation's non-wholly owned subsidiaries are 1155 Peachtree Associates, InfoVentures of Atlanta, Beijing Ji Tong—Bellsouth Communication & Information Engineering Co., Ltd., Compania de Radiocommunicaciones Moviles S.A., Telcel Celular C.A., Tele 2000, S.A., RAM Mobile Data Belgium, S.C.S., RAM Mobile Data C.V., RAM Mobile Data Limited, BellSouth Carolinas PCS, L.P. (d/b/a BellSouth Mobility DCS), Bloomington Cellular Telephone Company, Chattanooga MSA Limited Partnership, Decatur RSA Limited Partnership, Florida RSA #2B (Indian River) Limited Partnership, Georgia RSA No. 1 Limited Partnership, Georgia RSA No. 2 Limited Partnership, Georgia RSA No. 3 Limited Partnership, Gulf Coast Cellular Telephone Company, Huntsville MSA Limited Partnership, Lafayette MSA Limited Partnership, Los Angeles Cellular Telephone Company, Louisiana RSA No. 7 Cellular General Partnership, MCTA, Muncie Cellular Telephone Company, Inc., Orlando SMSA Limited Partnership, Richmond Cellular Telephone Company, and Terre-Haute Cellular Telephone Company, Inc.

SBC Communications, Inc., which has shares outstanding in the hands of the public, is the parent company of Southwestern Bell Telephone Company and Southwestern Bell Yellow Pages, Inc. SBC Communications Inc. has the following non-wholly owned subsidiaries which have shares or partnership interests outstanding in the hands of the public: Abilene SMSA Limited Partnership, Amarillo SMSA Limited Partnership, Buffalo Telephone Company, Cellular Mobile Corporation, Champaign CellTelco, Dallas SMSA Limited Partnership, Decatur Cellular Telephone Company, Inc., Eastern Missouri Cellular Limited

Partnership, Gainesville Development Associates Limited, Gary Cellular Telephone Company, Kansas City SMSA Limited Partnership, Lubbock SMSA Limited Partnership, McAllen/Edinburgh SMSA Limited Partnership, Midland-Odessa SMSA Limited Partnership, Missouri RSA 8 Limited Partnership, Missouri RSA 9 B1 Limited Partnership, Oklahoma City SMSA Limited Partnership, Oklahoma RSA 3 Limited Partnership, Oklahoma RSA 9 Limited Partnership, PTF/FCLC Associates (LP), PTF/GECC (California) Associates (LP), San Antonio SMSA Limited Partnership, SBMS Cellular Telecommunications Bloomington, Inc., SBMS Cellular Telecommunications Springfield, Inc., S.T.L.M. Programming Services Limited, St. Joseph SMSA Limited Partnership, Texas RSA 9B4 Limited Partnership, Texas RSA 10B1 Limited Partnership, Texas/ Illinois Cellular Limited Partnership, Topeka SMSA Limited Partnership, Washington/Baltimore Cellular Limited Partnership, Wichita SMSA Limited Partnership, and Worcester Telephone Company.

On April 1, 1997, SBC Communications Inc., Pacific Telesis Group ("PAC"), and SBC Communications (NV) Inc., a wholly owned subsidiary of SBC Communications Inc., completed an agreement and plan of merger by the means of which PAC and SBC Communications (NV) Inc. were merged into PAC, and PAC became a wholly owned subsidiary of SBC Communications Inc. PAC, formerly a publicly held corporation, and its wholly owned subsidiaries, Pacific Bell and Nevada Bell, provide telecommunications services subject to the general jurisdiction of the Federal Communications Commission.

U S WEST, Inc., has no parent company. Financial Security Holdings, Ltd. is a non-wholly owned subsidiary of U S WEST, Inc.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

Nos. 97-826, 97-829, 97-830, 97-831

AT&T CORP., *et al.*

Petitioners,

v.

IOWA UTILITIES BOARD, *et al.*,

Respondents.

AT&T CORP., *et al.*,

Petitioners,

v.

PEOPLE OF THE STATE OF CALIFORNIA, *et al.*,

Respondents.

And Related Cases

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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OPPOSITION OF THE REGIONAL BELL COMPANIES TO PETITIONS FOR A WRIT OF CERTIORARI

Ameritech Corporation, Bell Atlantic Corporation, BellSouth Corporation, SBC Communications Inc., and U S WEST, Inc., petitioners below, respectfully oppose the petitions for a writ of certiorari.

Despite the tortuous complexity of the underlying FCC regulations, this case presents, at bottom, only ordinary issues of statutory construction like those the courts of

appeals routinely resolve every day. The Eighth Circuit, relying on the plain text of the Telecommunications Act of 1996 (the "1996 Act") and adhering scrupulously to the principles of *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984), correctly resolved each of these questions and, notwithstanding petitioners' claims to the contrary, there is no circuit conflict as to any aspect of the court's decision.

Nor is there any substance to petitioners' wholly unsupported assertion that the Eighth Circuit's ruling has had catastrophic effects on local competition. Petitioners direct their principal challenge to the court of appeals' jurisdictional holding that the FCC could not, consistent with the governing statutory language and with this Court's decisions, dictate to States the pricing rules for local interconnection arrangements. But in the 14 months since the court of appeals stayed the FCC's intrusive pricing rules, the States have aggressively and successfully implemented the Act's local competition provisions—issuing some 200 arbitration decisions and supervising more than 1,700 interconnection agreements. They have done so, moreover, in a manner compatible with the FCC's own notions of desirable policy. By the FCC's own account, "*virtually every state in the union* has adopted [the FCC's pricing] policies." [1]

The other questions presented by petitioners—which bear no relationship to the jurisdictional issue—deal only with the details of the statute's "unbundling" and most-favored-nation provisions. These second-level statutory issues fall far short of this Court's usual threshold for certiorari.

STATEMENT OF THE CASE

1. Background. For over 60 years, since the enactment of the Communications Act of 1934, Congress has expressly confined the FCC's jurisdiction to interstate and

[1] Reed Hundt, Chairman, Federal Communications Commission, remarks to the Chamber of Commerce, Washington, D.C. (May 29, 1997) (as prepared for delivery) (emphasis added).

foreign communications and has reserved for the States exclusive jurisdiction over intrastate communications. Section 2(b) of the Act provides (with exceptions not relevant here) that "*nothing* in this Act shall be construed to apply *or to give the Commission jurisdiction* with respect to . . . charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier," 47 U.S.C. § 152(b) (emphasis added). This Court has squarely held that section 2(b) "fenc[es] off from FCC reach or regulation intrastate matters," and that only an "unambiguous" and "straightforward" grant of specific intrastate jurisdiction to the FCC can "override the command of [§ 2(b)]." *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 370, 377 (1986).

Prior to the current decade, most States exercised their federally guaranteed authority over local telephone service by granting exclusive franchises in each local service area and pervasively regulating these franchised "local exchange carriers" (or "LECs") with an eye to securing affordable "universal service." To keep prices low even for high-cost customers, the States mandated an extensive system of interservice subsidies under which LECs were typically required to charge below-cost rates for basic residential service and above-cost rates for business and other services. The level and structure of these subsidies naturally varied throughout the country depending on each State's local conditions and prevailing social policies.

Interservice subsidy arrangements were economically sustainable only because the States preserved certain legal barriers to entry that prevented competitors from cherry-picking LEC business customers whose above-cost rates fund universal service. In the years leading up to the 1996 Act, however, a number of States began to depart from the exclusive franchise model. Far from being "complicit[]" in preserving "monopolistic local markets" (MCI Pet. 7), these States took the lead in the difficult and inherently localized process of opening up local telephone markets to competition while still ensuring affordable,

high-quality service to all consumers. *See Iowa Utils. Bd. v. FCC*, 109 F.3d 418, 427 n.7 (8th Cir. 1996).

2. The 1996 Act. Building significantly on the work already done by the States, Congress crafted in the 1996 Act a "pro-competitive, de-regulatory national policy framework" designed to "open[] all telecommunications markets to competition." S. Conf. Rep. No. 104-230, at 113 (1996). With respect to local service markets, Congress expressly preempted all State and local legal barriers to entry, such as exclusive franchises. *See* 47 U.S.C. § 253(a). It also required incumbent carriers, on reasonable terms, to interconnect their local networks with the facilities and equipment of competing local carriers, to provide access to elements of their networks on an unbundled basis, and to offer their retail services to competitors for resale at wholesale rates. *Id.* § 251(c).

Recognizing, however, that these steps implicated the intensely local concerns of 50 different jurisdictions—each with its own system of rate structures, regulations, and subsidies—Congress enlisted the aid of State public utility commissions to ensure that local competition would be implemented fairly and with due regard to local conditions. Congress saw the States, *not* as obstructionists to be kept "on a short leash" (MCI Pet. 7), but as critical players in a pro-competitive enterprise.

Congress chose to rely in the first instance on private party negotiations to reach interconnection agreements consistent with the 1996 Act. But where the parties are unable to agree on all issues within a prescribed bargaining period, Congress provided that either party may petition the State commission "to arbitrate any open issues." 47 U.S.C. § 252(b)(1). Most significantly for present purposes, the Act entrusts solely to State commissions the resolution of disputes concerning the crucial question of pricing. It provides that "*a State commission* shall . . . establish any rates for interconnection, services, or network elements," in accordance with the pricing standards spelled out in the statute. *Id.* § 252(c)(2) (emphasis added).

Congress did provide for ultimate federal oversight of State arbitrations, but it chose a judicial, not an administrative, mechanism for this oversight. Once an arbitrated agreement has been finally approved by a State commission, any aggrieved party may bring an action in federal district court to determine whether the decision "meets the requirements of section 251 and [section 252]." *Id.* § 252(e)(6).

In contrast to its broad reliance on private negotiations, State-supervised arbitrations, and federal judicial review, Congress assigned the FCC a specifically delimited role in implementing the Act's local competition provisions. The statute provides that, if a State commission declines to carry out its responsibilities under section 252, the FCC "shall assume the responsibility of the State commission . . . with respect to the proceeding or matter." *Id.* § 252(e)(5). Otherwise, with a few tightly drawn exceptions,[2] Congress scrupulously avoided authorizing the FCC to intrude on the States' traditional jurisdiction exclusively to oversee intrastate telephone service. In particular, Congress gave the FCC *no* responsibilities with respect to the pricing of interconnection arrangements.

3. The FCC's Order. Unwilling to accept its circumscribed role under the new statute, the FCC moved aggressively to transform the deregulatory, State-centered plan Congress enacted into a comprehensive federal regulatory program. In its First Report and Order—a 700-page, 3,200-footnote opus (selected excerpts of which are reproduced at Pet. App. 131a-337a)—the Commission undertook to promulgate "uniform, national rules" ad-

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[2] For example, Congress gave the FCC "exclusive jurisdiction" over the administration of "telecommunications numbering," including the responsibility to make numbers available "on an equitable basis." 47 U.S.C. § 251(e)(1). It also gave the FCC a role in defining a carrier's duty to provide "number portability," *id.* § 251(b)(2); in determining what network elements should be unbundled, *id.* § 251(d)(2); in prescribing permissible resale restrictions, *id.* § 251(c)(4)(B); and in providing for the treatment of comparable carriers as "incumbents," *id.* § 251(h)(2).

dressing every conceivable local interconnection issue (*id.* at 166a), and it declared those rules "binding on the states, even with respect to intrastate issues" (*id.* at 201a). Although the FCC conceded that the 1996 Act "do[es] not contain an explicit grant of intrastate authority to the Commission" (*id.* at 191a), it nevertheless proclaimed that it had authority "without limitation" (*id.* at 213a) to issue such binding rules because, in its view, the "1996 Act moves beyond the distinction between interstate and intrastate matters that was established in the 1934 Act." *Id.* at 144a. As the FCC's Chairman declared in plainer terms, the 1996 Act tossed the States' traditional intrastate authority into "the trash can of history." [3]

Having asserted unconstrained intrastate authority, the FCC turned its attention to the pricing of local interconnection arrangements. Even though section 252(d) expressly assigns to "State commission[s]" the authority to determine "just and reasonable" rates, the FCC asserted that it nonetheless has jurisdiction to adopt "national pricing rules" and to relegate the States to the subordinate role of mechanically applying those rules. Pet. App. 191a, 210a. The Commission accordingly mandated a new pricing methodology known as "total element long run incremental cost" (or "TELRIC"), which required States to set prices based solely on the incremental, forward-looking cost of a hypothetical, ideally efficient network. *Id.* at 147a. The Commission also required States to apply FCC-prescribed rates (known as "proxy" prices) in all instances where TELRIC studies had not been completed. *Id.* at 147a-48a.

The FCC's Order also contained rules on a wide array of other matters. Two are relevant here.

First, the Commission dismantled the statute's carefully tailored distinction between access to an incumbent carrier's unbundled network elements—which must be priced at "cost" plus "a reasonable profit" (47 U.S.C.

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[3] Interview with FCC Chairman Reed Hundt, *in* Telecommunications Report, Supplement at 10 (July 9, 1996).

§ 252(d)(1))—and the provision of finished services for resale—which must be priced at the incumbent's "retail rates" less "avoided" costs (*id.* § 252(d)(3)). The FCC ruled that a competitor could purchase at cost-based rates all the elements necessary for the provision of a complete service—and could require the incumbent to provide those elements in *pre-combined form*. Pet. App. 230a-33a, 242a-49a. The FCC's rules therefore allowed a competitor to obtain a finished service at cost-based, unbundled-element rates simply by framing its request in different terms: instead of requesting the incumbent's retail service for resale at wholesale rates under section 251(c)(4), the competitor could simply invoke section 251(c)(3) and demand, in fully preassembled form, all the "unbundled network elements" needed to provide that retail service.

Second, the FCC transformed the 1996 Act's unexceptional most-favored-nation requirement—under which an incumbent must make available to requesting carriers, "upon the same terms and conditions," any interconnection arrangement contained in an approved agreement (47 U.S.C. § 252(i))—into an extreme "pick-and-choose" rule that subverts voluntary negotiations and undermines binding agreements. Under the FCC's Order, a competitor may pluck any isolated provision from any approved interconnection agreement, and may force it upon the incumbent carrier without any obligation to accept the other "terms and conditions" negotiated as part of the same agreement. Pet. App. 261a-62a. Furthermore, a competitor may unilaterally revise even a signed, State-approved agreement by "avail[ing] itself of more advantageous terms and conditions subsequently negotiated by any other [competitor]." *Id.* at 265a.

In a separate order in the same proceeding, the FCC asserted power to dictate to the States the terms and conditions for implementing intrastate "dialing parity"—a system that allows callers to choose a carrier other than their local telephone company without dialing extra digits. *See* 47 U.S.C. §§ 153(15), 251(b)(3). The FCC asserted this power even though Congress directed the

States, not the FCC, to implement dialing parity for intrastate toll calls. *See id.* § 271(e)(2)(B).

4. The Stay Proceedings. Numerous States, as well as many incumbent carriers, petitioned for review of the FCC's Order. Pursuant to 28 U.S.C. § 2112(a)(3), the petitions were consolidated in the Eighth Circuit.

Because the FCC's arrogation of pricing jurisdiction seemed so clearly to usurp authority that Congress granted to the States, a number of States, as well as some private petitioners, sought an interim stay of the FCC's rules pending judicial review. After full briefing and argument, the Eighth Circuit granted the requested stay in October 1996 because of "what appear[ed] to be the rather clear and direct indication [in the statutory text] that the state commissions"—not the FCC—"should establish prices." *Iowa Utils. Bd.*, 109 F.3d at 424.

Making the same arguments that they now present in their petitions for certiorari, the FCC, AT&T, and MCI applied to Justice Thomas to vacate the stay. Justice Thomas denied the applications. 117 S. Ct. 378; 117 S. Ct. 379 (1996). The FCC immediately reapplied to Justice Ginsburg, and AT&T and MCI reapplied to Justice Stevens. The renewed applications were referred to the full Court, which likewise refused to vacate the stay. 117 S. Ct. 429 (1996).

5. The Decision Below. After further briefing and oral argument, the court of appeals confirmed that the language of the 1996 Act "plainly grants the state commissions, not the FCC, the authority to determine the rates involved in the implementation of the local competition provisions of the Act." Pet. App. 14a. Section 252, the court held, "clearly assign[s] jurisdiction" over pricing to the States. *Id.* at 22a. If there were "[a]ny ambiguity," however, it would be resolved by the intrastate jurisdictional proscription of section 2(b), because "the prices that incumbent local exchange carriers may charge their new competitors for interconnection, unbundled access,

and resale . . . qualify as 'charges . . . for or in connection with intrastate communications service.'" *Id.* at 15a.

The Eighth Circuit also addressed a lengthy series of additional challenges to specific FCC rules.[4] Of relevance here, the court determined two respects in which the Commission's rules conflicted with the terms of the statute.

First, the court vacated the FCC's "pick-and-choose" rule because it "conflict[ed] with the Act's design to promote negotiated binding agreements" and was therefore "an unreasonable construction of the Act." *Id.* at 25a, 27a.

Second, the court held that "the FCC's rule requiring incumbent LECs, rather than the requesting carriers, to recombine network elements that are purchased . . . on an unbundled basis . . . cannot be squared with the terms of subsection 251(c)(3)" (*id.* at 52a), which states that "requesting carriers" are to "combine such elements" to provide telecommunications services. In light of that holding, the court concurrently rejected the incumbents' contention that new entrants cannot obtain access to all of the network elements that, when combined by the requesting carrier, are sufficient to provide service. *Id.* at 54a-58a. Because entrants must make an "up-front investment" and incur additional "costs and risks" in combining the elements themselves, the Eighth Circuit reasoned, recombining all the elements needed to provide a complete service would not simply be resale under another name. *Id.* at 56a-57a.

AT&T and others immediately sought to sidestep the Eighth Circuit's ruling on the issue of combining network elements. Citing the court's failure to vacate a particular subsection of the FCC's rules (47 C.F.R. § 51.315(b))—which provided that, "[e]xcept upon request, an incum-

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[4] Because it vacated the FCC's pricing rules on jurisdictional grounds, the Eighth Circuit found it unnecessary to reach additional claims that those rules were arbitrary and capricious, contrary to the statute, and confiscatory.

bent [carrier] shall not separate requested network elements that the incumbent [carrier] currently combines" (Pet. App. 294a)—AT&T argued in proceedings around the country that it could still skirt the resale pricing rules by obtaining at cost-based prices a "platform" of all the necessary network elements already combined into a complete service by the incumbent.

Once it was alerted to these attempted evasions of its ruling, the Eighth Circuit granted rehearing and vacated the FCC rule at issue as inconsistent with the plain statutory text. The court stated that "§ 251(c)(3) does not permit a new entrant to purchase the incumbent [carrier's] assembled platform(s) of combined network elements"; indeed, if that were allowed, it would "obliterate the careful distinctions Congress has drawn" between resale and unbundled elements. Pet. App. 71a.

In a separate appeal that was briefed and argued independently of the main appeal and that the court decided in a separate opinion, the Eighth Circuit concluded that the FCC lacked jurisdiction to issue mandatory rules governing the States' implementation of "intraLATA toll [*i.e.*, short-haul long-distance] dialing parity." Pet. App. 81a-89a. The court of appeals relied on the express language of section 271(e)(2)(B)—which "indicates that state commissions, not the FCC, have the authority to issue intraLATA dialing parity rules" (Pet. App. 88a)—as well as on this Court's analysis of section 2(b) in *Louisiana PSC*.

ARGUMENT

Each of the issues raised by petitioners is a straightforward matter of statutory construction on which the decision below was plainly correct. But even if there were doubt on that score, the issues would not warrant further review. There is no reason to believe that the court of appeals misunderstood its role under this Court's *Chevron* decision. Petitioners' claims of conflict with respect to individual decisions are so strained as to undermine their credibility. And their assertions that the decision below

has had adverse practical consequences are without foundation; indeed outside of litigation, petitioners themselves have frankly admitted as much.

The Eighth Circuit did not invalidate any part of the 1996 Act, but merely read it to vindicate the States' historical authority over intrastate matters, to preserve the Act's careful distinction between resale and unbundled elements, and to retain the role of voluntary negotiations in reaching interconnection agreements. These statutory rulings—among the many made by the court below—are but the first wave in what will unavoidably be a long series of decisions interpreting this new statute, each of which will have its own claims to importance.

The 1996 Act was enacted less than two years ago by a Congress, most of whose members remain in place. If the Eighth Circuit erred in reading that statute, Congress is in the best position to apply a remedy. There is no reason for this Court to play the role of Special Master in attempting to resolve each such dispute that might arise.

I. THE EIGHTH CIRCUIT'S JURISDICTIONAL RULINGS WERE CORRECT, REST ON THE PLAIN LANGUAGE OF DISCRETE STATUTORY PROVISIONS, AND RAISE NO ISSUE OF NATIONAL IMPORTANCE

The Eighth Circuit did not make a single, sweeping jurisdictional ruling. It made a series of discrete rulings concerning the scope of the FCC's authority to regulate numerous separate aspects of local interconnection arrangements. And, although each of these decisions was reinforced by section 2(b), each turns principally and in the first instance on the proper reading of individual provisions of the 1996 Act.

The most important of these jurisdictional rulings concerns the FCC's attempt to appropriate the State's authority to determine prices. We therefore focus primarily on the pricing issue in the discussion below. The separate oppositions of USTA/RTC and the mid-size LECs—

which also deserve close attention—discuss other jurisdictional rulings that are likewise encompassed within the first question presented in the FCC's petition.

The fact that there is not one jurisdictional issue—but a series of such issues implicating dozens of specific statutory provisions—should weigh heavily in the Court's consideration of whether to grant certiorari. By lumping all these issues under a single heading, petitioners try to create the impression that the Eighth Circuit has issued a core jurisdictional ruling that transcends in importance the proper interpretation of individual statutory provisions. But, as even a cursory review of its opinion shows, the court carefully parsed numerous individual statutory provisions to reach a succession of narrow, and perfectly correct, decisions concerning the 1996 Act's allocation of regulatory jurisdiction between the States and the FCC. These rulings raise no general legal issue, conflict with no other circuit court decisions, and have had no adverse effect on implementation of the 1996 Act. Further review is not warranted.

a. The 1996 Act could hardly be clearer in its assignment of pricing authority. Section 252(c)(2) provides that a "*State commission* shall . . . establish any rates for interconnection, services, or network elements according to subsection (d)" (emphasis added). Section 252(d)(1), entitled "Pricing Standards," in turn specifies that "[d]eterminations by a *State commission* . . . of the just and reasonable rate[s]" for interconnection and network elements shall be "based on the cost . . . of providing" those services and may include a "reasonable profit" (emphasis added). Likewise, section 252(d)(2) specifies that "a *State commission*" shall determine whether a carrier's reciprocal compensation arrangements are just and reasonable, and subsection (d)(3) provides that "a *State commission* shall determine wholesale rates" for resale of an incumbent's retail services (emphasis added). In stark contrast, *no* subsection of section 251 or 252 that discusses pricing even mentions the FCC, much less suggests that

the federal agency has been given authority over these rates.

There is no basis for the FCC's assertion (Pet. 15) that Congress intended to give the States only ministerial powers in a scheme in which the FCC prescribes detailed and binding "methodological" rules. Congress itself enacted the governing "Pricing Standards" in section 252 (d)(1) and assigned to State commissions the task of "establish[ing]" and "determin[ing]" "just and reasonable rates" consistent with those standards. 47 U.S.C. § 252(c), (d). The responsibility to "establish" and "determine" rates in accordance with the statutory standards plainly subsumes the "methodological" function wrongly arrogated by the FCC.[5]

Moreover, as the Eighth Circuit explained (Pet. App. 13a-14a), the structure of section 252(c) strongly bolsters the conclusion that Congress did not intend the States to be subservient to the FCC on pricing matters. Section 252(c) contains a clear dichotomy. Subsection (c)(1) provides that, when States arbitrate matters within the bounds of the FCC's concurrent jurisdiction (such as the availability of unbundled network elements or resale restrictions), they must ensure that the result meets both "the requirements of section 251" *and* "the regulations prescribed by the [FCC] pursuant to section 251." Subsection (c)(2), by contrast, addresses pricing as a separate matter and makes *no* reference to any FCC rules. It provides only that States shall "establish rates . . . *according to subsection (d)*" (emphasis added)—that is, according to the pricing standards set forth in section 252(d). Thus, Congress itself prescribed the standards that State commissions must follow, and it made clear that,

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[5] In any event, the agency did not stop at creating detailed pricing methodologies; it also adopted specific "proxy prices" that it instructed the States to apply in all instances where they had not completed TELRIC studies. Pet. App. 147a-48a.

with respect to the specific issue of pricing, the States need look only to the statute, not to any FCC rules.[6]

b. The Eighth Circuit correctly concluded that the plain language of section 252 is itself sufficient to preclude the FCC's seizure of pricing jurisdiction. Pet. App. 14a, 22a. It also correctly recognized, however, that if there were "[a]ny ambiguity" that it would be resolved by section 2(b). Pet. App. 15a.[7]

As this Court has held, section 2(b) is a "br[oad]" and "sweeping" "congressional *denial* of power" to the federal agency that "fences off from FCC reach or regulation intrastate matters." *Louisiana Pub. Serv. Comm'n*, 476 U.S. at 370, 373, 374. That provision bars implied federal jurisdiction—the FCC can assert regulatory authority over intrastate matters only if Congress uses language "so unambiguous or straightforward as to override the command of [section 2(b)]." *Id.* at 377. Section 2(b) thus operates both as a substantive limit on FCC authority and as a specific "rule of construction" (*id.* at 373) that necessarily defeats the FCC's claim to *Chevron* deference here (FCC Pet. 16).

Petitioners can point to nothing sufficiently "unambiguous or straightforward" to overcome the plain directive of section 2(b). On the contrary, the FCC has *conceded*

[6] If the FCC were correct that States were required to follow the FCC's pricing rules under section 252(c)(1), Congress would have had no reason to instruct States separately in subsection (c)(2) to establish rates under the standards of subsection (d). *See Walters v. Metropolitan Educ. Enters., Inc.*, 117 S. Ct. 660, 664 (1997) (statute should not be read to render a provision redundant). Moreover, section 252(c)(1) refers only to "regulations prescribed by the Commission pursuant to section 251." The Act's substantive pricing standards are in section 252(d), not section 251.

[7] It is therefore wrong to characterize the section 2(b) analysis as "central to" and "underlying all of" the court's jurisdictional holdings. AT&T Pet. 13. The court rested its pricing decision on the plain terms of section 252; it invoked section 2(b) only as supplementary, not as necessary, support. Yet, all of petitioners' claims of conflict—which themselves are meritless—bear solely on section 2(b) and not at all on the meaning of section 252.

that the 1996 Act "do[es] not contain an explicit grant of intrastate authority to the Commission." Pet. App. 191a. As a consequence, petitioners must argue that section 2(b) has no bearing here. *See* FCC Pet. 18-22. But their arguments are unavailing.

Petitioners contend initially that, because sections 251 and 252 *apply* to intrastate matters, these sections must also give the FCC *jurisdiction* over such matters. But that argument simply misreads the statute. Section 2(b) provides that, in the absence of express contrary direction, nothing in the Act "shall be construed to apply *or* to give the Commission jurisdiction with respect to" intrastate matters. Even if a particular statutory provision expressly "appl[ies]" to intrastate matters, therefore, section 2(b) independently forecloses the FCC's exercise of "jurisdiction" over such matters.

Petitioners alternatively contend that section 2(b) is irrelevant because the same facilities used to provide local telephone service are also used for interstate access services. FCC Pet. 19-23; AT&T Pet. 13-16. As a result, petitioners claim, it would not be "practicable" for the FCC to confine its jurisdiction, as the Act requires, to interstate matters. FCC Pet. 20. The short—and conclusive—answer to this argument is that the *FCC never even mentioned it* in its 700-page First Report and Order. It is well-established that "courts may not accept appellate counsel's *post hoc* rationalizations for agency action." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1993).

In any event, the argument plainly proves too much. Under petitioners' logic, the FCC would have had jurisdiction to impose all of the intrastate regulations at issue in this case, based entirely on its jurisdiction over *interstate* communications, *even before* Congress adopted the 1996 Act. This Court rejected essentially the same extravagant assertion of federal power in *Louisiana PSC*. The FCC there sought to substitute its own nationally uniform depreciation rules for those of the States on the theory

(echoed almost verbatim here) that the telephone equipment at issue was used for both interstate and intrastate calls and that "it makes no sense within the context of the Act to depreciate one piece of property two ways." 476 U.S. at 375. But, observing that "virtually *all* telephone plant that is used to provide intrastate service is also used to provide interstate service" (*id.* at 360 (emphasis added)), this Court *refused* to "confine[]" State regulation (as petitioners ask this Court to do) "to intrastate matters which are separable from and do not substantially affect interstate communication" (*id.* at 373 (internal quotation marks omitted)).

After *Louisiana PSC*, the courts of appeals have consistently rejected similar FCC arguments in other contexts. The settled rule is that preemption may *"not* be justified merely by the dual intrastate and interstate aspects of [a particular service]; the FCC [has] to show that it [can]not separate the interstate and intrastate components of its regulation." *Public Util. Comm'n of Texas v. FCC*, 886 F.2d 1325, 1333 (D.C. Cir. 1989) (emphasis added). To invoke this very limited exception, moreover, the FCC must also demonstrate "with some specificity" that a State's exercise of its intrastate authority makes it literally "impossib[le]" for the FCC to exercise "its own lawful authority over interstate communications." *NARUC v. FCC*, 880 F.2d 422, 429, 430 (D.C. Cir. 1989); *accord California v. FCC*, 905 F.2d 1217, 1243 (9th Cir. 1990).

No such showing has been made or even attempted here. Interconnection for the exchange of local calls, reciprocal compensation for the transport and termination of such calls, and resale of an incumbent's existing local services—the subjects of large portions of the FCC's pricing rules—are purely intrastate matters that lie beyond the FCC's jurisdictional reach even under the agency's own theory. And far from being powerless to regulate interstate aspects of the use of unbundled elements, the FCC has continued to issue regulations governing the

interstate charges that incumbents may levy. *See Competitive Telecom. Ass'n v. FCC*, 117 F.3d 1068 (8th Cir. 1997) (upholding FCC rules on payment of access charges by purchasers of network elements).

c. In an attempt to evade the clear language of sections 252 and 2(b), petitioners resort to a grab-bag of ambiguous, general provisions. Petitioners lean most heavily on section 251(d)(1), which states that "[w]ithin 6 months after the date of enactment of the Telecommunications Act of 1996, the Commission shall complete all actions necessary to establish regulations to implement the requirements of this section." *See* FCC Pet. 11-12, 17-18. That provision merely directs the FCC—which has a history of multi-year rulemaking proceedings—to adopt within six months whatever rules are necessary to implement the requirements for which the FCC was given express responsibility under section 251. *See* Pet. App. 12a. Nothing in this wholly procedural provision confers any new *substantive jurisdiction* on the FCC, and certainly nothing in it overrides section 252's express grant of pricing authority to the States.

When Congress wanted to extend the agency's authority to intrastate matters, it did so explicitly. For example, in section 276 of the 1996 Act, Congress not only directed the FCC to prescribe payphone regulations within nine months, but *also* gave the FCC jurisdiction with respect to "each and every completed *intrastate and interstate* call," and expressly preempted any contrary state regulations. 47 U.S.C. § 276(b), (c) (emphasis added).[8]

Similarly, in the Cable Act (Pub. L. No. 102-385)—to which the FCC itself pointed as a jurisdictional analog in the court of appeals—Congress not only directed the

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[8] AT&T's claim (AT&T Pet. 20) of a "square conflict" between this case and *Illinois Pub. Telecom. Ass'n v. FCC*, 117 F.3d 555 (D.C. Cir. 1997), simply betrays the weakness of AT&T's request for discretionary review by this Court. That case dealt with section 276, and it is the difference, not the similarity, between that provision and the one at issue here that is illuminating.

Commission to prescribe regulations within 180 days to carry out its responsibilities, but *also* expressly assigned the Commission substantive jurisdiction over the rates to be charged by cable systems (47 U.S.C. § 543(b)(1)(2)), and directed State regulators to follow the FCC's rate regulations. *Id.* § 543(a)(2)(A).

These provisions bring sharply into focus the missing links in the FCC's statutory argument. The 1996 Act assigns the FCC *no* substantive pricing jurisdiction. Instead, Congress entrusted pricing authority entirely to *State commissions*. 47 U.S.C. § 252(c), (d). Nor does the 1996 Act require States to follow any FCC pricing rules. On the contrary, as we have discussed, Congress went out of its way in section 252(c) to specify separately that States are to set rates only "according to subsection (d)."

Petitioners cannot avoid the clear assignment of pricing jurisdiction to the States by relying on the even more general language of section 201(b). Section 201(a) relates only to "interstate or foreign communication," and section 201(b) refers back to "such communication service"—a term that can only signify the same "interstate or foreign" service. Seeking to wrench the last sentence of section 201(b) from this context (FCC Pet. 12-13), petitioners suggest that this one sentence alone (which gives the FCC rulemaking authority to carry out its responsibilities under the Act) applies as well to *intra*state services—even though those services are nowhere mentioned in section 201. But statutory language must be read in context (*King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991)), and the FCC's suggested reading is nonsensical. If an isolated sentence in a provision that deals only with interstate and foreign communications can be read to give the FCC authority over *all intrastate* matters under the Act, then Congress truly wasted its breath when it stated in section 2(b) that "nothing in [the Communications Act] shall be construed . . . to give the Commission jurisdiction with respect to" intrastate matters.

Nor do any of the other provisions petitioners cite confer pricing jurisdiction on the FCC. The Commission wrongly discerns in section 251(d)(2)—which suggests only that the FCC may determine "what network elements should be made available" by incumbent carriers—an implication that Congress intended tacitly to give the FCC plenary intrastate jurisdiction with respect to local interconnection. But no such implication can provide the straightforward or unambiguous authority necessary under *Louisiana PSC*. Similarly, section 251(d)(3)—which provides that the FCC "shall not preclude the enforcement of any regulation, order, or policy of a State" that is consistent with section 251—is an *anti-preemption* provision that actually contradicts the FCC's claim. It presumes that the States, not the FCC, have authority to adopt intrastate access and interconnection regulations, and it specifically protects those State regulations against FCC preemption. Finally, as the Eighth Circuit correctly ruled (Pet. App. 12a-13a, 85a-86a) and as other courts of appeals have consistently held, section 4(i) is merely a "necessary and proper" clause that confers no added jurisdiction. *See California v. FCC*, 905 F.2d at 1240 n.35; *AT&T v. FCC*, 487 F.2d 865, 877 (2d Cir. 1973).[9]

d. There is no substance to the FCC's assertion that, in vindicating the States' historical authority over intrastate matters, the Eighth Circuit's decision threatens to "impede" local competition. FCC Pet. 22. The FCC it-

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[9] The same jurisdictional analysis applies to the dialing parity issue addressed in the Eighth Circuit's separate ruling. As in the lead case, the statutory language indicates that *States*, not the FCC, were to oversee intrastate dialing parity issues. *See* 47 U.S.C. § 271(e)(2)(B) (specifying the dates by which "a State" may or may not order dialing parity). Furthermore, the FCC was unable to show an unambiguous grant of jurisdiction sufficient to overcome section 2(b). Indeed, in a portion of its order omitted from AT&T's Appendix, the FCC expressly acknowledged that the interstate and intrastate aspects of dialing parity could easily be regulated separately. *See* Second Report and Order, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd 19392, 19414, ¶ 37 (1996).

self has acknowledged that "virtually every state in the union" has adopted pricing policies compatible with the FCC's own notions.[10] Thus, from petitioners' own perspective, this case amounts to little more than a fight about "who's ahead on some jurisdictional score sheet." [11]

Petitioners complain that it is inefficient to have these matters decided in individual State proceedings subject to federal district court review. But Congress deliberately chose to enact a decentralized scheme that respects the historical role and unique perspective of individual State commissions; it was not willing to turn State commissions into mere field offices of the FCC. As this Court made clear in *Louisiana PSC*, the FCC has no license to preempt State regulation merely because it believes that its own uniform national rules "will best effectuate [the] federal policy." 476 U.S. at 374.

In any event, the argument rests on a false assumption. There is no basis for petitioners' belief that the inevitable (or proper) result of this review process will be a single one-size-fits-all national mandate on every issue. The statute gives the States considerable latitude to make individual policy choices for their citizens within the bounds of the "Pricing Standards" set forth in section 252(d)(1). That is entirely appropriate in a federal system that acknowledges the differing concerns that may arise in different regions and that has for decades relied exclusively on States to set local telephone rates.

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[10] *See* n.1, *supra*. MCI and AT&T have echoed the point. MCI's Response to Motion for Summary Judgment, *Southwestern Bell Tel. Co. v. AT&T Communications of the Southwest*, No. A-97CA-132-SS, at 7 (W.D. Tex. June 16, 1997); *see also* AT&T's Reply Memorandum in Support of AT&T's Motion for Summary Judgment, No. A-97-CA-132-SS, *Southwestern Bell Tel. Co. v. AT&T Communications of the Southwest*, at 1-2 (W.D Tex. July 1, 1997).

[11] FCC Commissioner Rachelle Chong, *A Forest View from the Mystery Commissioner*, Remarks to the Communications Committee of the National Association of Regulatory Utility Commissioners (Feb. 26, 1997).

II. THE EIGHTH CIRCUIT'S GARDEN-VARIETY *CHEVRON* DETERMINATIONS ARE CORRECT, DO NOT CONFLICT WITH THE DECISION OF ANY OTHER COURT OF APPEALS, AND RAISE NO ISSUES OF NATIONAL IMPORTANCE

In addition to challenging the Eighth Circuit's jurisdictional rulings, petitioners contest the court of appeals' application of well-settled *Chevron* principles to several specific FCC determinations. The Eighth Circuit correctly decided each of these issues, and petitioners can make no claim of a circuit conflict as to the meaning of the statutory provisions in question. However the Court disposes of the jurisdictional issue, these unrelated tag-along issues plainly do not merit further review.

a. Petitioners first attack the Eighth Circuit's determination of what it means to provide access to "unbundled" network elements in a way that allows "requesting carriers" to "combine" those elements to provide a telecommunications service. 47 U.S.C. § 251(c)(3). This issue is not about whether incumbents may "discriminat[e]" against new entrants (MCI Pet. 15) or may engage in "destruction" of their networks (FCC Pet. 28). Rather, the question here is whether AT&T and MCI may evade the Act's resale pricing provisions and thereby subvert Congress's carefully balanced scheme for local entry.

i. Congress enacted two distinct mechanisms by which entrants may use incumbents' facilities to provide service. First, an incumbent must provide access to "network elements"—specific parts of the incumbent's network —"on an unbundled basis at any technically feasible point" and in a "manner that allows requesting carriers to combine such elements in order to provide . . . telecommunications service." 47 U.S.C. § 251(c)(3). In addition, an incumbent must "offer for resale at wholesale rates any telecommunications service that the [incumbent] carrier provides to subscribers who are not telecommunications carriers." *Id.* § 251(c)(4)(A).

Congress also provided different pricing mechanisms for these distinct modes of entry. The rates for unbundled network elements must be "based on the cost . . . of providing" those elements. *Id.* § 252(d)(1). In contrast, the wholesale rates for finished services must be determined "on the basis of the [incumbent's] retail rates charged to subscribers" minus only those costs that "will be avoided" by selling at wholesale. *Id.* § 252(d)(3).

This separate resale pricing rule provides crucial protection for both consumers and incumbents. Most jurisdictions require incumbents to charge below-cost rates for basic service (especially for rural and residential customers), and allow incumbents to offset those under-recoveries by charging above-cost rates to business and other customers. If new entrants—who, unlike incumbents, have no obligation to serve (and no interest in serving) these rural and residential customers—could obtain complete services at cost-based rates, they could easily siphon away the incumbents' valuable business customers, not by providing a better or lower cost service, but simply by undercutting the above-cost rates that incumbents must charge to subsidize their other services. Such regulatory arbitrage would lead to massive pressure on basic service rates and enormous losses for incumbents. By pegging resale prices to *retail* rates, Congress sought to preserve whatever contribution retail rates make to defray the cost of below-cost services. *See* H.R. Rep. No. 104-204, at 72 (1995) ("The [resale] rate should reflect whether, and to what extent, the local dialtone service is subsidized by other services . . . .").

Ever since Congress passed the 1996 Act, however, AT&T and MCI have continually tried to avoid this crucial pricing restriction, insisting that they can obtain the equivalent of a complete service for resale simply by demanding all of the incumbent's combined network elements at cost-based rates. AT&T's President has openly admitted that this gives competitors simply *"another way to resell"*—one that results in discounts of "52 percent" or

more, in contrast to State-determined resale discounts in the range of 15-25 percent.[12]

The FCC's rules facilitated these attempts to circumvent the resale pricing rules. They (1) permitted entrants to pay cost-based network element rates even when the entrant wants to rely exclusively on the incumbent's network elements to recreate an existing end-to-end service, *and* (2) allowed entrants to obtain network elements *already combined* by the incumbent, so that the entrant need do no work to combine the elements into a finished service but instead can simply order the incumbent's finished service in the form of a preassembled combination of network elements. *See* Pet. App. 230a-33a, 242a-49a.

Although incumbent LECs challenged both of those determinations, the Eighth Circuit sustained those challenges only in part. In a ruling barely mentioned by petitioners, the court of appeals concluded that entrants could obtain, at cost-based rates, all the elements necessary to reproduce an existing retail service. Pet. App. 53a-58a.[13] Recognizing that it must avoid rendering the resale pricing provision superfluous, however, the court tied its ruling on this issue to its prior determination that the FCC could not lawfully require incumbents to combine these "unbundled" elements on behalf of new entrants. *Id.* at 52a-53a. As the Court explained, "requiring the requesting carriers to combine the elements themselves" ensures that entrants bear "the costs and risks associated with unbundled access" and do not simply engage in resale by another name and at another price. *Id.* at 56a-57a.

Despite that holding, AT&T and other competitors continued to argue in proceedings across the country that they were entitled to demand a fully preassembled "plat-

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[12] Transcript, AT&T Investment Community Meeting (Mar. 3, 1997) (comments of John Zeglis) (emphasis added).

[13] The parties to this brief intend to file shortly a Conditional Cross-Petition on this issue.

form" of unbundled network elements—the equivalent of an end-to-end service—at cost-based rates. They pointed to the Eighth Circuit's failure to vacate a subsection of the FCC's rules prohibiting an incumbent from "separating" elements that it "currently combines." 47 C.F.R. § 51.315(b) (Pet. App. 294a).

When the issue was brought to the Eighth Circuit's attention on rehearing, the court vacated section 51.315(b) for the same reasons that it had already vacated sections 51.315(c)-(f). The court explained that, like these other provisions, section 51.315(b) (at least as then-interpreted by the FCC, AT&T, and MCI) was inconsistent with the express terms of the statute, which provides that "requesting carriers" are to "combine" unbundled elements. Pet. App. 70a-71a. The rule also made the separate statutory resale provisions meaningless:

> To permit such an acquisition of already combined elements at cost based rates or for unbundled access would obliterate the careful distinctions Congress has drawn in subsections 251(c)(3) and (4) between access to unbundled network elements on the one hand and the purchase at wholesale rates of an incumbent's telecommunications retail services for resale on the other.

Id. at 71a.

ii. The Eighth Circuit's analysis does not warrant further review. As an initial matter, there is no basis for petitioners' suggestion that the court's decision conflicts with the decisions of other courts of appeals. No other court has decided whether section 51.315(b) of the Commission's rules conflicts with the language and structure of the 1996 Act. Indeed, no other court has even ruled upon the scope and meaning of section 251(c)(3)'s requirement that incumbents provide new entrants with "nondiscriminatory access to network elements on an unbundled basis at any technically feasible point."

Given the absence of any direct conflict, petitioners attempt to argue that the term "unbundled" has been used

in other regulatory contexts to refer only to separate prices. FCC Pet. 26-27; MCI Pet. 17-18; AT&T Pet. 23-24. But, once again, this argument was never made in the FCC's Order. Indeed, it is flatly inconsistent with what the FCC actually said in the Order, where it read the "unbundling" requirement of section 251(c)(3) to mean that "incumbent LECs must provide [new] carriers with the functionality of a particular element, *separate* from the functionality of other elements, *and* must charge a separate fee for each element." Pet. App. 225a (emphasis added). In other words, just as the court of appeals held, each unbundled network element must not only bear a separate fee, but also must actually be separated from other elements.

The text of section 251(c)(3) is not susceptible to any other reading. Congress spoke of providing "*access* to network elements on an unbundled basis at any *technically feasible point*" and in a "manner that allows *requesting carriers* to *combine* such elements." 47 U.S.C. § 251(c)(3) (emphasis added). Petitioners cannot square their argument with that language. As petitioners understand unbundling, there is no need to obtain "access" at any point because they can obtain supposedly "unbundled" elements already combined into a complete service. Even more obviously, as the Eighth Circuit emphasized, petitioners' claim that they may demand access to already combined elements collides with Congress's express statement that the "requesting carrier[]" itself, not the incumbent, is expected to combine the incumbent's unbundled elements.

The Eighth Circuit's conclusion on this point, moreover, is fortified by the language of related statutory provisions. Under the 1996 Act, incumbents must permit "physical collocation"—that is, installation of a competitor's equipment on the incumbents' premises—"for interconnection or access to unbundled network elements." 47 U.S.C. § 251(e)(6). Congress would have had no need to require physical collocation for this purpose if unbundling were merely a pricing concept.

The Eighth Circuit's ruling is also consistent with the 1996 Act's scheme for local competitive entry. By taking the language of subsection (c)(3) at face value—and thus requiring a new entrant to undertake real work and investment to construct or fill in its own network based on the incumbent's unbundled network elements—the court of appeals preserved the crucial distinction between access to unbundled network elements under section 251(c)(3) and resale under section 251(c)(4). The Eighth Circuit's decision was thus based not on a mere "policy rationale" (MCI Pet. 19), but rather on the court's duty to " 'give effect, if possible, to every clause and word' " that Congress enacted. *Bennett v. Spear*, 117 S. Ct. 1154, 1166 (1997) (quoting *United States v. Menasche*, 348 U.S. 528, 538 (1955)).[14]

iii. Petitioners' position is not strengthened by their hyperbolic claims of harm. As petitioners well know, incumbents are fully prepared to allow them access to the incumbents' complete networks with all elements combined. All AT&T and MCI have to do is ask. That service, however, is known as resale, and resale rates apply. Alternatively, if AT&T and MCI want parts of the incumbents' networks, they can have that too. They simply have to undertake the work necessary to combine the network elements themselves. In sum, the only "harm" here is to a few companies' ability to undermine the Act.

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[14] It is no answer to this point to suggest vaguely that there are differences in the risks associated with the use of unbundled elements and those related to resale. The simple fact—admitted by AT&T's own witnesses—is that when an entrant purchases combined network elements, it simply uses different words in asking for the service. *See, e.g., Interconnection Agreement Negotiations*, Docket No. 96-AD-559 (Miss. PSC Feb. 10, 1997), Transcript at 25 (Testimony of Joseph Gillan) (AT&T witness answers "that is true" when asked whether, under AT&T's theory, "you could call up BellSouth and say . . . I want to order all of the component elements, we won't go through [the] process of unbundling and rebundling, I'll just order all the elements that make up that service and you charge me the unbundled network element cost").

That is why new entrants with their own competing local facilities oppose the position taken by MCI and AT&T here. As one competitor stated, the Eighth Circuit "made the right decision": those demanding that incumbents reassemble network elements for new entrants are part of a "rear-guard action being fought by the big long distance carriers to essentially get in there and not have to make any investment." [15] Another facilities-based competitor echoed the point: true local competitors "owe[] a debt of gratitude to the Eighth Circuit. . . . The fact that there will be no free ride for interexchange carriers seeking a cheap method of local market entry is a plus for our industry." [16]

In any event, the FCC's General Counsel stated just last month that there was "no reason" that State commissions could not act under their own authority to require incumbents to provide combined network elements.[17] AT&T and MCI have urged State commissions to do just that.[18] Although we vigorously disagree with these assertions, they show that the extent to which petitioners may ultimately obtain what they seek will be determined in future litigation. Until that question of State authority is resolved, the legal issue here will not be settled and the effect of the Eighth Circuit's ruling on entrants will not be finally known.

Moreover, the FCC relied upon section 51.315(b), prior to its vacatur, to support new regulations requiring

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[15] Communications Daily, at 2 (Dec. 10, 1997) (quoting Royce Holland, Chairman of Allegiance Telecom).

[16] Telecommunications Reports, at 18 (Nov. 10, 1997) (quoting James Allen, CEO of Brooks Fiber Properties, Inc.).

[17] Communications Daily, at 3 (Nov. 20, 1997) (statement of Christopher Wright).

[18] *See, e.g.*, Initial Post Argument Brief of AT&T Communications of Illinois, Inc., ICC Dkt. No. 96-0486, at 5 (Nov. 3, 1997); Post Oral Argument Reply Brief of MCI Telecommunications Corp., ICC Dkt. No. 96-0486, at 8 (Nov. 10, 1997).

incumbents to provide what the Commission called "shared transport"—which actually is a preassembled combination of most of the network elements in the incumbent's network.[19] The FCC's "shared transport" regulations are currently on review before the Eighth Circuit, and the court's decision in that case will determine in large measure the practical effect of its earlier decision vacating section 51.315(b).

In short, petitioners are not only wrong on the law; by their own account, they are premature in bringing this issue to this Court.

b. Finally, petitioners contest the Eighth Circuit's invalidation of the FCC's "pick-and-choose" rule, which precluded effective negotiation of binding agreements by allowing new entrants "to choose among individual provisions contained in publicly filed interconnection agreements" without accepting the other terms of that agreement. Pet. App. 261a.

The Eighth Circuit correctly held that the statute requires nothing like that bizarre result. Section 252(i) provides only that an incumbent LEC "shall make available" in the negotiating process "any interconnection, service, or network element" that it provides under an approved agreement with any other carrier "*upon the same terms and conditions* as those provided in the agreement" (emphasis added). Contrary to petitioners' claim (FCC Pet. 29), that text establishes a straightforward nondiscrimination principle: An incumbent must put on the bargaining table for negotiation any item contained in another agreement, but *only* on the "same terms and conditions"—all the same tradeoffs—that appear in that other agreement. That ensures that a second entrant can step into the shoes of an earlier one if it wishes to accept the

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[19] *See* Third Order on Reconsideration, *Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98 (Aug. 18, 1997).

deal that the earlier one has struck. It certainly does *not* mean that the second entrant can take what it likes from a prior agreement and leave behind what it doesn't like.

As the FCC would have it, a competitor may demand for itself a new term from another agreement at *any* time, even after it has already signed a different contract with the incumbent. But, as this Court has recognized, a contract that gives one party unfettered discretion " 'to deny or change the effect of the promise[] is an absurdity.' " *United States Trust Co. v. New Jersey*, 431 U.S. 1, 25 n.23 (1977) (quoting *Murray v. Charleston*, 96 U.S. 432, 445 (1878)). An agency rule that reads a statute to require such a result is equally absurd, especially in the context of a statute that expressly relies on private negotiation to establish "binding agreement[s]." 47 U.S.C. § 252(a)(1).

CONCLUSION

The petitions for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

October Term, 1997

AT&T CORP., *et al.*,

Petitioners,

-v.-

IOWA UTILITIES BOARD, *et al.*,

Respondents.

AT&T CORP., *et al.*,

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-v.-

CALIFORNIA, *et al.*,

Respondents.

MCI TELECOMMUNICATIONS CORPORATION,

Petitioner,

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Respondents.

(Actions continued on inside of cover)

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATE COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES, *et al.*

Petitioners,

-v.-

IOWA UTILITIES BOARD, *et al.*,

Respondents.

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA,

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Question Presented

Whether the United States Court of Appeals for the Eighth Circuit correctly held that the Telecommunications Act of 1996 does not grant the Federal Communications Commission the authority to dictate local pricing standards to the State commissions?

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JOINT BRIEF FOR STATE COMMISSION RESPONDENTS AND THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS IN OPPOSITION

Opinions Below

The principal opinion of the Court of Appeals in *Iowa Utils. Bd. v. FCC* is reported at 120 F.3d 753 and is reproduced in the Appendix to the Petition for Certiorari at 1a-67a. The court's order on rehearing is not yet reported. The opinion of the Court of Appeals in *California v. FCC* is reported at 124 F.3d 934. The First Report and Order of the Federal Communications Commission (FCC) is reported at 11 FCC Rcd. 15,499, and the Second Report and Order of the FCC is reported at 11 FCC Rcd. 19,392.

Jurisdiction

The judgment of the Court of Appeals in *Iowa Utils. Bd.* was entered on July 18, 1997. A subsequent order in that case, granting rehearing in part and denying rehearing in part, was issued on October 14, 1997. The judgment in *California v. FCC* was entered on August 22, 1997. Petitions for a writ of certiorari were filed between November 17 and November 19, 1997. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

Statement of the Case

In February, 1996 Congress passed the Telecommunications Act of 1996, which adopted a framework to open all local telecommunications markets to competition. Publ L. No. 104-104, 110 Stat. 56, *codified at and amending* the Communica-

tions Act of 1934, 47 U.S.C. section 151, *et seq.* (1996).[1] In lieu of active regulation, Congress sought to rely primarily on private negotiations between competitors to resolve the broad range of technical and pricing issues associated with interconnection and access to a local exchange carrier's facilities and services. To the extent that negotiations fail, carriers may request State commissions to mediate or arbitrate disputes.

The Act establishes specific pricing standards under section 252(d) that are to be used by the State commissions in the event parties cannot agree on prices and seek arbitration under section 252(b). Final agreements, whether voluntarily negotiated or adopted through arbitration, are brought before State commissions for approval. Only if a State commission demonstrably fails to carry out its responsibility under section 252 is the FCC empowered to "assume the responsibility of the State commission. . . ." 47 U.S.C. section 252(e)(5). In other words, FCC jurisdiction attaches *only* if the state fails to act.

The Act does alter narrow aspects of state and federal jurisdiction by granting the FCC rulemaking jurisdiction over several matters historically regulated by the states. *See* sections 251(b)(2), 251(c)(4)(B), 251(d)(2), 251(e), 251(g) and 251(h)(2). However, the Act does not alter the fundamental, dual jurisdictional scheme codified decades ago in section 2 of

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[1] According to the FCC, today some 92 percent of telephone calls are intrastate or local in nature and only 8 percent are interstate in nature. Statistics of Communications Carriers (FCC, 1994), at 22. The telephone network, while used predominately for intrastate calls, carries both interstate and intrastate calls. It has been and will remain a dual-use network.

the Communications Act, 47 U.S.C. section 152.[2] The legislative history of the Telecommunications Act makes it clear that apart from the narrow areas where it expressly provided to the contrary, Congress intentionally chose to leave the Act subject to section 152(b). The provisions requiring the FCC to engage in the jurisdictional separation of telephone service costs into interstate and intrastate components for ratemaking purposes also remained in place. *See* 47 U.S.C. sections 221(c) and 410(c).

On August 8, 1996, six months after passage of the Act, the FCC released two orders on local competition, *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd.15,499(1996) (First Report and Order), and *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd. 19,392 (1996) (Second Report and Order). In the First Report and Order (First R&O), the FCC found that sections 251, 252, and 253 of the 1996 Act required it to establish rules to govern interstate and intrastate prices for unbundled network elements, interconnection, resale, collocation, and termination of transport. (Pet. App. 190a) It asserted that the 1996 Act created a "parallel" jurisdictional scheme for the FCC over both interstate and intrastate matters under sections 251 and 252. (Pet. App. 191a). It also contended that section 152(b) did not preclude FCC regulations governing intrastate matters and that Congress intended it to adopt national rules for the states to follow in implementing the 1996 Act. (Pet. App. 192a-193a). This analysis was also the jurisdictional basis for the Second Report

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[2] Section 152(a) grants the FCC exclusive jurisdiction over interstate communications, while section 152(b) gives the states exclusive jurisdiction over intrastate matters. Section 152(b) specifically states "[N]othing in this Act shall be construed to apply or to give the [Federal Communications] Commission jurisdiction with respect to charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire. . .of any carrier."

and Order. (Pet. App. 341a). Under the FCC's interpretation, nearly all meaningful intrastate rate jurisdiction was effectively removed from State commissions.

It was these findings that 33 States and the National Association of Regulatory Utility Commissioners disputed, seeking review in a number of federal circuits. The petitions contesting the First R&O were consolidated and assigned by lottery to the Eighth Circuit. *See* 28 U.S.C. 2112(a)(3).

Little more than one year ago, the Eighth Circuit Court of Appeals, at the urging of four States and several incumbent local exchange carriers, stayed the effectiveness of the FCC's extensive First R&O rules setting national pricing standards for interconnection. *Iowa Utils. Bd. v. FCC*, 109 F.3d 418 (8th Cir. 1996). In staying those rules the Eighth Circuit found the FCC had exceeded its jurisdiction by promulgating pricing rules regarding local telephone service. The Court stated:

> In this first look at the issue, we are skeptical that the FCC's roundabout construction of the statute could override what, at first blush, appears to be a rather clear and direct indication in subsections 252(c)(2) and 252(d) that the state commissions should establish prices.

Id. at 424.

Immediately following the issuance of the stay, the Acting Solicitor General, on behalf of the FCC filed with the Supreme Court an application seeking a vacation of the stay.[3] The

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[3] Both AT&T and MCI in their respective statements of the case fail to mention the unsuccessful appeals to the Supreme Court for vacation of the stay.

application raised substantially the same arguments brought before this Court in the pending petitions for certiorari.[4] Without opinion, the Court denied the applications filed by the FCC and several other parties to lift the stay. *See FCC v. Iowa Utils. Bd.*, 117 S.Ct. 378, 379 (1996) (Thomas, J., in chambers), *motion to vacate denied* 117 S.Ct. 429 (1996). The case reviewing the First R&O progressed to an expedited ruling on the merits, confirming the earlier jurisdictional ruling on the stay (Pet App. 1a-67a).

The Telecommunications Act of 1996 has been in effect since February of 1996. State commissions have met each of the deadlines and responsibilities imposed by the Act. As indicated in a report compiled by the National Association of Regulatory Utility Commissioners and published in September of this year[5], State commissions have certified more than 1110 new competitors to provide local service. Over 180 arbitrations have been completed following the process set out in section 252(b). Over 500 interconnection agreements have been approved pursuant to section 252(d) and are available as a framework for providing local service. The transition has

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[4] A close comparison of the arguments advanced by the Acting Solicitor General in its "Application to Vacate a Stay Entered by the United States Court of Appeal for the Eighth Circuit" with this petition for certiorari shows a recycled effort. For example, the arguments contained in the section entitled "Reasons for Granting the Petition" beginning on page 11 of the petition through page 18 and pages 22 through 24 are nearly identical to arguments advanced to and considered by this Court one year ago. Indeed, many of the arguments in the FCC's petition are taken verbatim from that pleading.

[5] See "Telecommunications Competition 1997, A State-By-State Report on Pro-Competitive Measures in Intrastate Telecommunications," NARUC 1997.

begun and the basic building blocks envisioned by the Act are being put in place according to the schedule set out in the Act.[6]

Reasons for Denying the Petitions

Each of the petitions for certiorari implies that the Telecommunications Act of 1996, as interpreted by the Eighth Circuit, is not workable and that the states are both unable and unwilling to bring competition into the local markets. The progress made since the passage of the Act belies these assertions and demonstrates that a decision granting certiorari could actually delay competition.[7]

The FCC, and other petitioners, argue that the Eighth Circuit's vacation of the FCC's pricing methodology "has deprived the district courts of a national regulatory framework within which to review state arbitration proceedings and has relegated many of the fundamental disputes . . . to piecemeal litigation in disparate [district court] proceedings throughout the United States. (FCC petition at p. 23). These allegations lack merit. District courts and States are bound by the "national regulatory framework" specified in the statute.[8] In

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[6] Again, there has not been a case where the state failed to act which would have allowed FCC action pursuant to section 252(e)(5).

[7] For example, reinstatement of the FCC rules could require reevaluation of existing agreements as well as a remand of the arbitration agreements currently under review to ensure formal compliance with the FCC's methodology.

[8] Subsection 252(d), captioned "Pricing Standards", requires "[d]eterminations *by a State Commission* of the just and reasonable rates for the interconnection of facilities . . .and. . .for network elements. . ." be in accordance with the statute's listed terms. (emphasis added)

requiring local district court review,[9] Congress implicitly acknowledged, that, beyond the Act's pricing standards, other issues arising with respect to interconnection, are questions of fact. Moreover, the other broad, non-price issues the FCC's original orders seek to implement are not being subjected to "piecemeal litigation." Both decisions under review provide guidance to the district courts on the majority of these issues.

In support of a claim that the FCC can best bring about competition, AT&T and MCI repeatedly imply the FCC has pushed competition in local markets whenever possible, and the States have been recalcitrant. The record is replete with examples of States' pro-competitive efforts predating the Act. In fact, the FCC recognized that States' efforts to promote competition predated a national approach and the Act borrowed extensively from state initiatives. (Pet. App. 155a-157a, 165a-166a).

In any event, the issue is not whether the States or FCC have been more pro-competitive or whether the States or federal government are more capable of bringing competition to the local market, but whether Congress assigned responsibility to the FCC to dictate a single set of local rate standards. As this Court stated in *Louisiana Public Serv. Comm'n v. FCC*, 476 U.S. 355 (1986):

> [W]e do not assess the wisdom of the asserted federal policy of encouraging competition within the telecom-

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[9] Several states, citing the Eleventh Amendment, have challenged the jurisdiction of the federal courts over State commissions in such cases. *See e.g., US WEST Communications, Inc. v. Thoms*, Civil No. 4-97-CV-70082, slip op. (S.D. Iowa Aug. 4, 1997); *U S WEST Communications, Inc. v. Reinbold*, Civil No. A1-97-25, slip op. (D. N.D. Jul. 28, 1997); *U S WEST Communications, Inc. v. TCG Seattle*, No. C97-354WD, slip op. (W.D. Wash. Jul. 24, 1997).

> munications industry. Nor do [w]e consider whether the FCC should have the authority to enforce as it sees fit, practices which it believes would best effectuate this purpose. Important as these issues may be, our task is simply to determine where Congress *has* placed the responsibility. . . "

476 U.S. at 359 (1986).

Once the arguments regarding competitive policy are stripped away, it is clear this Court should deny certiorari. The Eighth Circuit decisions that responsibility for determining prices was expressly granted to the States by Congress are demonstrably correct, and the decisions do not conflict with the decisions of other federal circuits.

I.

THE EIGHTH CIRCUIT'S DECISIONS ARE CORRECT

The petitioners attempt to discredit the Eighth Circuit's analysis on local pricing standards by claiming it "rests on a basic misunderstanding of the telecommunications system and telecommunications law."[10] (FCC petition at p. 19). There is absolutely nothing in the Eighth Circuit's decisions concerning jurisdiction that reflects a misunderstanding of either the

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[10] The FCC went as far as to entreat this Court to take this case and "not allow the outcome of this case, with its enormous nationwide implications, to depend on which circuit happened to be selected in a jurisdictional lottery." (FCC petition at p. 22).

telecommunications system or the Act.[11] Petitioners' rhetoric aside, the Eighth Circuit's statutory analyses rest on two, rock-solid bases: first, the plain meaning of the statute, and second, application of the principles articulated by this Court in *Louisiana.*

The Eighth Circuit found that the Act plainly grants the State Commissions, not the FCC, the authority to determine the rates involved in the implementation of the local competition provisions of the Act. (Pet. App. 10a-15a). The Act assigns no local ratesetting responsibilities to the FCC. Section 251(c) makes no mention of FCC rate regulations. In direct contrast, subsection 252(c)(1) and (2) set forth the standards State commissions must apply in arbitrations when deciding disputes over rates.[12]

The FCC relies heavily on the directive outlined in section 251(d)(1) that it "complete all actions necessary to establish regulations to implement the requirements of this section." However, section 251(d)(1) calls for rules only in the circumscribed areas where Congress has specifically directed the FCC to act. *See* sections 251(b)(2), 251(c)(4)(B), 251(d)(2), 251(e), 251(g) and 251(h)(2). Had Congress expected the

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[11] If anything, it is the FCC's petition that evidences not only a misunderstanding of the Act, but a disregard for even the FCC's own prior statements. For example, the FCC's petition claims "interstate charges (*e.g.*, subscriber line charges) determined by the FCC ..." have long been a component of local retail rates. (FCC petition at p. 19). This allegation stands in stark contrast to the FCC's insistence in the First R&O that the "subscriber line charge is a component of interstate access rates, not of intrastate local service rates." (First R&O, para. 984).

[12] In setting rates, States are directed to follow only the standards outlined in section 252(d). The 251(c)(2)(D) obligation that incumbent local exchange carriers provide interconnection at rates that are just and reasonable requires that these rates conform to the prices set by the States under 252(d).

FCC to set all rules necessary for the carriers to meet their obligations, section 251(d)(1) would have explicitly stated that the FCC rules extended to all regulation necessary to implement section 251.[13]

The FCC claims in its petition that Congress was "quite clear in granting the Commission authority to implement the core provisions of Section 251, including the dialing parity provision of Section 251(b)(3) and the pricing provisions of Section 251(c)."[14] (FCC petition at p. 16). However, the FCC's arguments are based on a convoluted reading of various sections of the Act, illogical assumptions, unfounded implications[15] and a demand for deference to preempt areas traditionally regulated by the states.[16]

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[13] Moreover, it would have directed in section 252(d), the pricing provision, that the FCC make the determinations regarding just and reasonable rates for the purpose of section 251, or it would have directed the states to follow the FCC's rules in resolving disputes subject to arbitration.

[14] The FCC previously acknowledged that sections 251 and 252 do not contain an explicit grant of intrastate authority to the FCC. (Pet. App. 191a).

[15] For example, on page 13 of its petition, the FCC states "Section 251(d)(2) *assumes* that the Commission has jurisdiction to implement Section 251(c)(3)." On page 14, it states "*[b]y obvious implication* Section 251(d)(3) *presupposes* that the Commission does have authority . . . to preempt state laws. . . ." (emphasis provided)

[16] This Court consistently has articulated a stringent legal standard for determining whether federal law preempts state law. Where federal action preempts activities traditionally regulated by the states, such as local telephone services, the Court "'start[s] with the assumption that the historic police powers of the States were not to be superseded. . . unless that was the clear and manifest purpose of Congress.'" *Hillsborough County v. Automated Medical Laboratories, Inc.*, 105 S.Ct. 2371, 2376 (1985) (quoting *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977); *Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission*, 461 U.S. 375, 377 (1983).

Any ambiguity regarding the FCC's lack of authority over local telecommunications is resolved by following this Court's directive on the operation of section 152(b). *See Louisiana* at 377. As this Court stated, section 152(b) constitutes an "explicit congressional denial of power to the FCC." *Id.* To override this reservation of intrastate authority in section 152(b) requires "unambiguous and straightforward" authority over intrastate matters or a modification of section 152(b).[17] *Id.*

Moreover, section 601(c) of the Act states the FCC cannot rely on an implicit grant of authority to make rules over exclusively intrastate matters. Congress would not have been so oblique if it intended a major shift in regulation of the local market. Finally, deference for an agency construction is improper where the statute is clear. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

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[17] The FCC's petition claims that Congress' retention of section 152(b) was non-substantive. (FCC pet. at p. 18, n. 8). By the FCC's own admission, early drafts of the Act would have expressly excepted Title II, and thus sections 251 and 252, from the applicability of section 152(b). (Pet. App. 187a, 197a). However, the final version of the 1996 Act omitted the express exception. The only reasonable inference to be drawn is that, apart from the narrow areas where it expressly provided to the contrary, Congress consciously chose to leave the Act subject to section 152(b). *See Rusello v. United States*, 464 U.S. 16, 23-24 (1983).

II

THE HOLDING IN THE EIGHTH CIRCUIT DOES NOT CONFLICT WITH DECISIONS IN OTHER CIRCUITS

The petitioners allege a conflict among circuits as a result of the Eighth Circuit's decision. No conflict exists;[18] indeed, no other court has even ruled on the jurisdictional boundaries of sections 251 and 252 in the 1996 Act.[19]

In support of its claim of a conflict, the FCC contends that other courts have held section 152(b)'s jurisdictional separation to be of limited force because the same facilities are used to provide local and interstate services. (FCC Pet. at pp. 20-21). We know of no court that has accepted such a claim. Moreover, this Court has specifically rejected the same argument. *Louisiana,* 476 U.S. at 373.

The petitioners rely on cases applying an "impossibility" exception to section 152(b) to allege a conflict.[20] That narrow

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[18] The FCC admits as much when it cites to conflicts with decisions of courts of appeals in "analogous" cases (FCC petition at p. 19) and states there is a conflict "in principle." (FCC petition at p. 20).

[19] The DC Circuit issued a ruling on jurisdiction over payphones under an entirely separate section of the Act. *See* section 276. *Illinois Pub. Telecomm. Assn. v. FCC*, 117 F.3d 555 (D.C.Cir. 1997).

[20] The FCC's reliance on the impossibility exception as the basis for its authority did not surface until the issue was briefed before the Eighth Circuit. Nowhere, in its nearly 700 page First Report and Order, did the FCC even imply that its authority derived from the inability to separate the interstate aspects of ratemaking from the intrastate.

exception, also articulated in *Louisiana*, states that section 152(b) does not apply if the FCC has been assigned an express duty by Congress that it cannot carry out without preemption because it is impossible to separate the focus of that duty from state regulation. 476 U.S. at 376 n. 4. In that extraordinary situation, it is reasonable to assume that Congress did not intend section 152(b) to deter the FCC's execution of an unequivocal duty.[21]

The Eighth Circuit, however, correctly held that the impossibility exception to section 152(b) has no relevance to this case because the Telecommunications Act did not assign the FCC a duty to set local prices. (Pet. App. 21a). Because Congress expressly stated in sections 252(c)(2) and 252(d) that the states are to determine the rates for local telecommunications services, the Court held the FCC had no valid authority that was being threatened by the states. *Id.* Thus, the Eighth Circuit properly concluded the FCC had failed to demonstrate that the states' authority to establish rates in connection with the local competition provisions of the Act would render impossible the FCC's execution of any duty regarding interstate communications or impede any of its interstate regulatory goals. *See California v. FCC*, 75 F.3d 1350, 1359 (9th Cir.) *cert. denied*, 116 S. Ct. 1841 (1996).

The Eighth Circuit also pointed out that the cases decided by other circuits applying the impossibility exception did not have the assistance of a federal statute that specifically

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[21] In considering the impossibility argument and distinguishing these cases, the Eighth Circuit explained that telecommunication ratemaking has traditionally been capable of being separated into its interstate and intrastate components. (Pet. App. 20a). *Id.*

determined who had jurisdiction over the telecommunications area at issue. (Pet. App. 21a-22a). Those courts had to resort to analyzing the interstate/intrastate character of the telecommunications services. The Eighth Circuit's analysis was primarily based on basic statutory construction, not on an analysis of the interstate/intrastate character of the services. Nevertheless, there certainly is no conflict, because even applying this analysis, no preemption is necessary.[22]

CONCLUSION

This Court has previously reviewed each and every jurisdictional argument advanced by the petitioners, either in rejecting their requests to vacate the Eighth Circuit's stay or in *Louisiana*. No new grounds have been raised in these petitions. The petitions for a writ of certiorari should be denied.

Respectfully submitted,

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[22] The Eighth Circuit followed up its construction of the statute with a finding that the functions of interconnection, unbundled access, resale, and transport and termination of traffic are fundamentally intrastate in character and the states' regulation of the rates for these services will not negate the FCC's traditional jurisdiction over interstate communications. (Pet. App. 22a).

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Nos. 97-826, 97-829, 97-830 and 97-831

IN THE

Supreme Court of the United States

October Term, 1997

AT&T CORP., *et al.*,

Petitioners,

v.

IOWA UTILITIES BOARD, *et al.*,

Respondents,

AT&T CORP., *et al.*,

Petitioners,

v.

CALIFORNIA, *et al.*,

Respondents.

AND RELATED PETITIONS

On Petitions for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF IN OPPOSITION

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December 18, 1997

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GTE Arkansas Incorporated
GTE California Incorporated
GTE Florida Incorporated
GTE Midwest Incorporated
GTE South Incorporated
GTE Southwest Incorporated
GTE North Incorporated
GTE Northwest Incorporated
GTE Hawaiian Telephone Company Incorporated
GTE West Coast Incorporated
Contel of Minnesota, Inc.
Contel of the South, Inc.

QUESTIONS PRESENTED

1. Did the Court of Appeals err in concluding that the plain terms of the Telecommunications Act of 1996 leave pricing determinations under the local competition provisions of the Act to state public utility commissions, rather than the FCC?

2. Did the Court of Appeals err by interpreting 47 U.S.C. § 251(c)(3), which requires incumbent telephone companies to provide network elements to requesting carriers "in a manner that allows requesting carriers to combine such elements," as requiring requesting carriers, rather than incumbents, to undertake the burden of combining elements in order to provide telephone service?

3. Did the Court of Appeals err in vacating the FCC's rule implementing 47 U.S.C. § 252(i), which provides that an incumbent telephone company must "make available any interconnection, service, or network element provided under an agreement . . . to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement," where the FCC's rule would have allowed requesting carriers to pick and choose individual terms from other agreements without accepting all of the trade-offs that had produced those terms?

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, the GTE Entities advise the Court that each of the GTE Entities listed inside the front cover of this brief is a subsidiary of GTE Corporation. In addition, GTE Corporation has the following subsidiaries or affiliates that have outstanding securities in the hands of the public:

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BBN Corporation
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Cable-Axion Quebec Inc.
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CTI Compania de Telefonos del Interior S.A.
CTI North Compania de Telefonos del Interior S.A.
Digital Courier International Inc.
GTE California Incorporated
GTE Directories Corporation Ltd.
GTE Florida Incorporated
GTE Hawaiian Telephone Company Incorporated
GTE Leasing Corporation
GTE Midwest Incorporated
GTE Mobilnet of Florence, Alabama Incorporated
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GTE Southwest Incorporated
GTE Yellow Pages Hungary Kft

RULE 29.6 STATEMENT
(continued)

La Compagnie de Telephone Anglo-Canadienne/Anglo-Canadian Telephone Company
MTX Italia
Parque Industrial ITABO, S.A.
Quebec-Telephone
Radiowealth, Inc.
The Micronesian Telecommunications Corporation
Zona France Las Americas

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STATEMENT

In their petitions, the FCC and the long-distance companies attempt to paint the States as guardians of monopolies designed to deprive American consumers of the benefits of affordable telephone service. That claim is a gross distortion, and correcting it makes it even clearer why, as the Eighth Circuit held, Congress expressly assigned jurisdiction over the pricing provisions of the Telecommunications Act of 1996 to the States, not the FCC.

A. Regulation Prior to the Telecommunications Act of 1996.

For decades prior to the passage of the Telecommunications Act of 1996, the provision of local telephone service was regulated by the States as a natural monopoly. The capital investment required to build a telephone network connecting every home and business in a given area was so vast that it made sense economically for only one company to construct and operate such a local exchange network. As a result, state public utility commissions regulated local telephone companies ("local exchange carriers" or "LECs") through a system of exclusive franchises.

Through the prior exclusive franchise system, the States and the LECs built and extended to all Americans the finest local telecommunications network in the world at affordable rates. The provision of basic service to all who desire it at affordable rates is known as "universal service." The exclusive franchise system was key to the success of universal service in two ways. First, it enabled the States to encourage LECs to make the enormous investment needed to construct and upgrade first-rate networks and to extend them to all Americans, however remote their location. Second, it was the central pillar of an elaborate system of intercustomer subsidies that has kept rates for basic residential service extremely low.

For example, under the rates typically approved by State utility commissions, most everyday residential customers pay well below the full cost of providing them with basic service, and business customers pay well in excess of cost. Thus, among other intercustomer subsidies, businesses subsidize the local residential telephone service of most American citizens.

This background is relevant because now that local telephone service has been opened up to plenary competition, this subsidy system (and the low-cost residential universal service that it guarantees) is not sustainable in its current form. If new entrants are allowed to "cherry pick" high-revenue, low-cost business customers without paying their fair share of the costs of subsidizing low-cost service to all residents who desire it, the subsidy system, and the affordable universal service that it supports, will collapse. Congress knew this, and therefore (as we explain below), in the Telecommunications Act of 1996 placed the power to establish just and reasonable prices for services and facilities that a competitor purchases from the incumbent LEC in the hands of the State public utility commissions, who not only have traditionally regulated in this area, and thus have expertise in determining individual LECs' costs, but who also are in a much better position to ensure that competition is introduced in a manner that will preserve, not destroy, universal service.

B. Introduction of Competition By the States and The Telecommunications Act of 1996.

To read the petitions of the FCC and the long-distance companies, one would think that Congress, in the 1996 Act, dragged the States into the new world of competition. That impression is false.

The reality is that many States were well ahead of Congress in opening the markets for local telephone service to competition. By the early 1990s, advancing technology (particularly advances in wireless communication and the

pervasive presence of cable television wiring in almost every home in many areas) had made the possibility of competition in local telephony a reality. Acting on these advances, many States began in the early 1990s, before Congress, to open up the markets for local telephone service to competition.[1] In the 1996 Act, Congress essentially codified at the national level the trend that was already well underway in the States -- rejecting the view that local service continued to be a natural monopoly.

Indeed, the 1996 Act provides what Congress characterized as a "pro-competitive, *de-regulatory*" framework for opening to competition both the local and long-distance markets for telephone service. Joint Explanatory Statement of the Committee of the Conference, H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 113 (1996) (emphasis added). With respect to local telephone service, the Act seeks to promote a rapid transition to competition in part by imposing three duties on incumbent LECs. First, the Act requires an incumbent LEC to allow other carriers to interconnect with its network so that the new entrants can connect calls from their own customers to customers served by the incumbent LEC's network. *See* § 251(c)(2). Second, the Act requires an incumbent LEC to offer for resale at wholesale rates any telecommunications service that the LEC provides to retail customers. *See* § 251(c)(4). Third, the Act requires an incumbent LEC to allow competitors to purchase on an "unbundled basis" individual pieces, or "elements," of the LEC's network (such as the switch or the wire to a customer's house), so that the new entrants may "combine such elements in order to provide . . . telecommunications service." *See* § 251(c)(3).

To implement these provisions while at the same time preserving the Act's stated goal of "reduc[ing] regulation,"

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[1] *See, e.g.*, Notice of Proposed Rulemaking, CC Docket No. 96-98, 61 Fed. Reg. 18311, 18314 (Apr. 25, 1996) (noting that by 1996, nineteen States had already begun to open local service to competition).

Pub. L. No. 104-104 Preamble (1996), Congress crafted a system that relied on private negotiations between incumbent LECs and other carriers, backed up by binding arbitrations conducted by state public utility commissions. Thus, an incumbent LEC has a duty under the Act to "negotiate in good faith" to reach agreements allowing competitors to use its network, *see* § 251(c)(1), and agreements reached by such private negotiations are explicitly freed from many of the specific requirements of the Act, *see* § 252(a). If the parties fail to reach a private agreement, the Act calls upon state utility commissions to resolve open issues in binding arbitrations. *See* § 252(b).

In particular, the Act expressly assigns the States the role of determining, in arbitrations, the prices for interconnection, network elements, and wholesale services. Thus, the Act provides that in arbitrations, "a *State commission* shall . . . establish any *rates* for interconnection, services, or network elements *according to subsection (d)*" of section 252. § 252(c)(2) (emphasis added). Section 252(d), which is entitled "PRICING STANDARDS," then spells out the standards state commissions must follow in establishing those rates. With respect to interconnection and network elements, section 252(d)(1) provides that "[d]eterminations by a *State commission* of the just and reasonable rate . . . shall be . . . based on the cost . . . of providing the interconnection or network element . . . and . . . may include a reasonable profit." § 252(d)(1) (emphasis added). With respect to services, section 252(d)(3) provides that "*a State commission* shall determine wholesale rates on the basis of retail rates . . . excluding the portion thereof attributable to any . . . costs that will be avoided by the local exchange carrier" by selling at wholesale rather than retail. § 252(d)(3) (emphasis added).

The Act also gives some role to the FCC in implementing local competition, albeit not jurisdiction over prices. For example, § 251(e) authorizes the FCC to designate an entity "to

administer telecommunications numbering and to make such numbers available on an equitable basis." *See also* § 251(b)(2) (giving the FCC a role in defining duties to implement number portability); § 251(b)(4) (access to rights of way).

To ensure that the Act would be implemented swiftly, Congress imposed strict deadlines on the state commissions and the FCC. With respect to the state commissions, section 252(b) requires a state commission to conclude arbitrations "not later than 9 months after" a competing carrier first requests interconnection, network elements or services. § 252(b)(4)(c). With respect to the FCC, § 251(d) directed the FCC to complete all necessary actions to issue regulations implementing its tasks under section 251 "[w]ithin 6 months after the date of enactment" of the Act. § 251(d)(1).

C. The FCC's First Report and Order.

The process established by Congress for introducing local competition got underway immediately after passage of the Act in February 1996. Private negotiations started promptly and, under timetables set in the Act, state commissions soon began arbitrating agreements. In short, as the Court of Appeals later explained in entering a stay of the FCC's pricing rules, "[t]he Act's system of private negotiation backed by state-run arbitration was operating without the input from the FCC" to speed the transition to competition and had "initially proved to be successful." *Iowa Utilities Board v. FCC*, 109 F.3d 418, 427-28 (8th Cir. 1996).

On August 8, 1996, however, the FCC announced its First Report and Order[2] and threatened to derail that process entirely. While purporting to implement the *de-regulatory* mandates of the Act, the FCC instead produced a mammoth 700-page Report and Order that replaced the process Congress

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[2] In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98 (Aug. 8, 1996).

envisioned for fostering competition -- a system of private negotiations backed by localized state arbitrations -- with an exhaustive national code purporting to dictate virtually every aspect of the terms the States were to impose in arbitrations.

In particular, the FCC set specific so-called "proxy prices" to be used in the ongoing arbitrations. The FCC declared that the States *must* use these proxy prices unless they first completed cost studies based on a pricing methodology described for the first time in the FCC's order. *See* First Report and Order ¶ 619 (App. 1a).

In addition, the FCC claimed plenary authority to dictate to the States exactly what costs they could and could not consider in setting rates. *First*, the First Report and Order prohibited States from even considering the actual historical costs of constructing an incumbent LEC's network. Instead, the FCC commanded that all States must set prices based only on forward-looking costs -- specifically on what the FCC termed total element long-run incremental cost ("TELRIC"). *See* First Report and Order ¶¶ 705-06 (Pet. App. 250a-252a). *Second*, the FCC even prohibited States from considering a LEC's own forward-looking costs -- *i.e.*, the prospective costs an incumbent LEC would actually incur in operating its own network. Instead, the FCC purported to require all States to set prices based on a nonexistent *hypothetical network* that used only the most efficient technology available. *See id.* ¶ 685 (App. 8a). *Third*, even as to the FCC's hypothetical forward-looking costs, the First Report and Order sharply limited the joint and common costs that a LEC could recover, *see id.* ¶ 696 (App. 8a-9a), effectively ensuring that a LEC would not be able to recover most of its joint and common costs.

The FCC also promulgated a series of rules radically expanding the unbundling obligation imposed by the Act. The FCC concluded that a new entrant could provide service solely through the purchase of all the elements of an incumbent's network. *See* First Report and Order ¶¶ 328-334 (Pet. App.

242a-246a). At the same time, the agency ruled that an entrant could obtain these elements already pre-assembled into a finished package of local service -- the entrant would not have to do any "combining" of elements whatsoever. *See* 47 C.F.R. § 51.315(b), (c) (Pet. App. 294a).

This so-called "sham unbundling" rule (together with the hypothetical TELRIC pricing rules) threatened to undermine the system of universal service that Congress was so careful to preserve during the transition to competition. In setting the statutory standard for the price of wholesale services, Congress was careful to require new entrants to contribute towards the subsidization of residential universal service by requiring State commissions to set wholesale prices at the LEC's retail rates (which, for high-revenue customers, include a margin that contributes to universal service) minus only those costs that the LEC will avoid by selling at retail instead of wholesale.[3] By allowing competitors to purchase all of the network elements necessary to provide local service already combined into the local service and not unbundled, the FCC effectively gave behemoth companies like AT&T and MCI a blueprint for undermining universal service and pocketing for themselves, through simple regulatory arbitrage, the very subsidies that keep residential service affordable. Either the competitor could call its purchase a purchase of local *service* -- in which case it would be required to contribute toward the subsidization of universal service through the LEC's wholesale rates -- or it could *relabel* that same purchase as one for all of the incumbents' network elements already combined together -- in which case the competitor could purchase the same service for

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[3] Indeed, Congress explicitly recognized that such a pricing standard was necessary to protect existing subsidies in the LEC's rates. *See, e.g.*, H.R. Rep. No. 204, 104th Cong., 1st Sess., pt. 1, at 72 ("The [resale] rate should reflect whether, and to what extent, the local dialtone service is subsidized by other services . . . .").

a fraction of the wholesale cost of the service[4] and avoid making any contribution to universal service.[5]

D. Review in the Eighth Circuit.

Numerous parties filed petitions for review of the FCC's First Report and Order and the cases were consolidated in the United States Court of Appeals for the Eighth Circuit. The States of Iowa, Florida, Louisiana, and South Dakota, as well as GTE and other telephone companies, immediately sought a stay, at a minimum, of the FCC's pricing rules. After convening a special oral argument, the Court of Appeals stayed the FCC's pricing rules and expressly found that the States and other movants were likely to prevail on their claim that under the plain terms of the Act the FCC lacked jurisdiction to promulgate rules implementing the pricing terms of the Act. *See Iowa Utilities Board v. FCC*, 109 F.3d 418, 423-25 (8th Cir. 1996). The Court also found that the FCC's pricing rules would cause both the parties seeking the stay and the process set up by Congress for implementing the Act immediate and irreparable harm. *Id.* at 425-26.

At the merits stage, the parties re-briefed the issues of statutory construction that had been raised on the motions for

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[4] AT&T's president touted to analysts that buying elements provides "another way to resell" service, but at a discount of "52 percent," as opposed to the statutory resale discounts which have been set in the range of 15-25 percent. *See* Transcript, "AT&T Investment Community Meeting" (March 3, 1997).

[5] While section 254(f) of the Act plainly commands that "every telecommunications carrier that provides intrastate telecommunications services *shall contribute*, on an equitable and nondiscriminatory basis . . . to the preservation and advancement of universal service," 47 U.S.C. § 254(f), the FCC made it clear that under its plan for implementing the pricing terms of the Act, in the critical period of transition to competition, new entrants would be allowed to purchase network elements at prices that failed to reflect universal service costs long *before* States had established new mechanisms for spreading the burden of universal service.

stay, and addressed additional issues as well. After considering several hundred pages of briefs and hearing three hours of oral argument, the Eighth Circuit adhered to its initial conclusion that the plain terms of the Act denied the FCC any authority over implementing the pricing provisions of the Act. The Court also vacated several further provisions of the FCC's rules. Three of the Court's decisions are most relevant to the questions raised in the petitions for *certiorari*.

First, applying standard principles of construction, the Court turned to the text of the Act to determine whether Congress had given the FCC authority to promulgate rules concerning the pricing terms for the local competition provisions. The Court found that section 252(c)(2) expressly directs state commissions, not the FCC, to establish rates in arbitrations conducted between new entrants and incumbents. Moreover, section 252(d) spells out the standards the state commissions are to apply. Examining the Act as a whole, the court concluded that "the Act plainly grants the state commissions, not the FCC, the authority to determine the rates involved in the implementation of the local competition provisions of the Act." Pet. App. 14a.

Alternatively, the Court explained that *even if* the text of section 252 were not clear, any ambiguity was resolved by section 2(b) of the Communications Act, which provides that "nothing in this chapter shall be construed to apply or to give the [FCC] jurisdiction with respect to . . . charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communications service." 47 U.S.C. § 152(b). The Court noted that the rates incumbents could charge for opening their networks to competing providers of local exchange service were charges "for or in connection with intrastate communications service" and reasoned that under settled law, the restriction of section 2(b) barring the FCC from authority over such matters could only be overcome by a straightforward and unambiguous command

from Congress. *See* Pet. App. 15a-19a (citing *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355 (1986)). But far from providing any unambiguous grant of authority to the FCC, the 1996 Act straightforwardly assigned the task of implementing the pricing standards of the Act to the States. The rule of section 2(b) thus confirmed the Court's construction of the plain terms of section 252.

Second, the Court addressed the scope of incumbent LECs' unbundling duties under the Act. GTE and other incumbents had argued that new entrants should not be permitted to provide local service wholly through the use of unbundled elements. Given that the FCC and most States had interpreted the pricing standards for unbundled elements and for services in a way that excluded historical, subsidy and other relevant costs, and thus made it substantially cheaper to buy all the elements of the network from end to end rather than to buy services at wholesale, GTE argued that it made no sense to allow entrants effectively to obtain the incumbent's own service for resale through the fiction of labeling their purchase as one of unbundled elements.

Rejecting the full scope of GTE's position, the Eighth Circuit ruled that entrants could provide service solely by purchasing all network elements. In other words, they could buy the entire network from end to end as elements and provide service solely over the incumbent's facilities. The Court emphasized, however, that it was critical to its analysis that under the terms of section 251(c)(3), new entrants would have to shoulder the burden of combining elements themselves. As the Court explained, the costs and risks that new entrants would have to bear in combining elements would ensure that the purchase of network elements and the purchase of finished service would remain separate methods of entry. The Court thus vacated a series of FCC rules requiring incumbent LECs to undertake the task of combining elements at new entrants' request. In its initial opinion, however, the Court without

comment left in place one rule, 47 C.F.R. § 51.315(b), that required incumbent LECs to provide entrants with elements already pre-assembled into a fully functioning package if the elements were already connected in the LEC's own network.

In a petition for rehearing, GTE and other parties pointed out that the failure to vacate this rule would fatally undermine the Court's rationale for allowing entrants to purchase all the network elements required to provide finished service. If an entrant could purchase elements already pre-assembled, it would face none of the additional costs and risks that the Court had identified and would, in effect, simply be obtaining finished service for resale, but at a lower price that undermined the system of universal service. The Eighth Circuit agreed and specifically vacated section 51.315(b). The Court explained that its ruling was critical for preserving a coherent reading of the Act, for to "permit such an acquisition of already combined elements at cost based rates for unbundled access would obliterate the careful distinctions Congress has drawn in subsections 251(c)(3) and (4) between access to unbundled network elements on the one hand and the purchase at wholesale rates of an incumbent's telecommunications retail services for resale on the other." Pet. App. 71a.

Third, the Court vacated the FCC's rule purporting to implement section 252(i). Under that section, incumbents must "make available any interconnection, service, or network element provided under an agreement . . . to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement." The FCC concluded that under this provision an entrant could pluck out from any other agreement solely the terms that applied to a single service or network element without having to accept any other provisions of the agreement -- even if terms on another matter had been the critical *quid pro quo* that made the favorable term selected by the entrant possible. The Court of Appeals recognized that this construction would render

unworkable the process of private negotiations that Congress had outlined as the primary means of implementing the Act. Incumbents could not realistically engage in a free give-and-take in bargaining if new entrants would always remain free to jettison selected portions of their agreements and to pick and choose the most favorable terms obtained by other carriers as replacements. The Court thus vacated the FCC's "pick and choose" rule as an unreasonable construction of the Act.

REASONS FOR DENYING THE WRIT

SUMMARY

None of the three separate issues raised by the petitions for certiorari warrants review by this Court.

1. The Eighth Circuit's ruling that the FCC lacks jurisdiction to impose pricing rules on the States does not merit review in this Court for several reasons.

First, the petitions for review largely ignore the actual holding below -- which rested on the 1996 Act's *express* assignment of pricing authority to the States. Only by ignoring this holding, which involves only a straightforward application of settled principles of statutory construction, can petitioners attempt to suggest that this case raises more far-reaching issues concerning the jurisdiction of the FCC. In addition, as explained below, the holding below is plainly correct.

Second, petitioners' attempt to concoct a circuit split out of the Court of Appeals' alternative reasoning based on section 2(b) of the Communications Act fails for at least three separate reasons. First, the theory on which petitioners rely in this Court -- that, despite section 2(b), the FCC has jurisdiction because the local telephone network is used inseverably for both intrastate and interstate communications -- was *not* the basis upon which the agency asserted jurisdiction in the First Report and Order. Under settled principles of administrative law, that rationale cannot now provide a basis for second-guessing the Court of Appeals. Second, the Court of Appeals

explicitly held that, because the 1996 Act expressly assigned jurisdiction to the States, it was not necessary to rest its decision on whether the services in question were intrastate or interstate in nature and on how that might affect the application of section 2(b). Third, the Eighth Circuit's decision cannot possibly conflict with the decisions of other circuits interpreting section 2(b) for the additional reason that none of the cases cited by petitioners involved an express statutory assignment of jurisdiction to the States.

Third, while important at the time (because it stayed the FCC's arbitrary proxy prices), the Eighth Circuit's jurisdictional decision has had no real impact on the substantive pricing rules that have been imposed on LECs, because, as FCC Commissioners have repeatedly proclaimed, virtually every State has adopted a substantive pricing approach similar to that adopted by the FCC. Revisiting and reversing the Eighth Circuit's jurisdictional holding would only lead to delays from further rounds of litigation and, by the FCC's own admission, could accomplish little substantive change in the pricing approach the States have applied.

2. Nor is it appropriate to grant certiorari to review the Court of Appeals' decision that incumbent LECs cannot be required to provide competitors with unbundled network elements already preassembled into finished telephone service.

First, the Eighth Circuit's decision on this issue is plainly correct. It would be contrary to the plain language of the statute, and would undermine the entire structure of the Act, if a competitor were allowed to evade the wholesale pricing standards established by Congress merely by *relabeling* its purchase of local service as the purchase of all the network elements necessary to provide that service already preassembled into a finished package. Congress did not intend to allow an entrant to purchase local service at roughly half the cost of wholesale service and to avoid its obligation to contribute toward the provision of universal service merely by

relabeling its purchase of service as the purchase of all the elements of a LEC's network already bundled together.

Second, granting certiorari on this question would require the Court also to delve into at least two additional questions that are inextricably intertwined with the issue on which petitioners' seek review and that the Court of Appeals decided *in petitioners' favor*. Specifically, the questions of (i) what parts of a LEC's business constitute "network elements," and (ii) whether a competitor can purchase *all* of the elements necessary to provide finished telephone service, are inextricably linked with the Court of Appeals' decision that a LEC, while required to provide a competitor with all network elements, need not provide them already preassembled into finished telephone service. It would be unfair, and would result in an incoherent interpretation of the 1996 Act, for the Court to attempt to address the Court of Appeals' invalidation of section 51.315(b) of the First Report and Order without also addressing these other issues. The Court simply cannot wade halfway into the complex telecommunications issues presented by this case. While we believe that the Court should not reopen any of these issues that consumed hundreds of pages of briefing below, we intend to file promptly a conditional cross-petition raising those issues that are intertwined with the nonjurisdictional unbundling issues raised by the petitions.

3. Finally, the Court of Appeals' decision invalidating the FCC's "pick and choose" interpretation of section 252(i) of the Act is plainly correct and involves only the most fact-bound application of settled rules of statutory construction. It is in no event worthy of review by this Court.

I. The Eighth Circuit's Ruling that the FCC Lacks Jurisdiction To Impose Its Pricing Theories on the States Was Plainly Correct And in Any Event Involves Only Settled Principles of Statutory Construction.

A. The Eighth Circuit Correctly Determined That the Plain Terms of the Act Assign the States the Task of Implementing the Pricing Terms of the Act.

The petitions for certiorari largely ignore the actual holding below, which rested on the express assignment of pricing authority to the States in section 252. Instead, they focus their attacks on the Court's alternative analysis under section 2(b). That tactic is hardly surprising, for a review of the terms of section 252 readily demonstrates that Congress straightforwardly assigned authority over pricing to the States, and that nothing in the ruling below merits this Court's review.

As the Eighth Circuit explained, section 252(c) commands the "State commission[s]" to "establish any rates for interconnection, services, or network elements," and it requires them to follow only the standards outlined in subsection 252(d).[6] Section 252(d), a section entitled "Pricing Standards," provides the specific substantive standards the States are to apply, "thus negating the need for additional FCC-mandated ratemaking standards or guidelines." Pet. App. 14a.[7]

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[6] Congress addressed any concerns that might be raised under the Tenth Amendment by ensuring that States could opt out of their role under the Act. *See* 47 U.S.C. § 252(e)(5).

[7] Contrary to the claims of petitioner MCI, the decision below raises no constitutional concern that federal lawmaking authority has been delegated to the States. MCI attempts to manufacture such a problem by grossly misquoting the opinion to suggest that state commissions would be "'dictat[ing] the substantive standards'" under the Act. *See* MCI Pet. at 26. The passage cited actually states simply that Congress had *not* intended *the FCC* to be "in a position to dictate the substantive standards governing the

(continued...)

The absence of any role for the FCC in pricing is confirmed by the structure of section 252(c). In defining States' obligations for conducting arbitrations, that section creates a clear dichotomy. Section 252(c)(1) makes it plain that in imposing terms on subjects over which the FCC has some rulemaking authority under section 251, States must ensure that those terms meet *both* "the requirements of section 251" *and* "the regulations prescribed by the Commission pursuant to section 251." In sharp contrast, in the very next paragraph, the Act addresses the States' role in setting prices as a separate matter and -- omitting any reference to FCC rules -- commands solely that "a state commission shall . . . establish rates for interconnection, services, or network elements according to subsection [252](d)." As the Court of Appeals explained in entering its stay of the FCC's pricing rules, the contrast between section 252(c)(1) and section 252(c)(2) makes it plain that "where Congress intended for the state commissions to follow FCC rules in arbitrations, it expressly said so." 109 F.3d at 424.

In short, the Eighth Circuit was correct in concluding that "the absence of any reference whatsoever to the FCC in the sections of the Act that directly authorize the state commissions to establish prices confirms to us that Congress did not envision the FCC's participation in determining prices." Pet. App. 13a.

The Eighth Circuit also rightly concluded that *even if* there were some ambiguity in the terms of section 252, section 2(b)

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[7] (...continued)
[rural] exemption process." Pet. App. 30a. A restriction on the FCC in implementing the rural exemption provisions of the Act in no way suggests that States have been granted federal lawmaking authority, and it certainly has no bearing on the States' role under the provisions MCI purported to be addressing -- the pricing provisions. Relying on state agencies to apply the pricing standards spelled out in the Act through quasi-adjudicative arbitrations raises no constitutional concerns whatsoever.

of the Communications Act would preclude FCC jurisdiction over pricing. Section 2(b) provides that "nothing in this chapter shall be construed to apply or to give the [FCC] jurisdiction with respect to . . . charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communications service." 47 U.S.C. § 152(b). As this Court has pointed out, section 2(b) is a "congressional denial of power to the FCC" that "fences off" intrastate matters from FCC control. *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 370, 374 (1986). This restriction on the FCC can be overcome only if Congress includes "unambiguous" and "straightforward" language in the Act either modifying section 2(b) or expressly granting the FCC additional authority. *Id.* at 377. Here, the provisions of the Act allowing new entrants access to incumbents' networks so that they may provide competing local telephone service clearly address predominantly intrastate matters. Yet the FCC cannot point to either exception to section 2(b). There is no "unambiguous" grant of authority to the FCC over pricing, nor did Congress amend section 2(b) to exempt the local competition provisions from its operation.

The FCC's strained attempts to find unambiguous language supplying its claimed authority over pricing are of no avail. The FCC first points to section 251(d)(1), which provides only that the FCC must promulgate any regulations implementing section 251 within 6 months of the date of enactment. But even the FCC tacitly acknowledges that section 251(d) provides no clear grant of rulemaking authority over pricing as it equivocates between calling the section a "grant" and a "confirmation" of authority. *See* FCC Pet. at 12. Such a provision that appears to *assume* an unspecified measure of rulemaking authority conferred upon the FCC elsewhere can hardly override the express delegation to the States of authority over *pricing* in section 252(d). Indeed, the section cannot possibly grant authority over pricing, for to the extent it implies any authority at all, it refers only to rules to

"implement the requirements of *this section*."[8] (Emphasis added). But it is plainly section 252, not section 251, that provides the pricing standards under the Act. The FCC can only pretend that section 251 "prescribes a set of new federal standards to govern . . . the prices that incumbent[s] . . . may charge competitors," FCC Pet. at 11, by studiously ignoring the section that by its terms actually addresses "Pricing Standards" -- that is, section 252(d).

Nor can the FCC or its supporters rely on the fact that section 251(c)(3), in defining the duty to provide unbundled elements, requires that elements be provided on "rates, terms, and conditions that are just [and] reasonable," to claim that the FCC must have authority to implement the "rate provisions of Section 251(c)." FCC Pet. at 15. The mere reference to "just and reasonable" rates in section 251(c) cannot provide the FCC the authority it purported to exercise in issuing its exhaustive pricing regulations. To the contrary, in outlining its forward-looking cost methodology, the FCC explicitly sought to implement the cost-based pricing standard that *State commissions* were directed to apply under section 252(d). *See* First Report and Order ¶¶ 628, 630-633 (App. 2a-7a). Pointing now to section 251(c)'s "just and reasonable" language thus cannot possibly justify the FCC's rules.

Next, the FCC and other petitioners point to general grants of rulemaking authority elsewhere in the Communications Act of 1934. For example, the FCC relies on the last sentence of section 201(b). The Eighth Circuit rightly concluded, however, that this grant of authority is limited to interstate matters. Section 201(a) is expressly limited to "interstate or foreign communication by wire or radio," and section 201(b) begins by making it plain that it is addressing "such communication service" -- that is, the same interstate or foreign communication

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[8] Similarly, section 252(c) refers to state commissions following FCC rules promulgated only under section 251. *See* § 252(c)(1).

addressed in section 201(a). The FCC's claim that the last sentence of the section is somehow freed from the same restriction blithely ignores everything that comes before. In any event, any grant of general rulemaking authority in the 1934 Act cannot override Congress's express assignment to the States of authority over the specific pricing terms of the local competition provisions of the 1996 Act. That result follows ineluctably from the long-settled canon of construction that specific terms trump the general. *See, e.g., Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384-85 (1992).

At bottom, the FCC and its supporters rest their arguments on the assumption that it would be inconceivable that the federal Act could ever apply to a subject without simultaneously giving the FCC rulemaking authority. Nothing in the text of the Act, however, dictates that the FCC's authority must follow wherever Congress has applied federal law, especially where Congress has specifically assigned authority for implementing certain provisions of the Act to state commissions.[9]

B. The Eighth Circuit's Decision Does Not Create Any Circuit Conflict Concerning the Application of Section 2(b).

Petitioners next claim that the Eighth Circuit's decision creates a conflict among the circuits concerning the application of section 2(b). That assertion is false for at least three independent reasons.

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[9] The question of authority over dialing parity rules that was addressed in the Eighth Circuit's ruling on the Second Report and Order does not raise any fundamentally different analysis. There too, the plain terms of the Act indicate State control, *see, e.g.*, 47 U.S.C. § 271(e)(2)(B) (indicating that States may issue orders requiring toll dialing parity), and in any event, the FCC can point to no unambiguous grant of authority to overcome section 2(b).

First, the so-called "inseverability" analysis on which the FCC now relies to support its claimed authority over pricing formed no part of the agency's rationale for its jurisdiction when it issued the First Report and Order. *See* First Report and Order ¶¶ 83-103, 111-120 (Pet. App. 190a-202a, 210a-215a). Under settled principles of administrative law, this new-found theory cannot serve as a basis for second-guessing the Court of Appeals' decision now. *See SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947). In any event, inseverability analysis could never justify the broad authority the FCC has claimed -- an authority that includes the power to set wholesale rates for wholly *intra*state local telephone service. There is no plausible basis for claiming that allowing the States authority to set such wholesale rates for local service would negate the FCC's ability to regulate *inter*state communications.

Second, and equally importantly, petitioners flatly misread the decision below. Petitioners claim that the Eighth Circuit rested its jurisdictional holding critically on the conclusion that section 2(b) denies the FCC authority because the local competition provisions address services that are "fundamentally intrastate" in nature. According to petitioners, that reasoning supposedly conflicts with the decisions holding that where equipment is used to provide both interstate and intrastate service, and the FCC cannot successfully regulate the interstate aspects of the equipment's use as a separate matter, the FCC may regulate *both* interstate and intrastate uses of the equipment. *See, e.g.*, FCC Pet. at 19. According to petitioners, other circuits would have recognized that the local exchange is used to provide both interstate and intrastate services and on that basis would have granted the FCC's claimed authority over all pricing under the Act.

The central flaw in petitioners' argument is that the Eighth Circuit did not, as petitioners suggest, rest its decision primarily on section 2(b). To the contrary, as outlined above, the Court relied on the plain terms of the Act, which "directly

and straightforwardly assig[n] to the States the authority to set the prices regarding the local competition provisions of the Act." Pet. App. 17a. The Court went on to address section 2(b) only to demonstrate that *even if* the text of section 252 were not so clear, any ambiguity would still have to be resolved by assigning control over pricing to the States. Characterizing the services covered in the local competition provisions as intrastate or interstate thus formed no essential part of the Court's holding. Indeed, the Court even took pains to make it clear that "subsections 252(c)(2) and 252(d) clearly assign jurisdiction over the rates for the local competition provisions of the Act to the state commissions, *thus avoiding the need to analyze the interstate/intrastate character of these services*." Pet. App. 22a (emphasis added). The decision cannot create a circuit conflict concerning the application of the so-called "inseverability" exception to section 2(b) when the Court made it clear that the entire analysis under section 2(b) was only an alternative rationale for its result.

To the extent the Court below did point out that "*even* a traditional analysis of the interstate/intrastate quality of the local competition provisions of the Act reveals that these functions . . . are fundamentally intrastate in character," Pet. App. 22a (emphasis added), it was providing reasoning in the alternative that was not essential to its holding. Petitioners' attempt to seize upon this dicta as the critical basis for a purported circuit conflict, *see, e.g.*, FCC Pet. at 19; AT&T Pet. at 13, is nothing but an effort to manufacture an illusory dispute and cannot justify review by this Court.

Third, because the Act straightforwardly assigns the States the task of implementing the pricing provisions, this case is readily distinguishable from those in which inseverability analysis has been applied to extend FCC jurisdiction over intrastate matters. Indeed, the Eighth Circuit distinguished many of the very cases petitioners cite on precisely that basis. *See* Pet. App. 21a.

C. The Eighth Circuit's Ruling Implementing the Balance of Authority Specified By Congress in No Way Impedes the Implementation of the Act.

Petitioners finally attack the Eighth Circuit's decision on the grounds that, in their view, by depriving the FCC of absolute authority to dictate national pricing rules, it makes the implementation of the Act, and the advent of competition, impossible. In reality, however, it is further review of the FCC's jurisdictional claims that would lead to delay.

In part, petitioners suggest that uniformity is critical to the success of the Act. But throughout the petitions there is also an undercurrent suggesting something more sinister in allowing the States an independent role in applying the terms of the Act to local conditions. Petitioner MCI brazenly makes its mistrust explicit as it charges the States with "complicity . . . in past monopolistic local markets" and exclaims that, given their "complicity," "Congress kept state commissions on a short leash" in performing any role under the Act. MCI Pet. at 7.

Contrary to such wild claims, the terms of the Act make it plain that Congress intended the States to play a vital and independent role in implementing critical terms of the Act. While the FCC and its supporters see any variation in the application of the Act as a descent into chaos that must be stopped, the 104th Congress saw it as federalism. As this Court has often pointed out, decentralized decisionmaking is one of the most salutary aspects of our federalist system of government. *Cf. Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (noting that the "federalist structure of joint sovereigns" "allows for more innovation and experimentation in government"). The 104th Congress that passed the Telecommunications Act was keenly aware of the benefits that can come from keeping power in the hands of the States and thus called upon the state commissions -- which have regulated local telephone service for decades -- to play a central role in implementing the Act by conducting the case-specific

arbitrations that would lead to interconnection agreements. The States, after all, were in the best position to implement the Act in a manner that would not undermine the mechanisms used in each locality for promoting universal service.

In large part, the FCC simply assumes that there must be an overriding concern for producing a single, uniform application of the terms of the Act nationwide. Thus, the FCC and its supporters complain that under the Eighth Circuit's decision, the district court review process provided by Congress may take years before a completely uniform interpretation of the pricing provisions of the Act is achieved. The answer to this claimed infirmity in the decision is simple: the federal agency's obsession with rigid uniformity in results appears nowhere in the text of the statute. To the contrary, the Act relies primarily on private negotiations to establish interconnection agreements and frees such negotiated agreements from many of the specific requirements of the Act. *See* § 252(a). That rule obviously permits the widest imaginable variation in results. In addition, after assigning individual state commissions the task of conducting arbitrations, Congress provided for the most decentralized system of review possible -- review in the 93 federal district courts. *See* § 252(e)(6). Nothing about that system reveals a congressional concern with rapidly establishing a single, rigidly uniform application of the Act. To the contrary, Congress gave the States a vital role in implementing the Act precisely so that state commissions could use their localized experience to apply the Act to the varying circumstances in each of the fifty States.

That process of applying the Act, moreover, has long been underway. And while the FCC claims that it wants to speed implementation of the Act, it is actually further review of the FCC's claims to jurisdiction that will disrupt the steady progress the States have made in moving towards competition under the Act. Since the Eighth Circuit stayed the FCC's

pricing rules over a year ago, state commissions have proceeded rapidly with localized, case-specific arbitrations and have produced final interconnection agreements allowing new entrants to use incumbents' facilities, just as Congress intended. And despite the FCC's claims last fall that only it, and not the States, could be trusted to impose proper prices under the Act, as events have unfolded, the FCC has recently proclaimed that in fact "virtually every state" has followed the general approach adopted by the FCC and has required pricing based on forward-looking measures of cost. *See, e.g.* Reed Hundt, Chairman, FCC, remarks to the Chamber of Commerce, Washington, D.C. (May 29, 1997) ("[V]irtually every state in the Union has adopted our policies.").

Given the FCC's own assertions about the success its pricing theories have enjoyed in the States, the dire claims presented to this Court concerning the implementation of the Act ring rather hollow. Indeed, it seems clear that what is at stake here is not a battle over a fundamentally different pricing theory that will make or break competition in local telephone service, but rather a turf battle over whether or not a federal agency can augment its power so as to dictate every nuance of the pricing decisions state regulators must make under the Act.

Even if the Court were to grant review and even if it were somehow to conclude that the Eighth Circuit erred in its rulings on the FCC's jurisdiction over pricing, that decision would hardly lead to any speedier implementation of the local competition provisions of the Act. To the contrary, it would only produce lengthy rounds of additional litigation.

To begin with, GTE and other parties argued below that the FCC's pricing rules were invalid not only because the FCC lacked jurisdiction, but also because the substantive pricing standards violated the terms specified by Congress. On remand the Eighth Circuit would have to revisit the question of the substantive validity of the FCC's pricing rules. And given that the Eighth Circuit already has squarely concluded that the

proxy prices the FCC developed based on its pricing theories were likely to cause incumbents irreparable harm, there is a substantial possibility that the Eighth Circuit will strike down the FCC's pricing rules on the merits. In that event, the FCC would have to re-work its pricing approach before there could be any question of its rules ultimately being implemented by state commissions across the country.

Moreover, even if a set of pricing rules from the FCC were eventually approved in court, that would not mean that such rules could instantly be implemented. Since the Eighth Circuit stayed the FCC's pricing rules over a year ago, the States have been conducting arbitrations under their own interpretations of the Act's pricing provisions. Most of those arbitrations have produced final agreements that are now before district courts under the review provisions specified by Congress. *See* § 252(e)(6). Changing the applicable pricing rules now would mean suspending all of those district court actions, turning the clock back to the fall of 1996, and returning the arbitrated agreements to the States so that state commissions could re-work their pricing decisions to conform precisely to the FCC's rules. There is no reason to expect that this would be a speedy process. While most States have adopted many of the same basic approaches favored by the FCC, local variations in the details are plentiful -- just as Congress intended in allowing state commissions to use their local experience to implement the basic pricing standards of the Act. Even a slight change in the method used for determining the costs that underlie the cost-based pricing mandated by section 252(d)(2) could mean requiring the preparation of entirely new cost models, a process that could take many months of work.

In short, for well over a year, since the Eighth Circuit first stayed the FCC's pricing rules, the States have been laboring to implement the local competition provisions of the Act and have proceeded far along the path of using their own localized expertise to apply the pricing standards specified in section

252(d). The FCC, moreover, has publicly declared that the most critical aspects of its own pricing theories have been adopted across the country by the States acting independently. If this Court were to grant review now, the progress the States have made would be suspended and implementation of the Act would only be delayed.

II. The Eighth Circuit's Holding that Incumbent LECs Cannot Be Required to Provide Unbundled Elements Already Preassembled Into Platforms Was Plainly Correct, and in Any Event Involves Only Settled Principles of Statutory Construction.

The Court of Appeals' ruling that entrants may not obtain network elements already preassembled into fully operational service platforms also does not merit review for at least two reasons.

First, the holding was simply a correct application of standard rules of construction. The holding implements the clear directive in section 251(c)(3) that incumbents must provide "unbundled network elements in a manner that allows *requesting carriers to combine such elements*." (emphasis added). As the Eighth Circuit explained, this "sentence unambiguously indicates that requesting carriers will combine the unbundled elements themselves" -- incumbent LECs, in other words, have no duty to accomplish the combining for new entrants. Pet. App. 53a.

The Eighth Circuit's ruling on this point, moreover, was critical for maintaining a coherent interpretation of the obligations imposed on incumbents by the Act. GTE and other petitioners had argued that new entrants should not be allowed to provide local service *solely* through the purchase of unbundled elements because it would create opportunities for rampant arbitrage. As outlined above, given the prevailing interpretation that the pricing standards for wholesale service and for network elements were different, allowing entrants to

obtain all the elements needed for local service would simply allow them to obtain effectively the same thing as wholesale service, but at a different, lower price. Moreover, it would allow entrants to obtain the incumbent's finished service while completely evading any contribution toward universal service.

The Eighth Circuit did not agree entirely with either side on this issue. The Court ruled that an entrant could provide service solely through purchasing unbundled network elements, but it emphasized that its ruling would *not* result in the arbitrage GTE and others had feared. It was critical to the Court's analysis that, even though an entrant could effectively provide the incumbent's own finished service by means of purchasing network elements, purchasing elements would not be a simple substitute for purchasing wholesale service because it would require the entrant to assume much higher costs and risks. In particular, purchasers of elements would have to bear the costs and risks associated with *combining* the elements themselves. As the Court explained, "our decision requiring the requesting carriers to combine the elements themselves increases the costs and risks associated with unbundled access as a method of entering the local telecommunications industry *and simultaneously makes resale a distinct and attractive option*." Pet. App. 56a-57a (emphasis added).

Allowing new entrants to obtain all of the network elements needed to provide service already combined together, however, "would obliterate the careful distinctions Congress has drawn in subsections 251(c)(3) and (4) between access to unbundled network elements on the one hand and the purchase at wholesale rates of an incumbent's telecommunications retail services for resale on the other." Order on Rehearing, Pet. App. 71a. As the Court recognized, obliterating that distinction would make no sense of the Act, and would simply allow the disastrous arbitrage that GTE and other LECs had feared.

Petitioners primarily argue that the Eighth Circuit misinterpreted the term "unbundled." All the ink petitioners

spill on the meaning of "unbundled" in other contexts, *see, e.g.*, FCC Pet. 26-27, AT&T Pet. 24-25, however, is entirely beside the point. Contrary to the picture petitioners would like to paint, the Court did not simply look at the term "unbundled" in isolation and produce the "unexplained assertion," AT&T Pet. at 23, that unbundled must mean "separated." Rather, the text of section 251(c)(3) makes it clear that Congress envisioned requesting carriers undertaking the burden of "combining" physically separated elements. Thus, whatever "unbundled" may mean in other contexts, read in the context of the sentence in which it appears in section 251(c)(3), it refers to pieces of the network that have been provided on a separated basis and which carriers can "combine." Moreover, as the Eighth Circuit explained, the burdens and risks associated with combining unbundled elements are essential for making sense of the overall structure of the Act since they preserve a vital distinction between purchasing unbundled elements and purchasing services for resale.

In short, the Eighth Circuit's ruling ensuring that incumbents will not be forced to provide new entrants with elements already pre-assembled into operational platforms not only implements the plain terms of section 251(c)(3) but is also necessary to preserve the distinction between network elements and resold service as separate methods of entry into the local market and to prevent new entrants from pocketing for themselves the very revenues that support universal service.

Second, as the above analysis suggests, the Eighth Circuit's decision to vacate the rule requiring incumbents to provide pre-assembled packages of elements was only one facet of its broader reading of the unbundling provisions of the Act. Thus, the Eighth Circuit ruled *in favor* of the FCC and other petitioners in determining both (i) that virtually all of the business functions of an incumbent LEC were network elements that must be provided to competitors and (ii) that an entrant could provide service *solely* through the purchase of an

incumbent's elements. As a result, if this Court were to reexamine the Eighth Circuit's ruling on the issue of pre-combined network element packages, it would necessarily require wading into a re-evaluation of the Court of Appeals' entire approach to understanding the unbundling duties required by the Act. To preserve its rights on these issues, GTE intends to file a conditional cross-petition for certiorari challenging both the Eighth Circuit's decision affirming the scope of the FCC's unbundling rules and its conclusion that new entrants can be allowed to provide local service solely through the use of unbundled network elements.

III. The Eighth Circuit's Decision to Vacate the "Pick and Choose" Rule Correctly Implements the Terms of the Act and Does Not Merit Review in this Court.

Petitioners' final claim is that the Eighth Circuit erred in striking down the FCC's rule purporting to implement section 252(i). That section provides that a "local exchange carrier shall make available any interconnection, service, or network element provided under an agreement . . . to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement." 47 U.S.C. § 252(i). The FCC ruled that under this section requesting carriers could "pick and choose" among individual provisions of interconnection agreements, selecting only the terms that seemed favorable to them and leaving others behind.

The Eighth Circuit rightly concluded that such an interpretation would undermine the process Congress outlined for implementing the Act and thus was not a reasonable reading of the text. Negotiating an interconnection agreement necessarily involves a process in which each party may make a concession on a particular point in return for a concession from the other party -- often on an unrelated part of the agreement. That bargaining process would be derailed, however, if after accepting one set of trade-offs in an agreement every new entrant would remain free to abandon

some terms of its deal and to pick out individual terms some other carrier had obtained -- terms unrelated to the particular bargains that had been struck in that entrant's own negotiations. In essence, agreements reached by negotiation would never actually be binding since a new entrant would always be free to jettison the trade-offs it had accepted and to cherry-pick favorable provisions found elsewhere. The Eighth Circuit was thus entirely correct in concluding that the FCC's construction was not a reasonable reading of the Act.

Petitioners claim that the Eighth Circuit misapplied the rule of *Chevron* by substituting its construction of an ambiguous provision for the FCC's. *See, e.g.*, AT&T Pet. at 29. That claim, however, mischaracterizes the Eighth Circuit's analysis. The Court fully acknowledged that "the language of subsection 252(i) in isolation does not clearly reveal Congress's intent," and, following *Chevron* precisely, explained that "we 'must look to the structure and language of the statute as a whole' to determine if the FCC's interpretation of this ambiguous provision is a reasonable one." Pet. App. 25a (quoting *National R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 417 (1992)). The Eighth Circuit reasonably concluded that given the emphasis in the Act on establishing a system of private negotiations, the FCC's expansive reading of section 252(i) would undermine the very process Congress had intended to be the primary means for implementing the local competition provisions of the Act.

In any event, even if the Eighth Circuit had erred in applying *Chevron* analysis, the fact-bound application of such a well-settled rule of law to the construction of a single section of a statute cannot justify review in this Court.

CONCLUSION

For the foregoing reasons, the petitions for certiorari should be denied.

Respectfully submitted,

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December 18, 1997

APPENDIX

EXCERPTS FROM *IN THE MATTER OF IMPLEMENTATION OF THE LOCAL COMPETITION PROVISIONS IN THE TELECOMMUNICATIONS ACT OF 1996*, FIRST REPORT AND ORDER, CC DOCKET NO. 96-98 (AUG. 8, 1996)

¶¶ 619, 628, 630-633, 685, 696

I. PRICING OF INTERCONNECTION AND UNBUNDLED ELEMENTS

A. Overview

[* * *]

619. While every state should, to the maximum extent feasible, immediately apply the pricing methodology for interconnection and unbundled elements that we set forth below, we recognize that not every state will have the resources to implement this pricing methodology immediately in the arbitrations that will need to be decided this fall. Therefore, so that competition is not impaired in the interim, we establish default proxies that a state commission shall use to resolve arbitrations in the period before it applies the pricing methodology. In most cases, these default proxies for unbundled elements and interconnection are ceilings, and states may select lower prices. In one instance, the default proxy we establish is a price range. Once a state sets prices according to an economic cost study conducted pursuant to the cost-based pricing methodology we outline, the defaults cease to apply. In setting a rate pursuant to the cost-based pricing methodology, and especially when setting a rate above a

default proxy ceiling or outside the default proxy range, the state must give full and fair effect to the economic costing methodology we set forth in this Order and must create a factual record, including the cost study, sufficient for purposes of review after notice and opportunity for the affected parties to participate.

[* * *]

B. Cost-Based Pricing Methodology

1. Application of the Statutory Pricing Standard

c. Discussion

628. Sections 251(c)(2) and (c)(3) impose an identical duty on incumbent LECs to provide interconnection and access to network elements "on rates, terms, and conditions that are just, reasonable, and nondiscriminatory."[1] In addition, both interconnection and unbundled network elements are made subject to the same pricing standard in section 252(d)(1). Based on the plain language of sections 251(c)(2), (c)(3), and section 252(d)(1), we conclude that Congress intended to apply the same pricing rules to interconnection and unbundled network elements. The pricing rules we adopt shall, therefore, apply to both.

[* * *]

2. Rate Levels

a. Pricing Based on Economic Costs

(1) Background

630. We observed in the NPRM that economists generally agree that prices based on forward-looking long-run incremental costs (LRIC) give appropriate signals to producers and consumers and ensure efficient entry and utilization of the

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[1] 47 U.S.C. § 251(c)(2), (c)(3)

telecommunications infrastructure.[2] We noted, however, that there was a lack of general agreement on the specifics of methodology for deriving prices based on LRIC or total service long-run incremental cost (TSLRIC). We invited parties to comment on whether we should require the states to employ a LRIC-based pricing methodology and to explain with specificity the costing methodology they support.[3] We recognized, however, that prices based on LRIC might not permit recovery of forward-looking costs if there were significant forward-looking joint and common costs among network elements.[4] We sought comment on how, if rates are set above incremental cost, to deal with the problems inherent in allocating common costs and any other overheads.[5] We observed that, by defining the unbundled elements at a sufficiently aggregated level, it may be possible to reduce the costs to be allocated as joint and common by identifying a substantial portion of costs as incremental to a particular element. To the extent that joint and common costs cannot be entirely eliminated, we sought comment on various methodologies for assigning them, including the use of a fixed allocator or on the basis of inverse demand elasticity. We also sought comment on whether, regardless of the method of allocating common costs, we should limit rates to levels that do not exceed stand-alone costs.[6] Finally, we invited parties to comment on whether a LRIC-based methodology would establish a price for interconnection and unbundled network

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[2] NPRM at para.124.

[3] *Id.* at para. 126.

[4] *Id.* at para. 129.

[5] *Id.* at para. 130.

[6] *Id.* For a definition of stand-alone costs, *see* Section VII.B.2.a. *infra*.

elements that includes a reasonable profit and thus complies with section 252(d)(1).[7]

631. A number of states already employ, or have plans to utilize, some form of LRIC or TSLRIC methodology in their approach to setting prices for unbundled network elements,[8] with several states choosing LRIC or TSLRIC as a price floor.[9] For instance, the Connection Commission adopted a TSLRIC methodology to measure the cost of service on SNET, its principal incumbent LEC.[10] Arizona also requires incumbent LECs to conduct TSLRIC costs studies to establish the

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[7] 47 U.S.C. § 252(d)(1)(A)(i); NPRM at para. 129.

[8] *See, e.g.*, California Commission comments at 29 (California has adopted TSLRIC as the standard for developing the costs of unbundled elements and in a rulemaking this summer will determine the unbundled network elements and what level of shared and common costs should be included in the price of each); Michigan Commission comments at 13 (1996 prices for loops to remain at levels established by the Michigan Commission in its original interconnection order or at TSLRIC); Texas Commission comments at 22 (Texas Commission has employed LRIC-based pricing methodologies for many years; SWBT and GTE required to file LRIC costs studies to be used in pricing not later than November 1, 1996).

[9] *See, e.g.*, Colorado Commission comments at Attachment (Rules Prescribing Principles for Costing and Pricing of Regulated Services of Telecommunications Service Providers) 4 CCR 723-30, Rules 4-5; Hawaii Administrative Rules, Sections 6-80-32-34 (setting out a three-tiered pricing regime with TSLRIC set as floor for pricing of competitive services); Louisiana Commission comments at Attachment (Louisiana Public Service Commission "Regulations for Competition in the Local Telecommunications Market"), p. 30; Washington Commission comments at 25, Appendix B (*Washington Utilities and Transportation Commission v. U S West Communications*, Docket No. UT-950200 at 82 (Washington Commission, April 11, 1996)); Wisconsin Stat. Ann. section 196.204 (requiring the price of each network service or function to exceed TSLRIC).

[10] Connecticut Commission comments at 4.

underlying cost of unbundled services and facilities.[11] The Ohio Commission has adopted Long Run Service Incremental Cost ("LRSIC") , which is closely related to TSLRIC.[12] The Missouri and Wyoming Commissions are among a number of state commissions that have not yet adopted a pricing methodology, but are considering LRIC or TSLRIC.[13] Oklahoma law provides for submission of LRIC cost studies and studies identifying a contribution to common costs for interconnection of facilities and access to network elements to the Oklahoma Commission during an arbitration.[14] A number of states have yet to choose a pricing methodology. For instance, the New York Commission sets prices on a case-by-case basis.[15] Unbundled element prices also exist in several states pursuant to negotiated interconnection agreements that

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[11] Arizona Commission comments, Exhibit V (Arizona Administrative Code R14-2-1101 *et seq.*), p. 10.

[12] See, Ohio Commission comments at 43-45.

[13] *See, e.g.*, Missouri Commission comments at 11 (supports LRIC for costing; LRIC is defined in pending state legislation); Wyoming Commission comments at 26-27 (draft rules propose use of TSLRIC as a price floor, with prices to include a contribution to shared, common, and joint costs, and the sum of prices for unbundled elements not to exceed retail for bundled services; incumbent LECs shall impute the prices of unbundled elements into the price floors of each of their own services that utilize the network elements).

[14] Oklahoma Commission comments at appendix A (Corporation Commission Telephone Rules OAC 165:55-17-25), pp.10-11.

[15] *Competition, The State Experience* at 80 (compilation of written responses by state commission staffs to questions by FCC staff, compiled by NARUC) (March 8, 1996).

have either already been approved by state commissions or are under consideration.[16]

632. Section 252(d)(1) requires, *inter alia*, that rates for interconnection and unbundled network elements be based on "cost (determined without reference to a rate-of-return or other rate-based proceeding)."[17] We tentatively concluded in the NPRM that this language precludes states from setting rates by use of traditional cost-of service regulation, with its detailed examination of historical carrier investment and expenses.[18] Instead, we indicated our belief that the statue contemplates the use of other forms of cost-based price regulation, such as the setting of prices based on forward-looking economic cost methodologies (such as LRIC) and do not involve the use of an embedded rate base. We sought comment on whether section 252(d)(1) forecloses consideration of historical or embedded costs or merely prohibits state commissions from conducting a traditional rate-of-return proceeding to establish prices for interconnection and unbundled network elements. Embedded costs are the costs that the incumbent LECs carry on their accounting books that reflect historical purchase prices,

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[16] According to information in our possession, such agreements have been negotiated in, among other states, Alabama, Florida, Georgia, Kentucky, Illinois, Louisiana, Mississippi, North Carolina, South Carolina, and Tennessee. Letter from W.W. Jordan, Executive Director--Federal Regulatory, BellSouth, to William F. Caton, Acting Secretary, July 11, 1996 at Attachment (containing chart detailing agreements between BellSouth and new entrants in Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, and Tennessee); "Interconnection Agreement Under Sections 251 and 252 of the telecommunications Act of 1996, by and between, Ameritech Information Industry Services and MFS Intelenet of Illinois, Inc.," dated May 17, 1996 (filed July 25, 1996).

[17] 47 U.S.C. § 252(d)(1)(B).

[18] NPRM at para. 123.

regulatory depreciation rates, system configurations, and operating procedures. We invited parties to comment on whether incumbent LECs should be permitted to recover some portion of their historical or embedded costs over TSLRIC.[19]

633. In the NPRM, we noted that certain incumbent LECs had advocated that interconnection and access to unbundled element prices be based on the "efficient component pricing rule" (ECPR).[20] Under this approach, an incumbent LEC that sells an essential input element, such as interconnection, to a competing network would set the price of that input element equal to "the input's direct per-unit incremental costs plus the opportunity cost to the input supplier of the sale of a unit of input."[21] We tentatively concluded in the NPRM that ECPR or equivalent methodologies are inconsistent with the section 252(d)(1) requirement that rates be based on "cost," and we proposed to preclude the states from using this methodology.[22]

[* * *]

(3) Discussion

(a) Total Element Long Run Incremental Cost

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[19] *Id.* at para. 129.

[20] *Id.* at para. 147. *See* William J. Baumol, *Some Subtle Issues in Railroad Deregulation*, 10 Int'l J. Trans. Econ. 341 (1983); William Baumol & Gregory Sidak, *Toward Competition in Local Telephony* (1994); William Baumal & Gregory Sidak, *The Pricing of Inputs Sold to Competitors*, 11 Yale J. on Reg. 171 (1994).

[21] William Baumol & Gregory Sidak, *The Price of Inputs Sold to Competitors*, 11 Yale J. on Reg. 171, 178.

[22] NPRM at para. 148.

685. Under the third approach, prices for interconnection and access to unbundled elements would be developed from a forward-looking economic cost methodology based on the most efficient technology deployed in the incumbent LEC's current wire center locations. This approach mitigates incumbent LECs' concerns that a forward-looking pricing methodology ignores existing network design, while basing prices on efficient, new technology that is compatible with the existing infrastructure. This benchmark of forward-looking cost and existing network design most closely represents the incremental costs that incumbents actually expect to incur in making network elements available to new entrants. Moreover, this approach encourages facilities-based competition to the extent that new entrants, by designing more efficient network configurations, are able to provide the service at a lower cost than the incumbent LEC. We, therefore, conclude that the forward-looking pricing methodology for interconnection and unbundled network elements should be based on costs that assume that wire centers will be placed at the incumbent LEC's current wire center locations, but that the reconstructed local network will employ the most efficient technology for reasonably foreseeable capacity requirements.

[* * *]

696. We conclude that forward-looking common costs shall be allocated among elements and services in a reasonable manner, consistent with the pro-competitive goals of the 1996 Act. One reasonable allocation method would be allocate common costs using a fixed allocator, such as a percentage markup over the directly attributable forward-looking costs. We conclude that a second reasonable allocation method would allocate only a relatively small share of common costs to certain critical network elements, such as the local loop and collocation, that are most difficult for entrants to replicate promptly (*i.e.*, bottleneck facilities). Allocation of common costs on this basis ensures that the prices of network elements

that are least likely to be subject to competition are not artificially inflated by a large allocation of common costs. On the other hand, certain other allocation methods would not be reasonable. For example, we conclude that an allocation methodology that relies exclusively on allocating common costs in inverse proportion to the sensitivity of demand for various network elements and services may not be used.[23] We conclude that such an allocation could unreasonably limit the extent of entry into local exchange markets by allocating more costs to, and thus raising the prices of, the most critical bottleneck inputs, the demand for which tends to be relatively inelastic. Such an allocation of these costs would undermine the pro-competitive objectives of the 1996 Act.

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[23] *See* Frank P. Ramsey, *A Contribution to the Theory of Taxation*, 37 Econ. J. 47 (1927); *see generally* Kenneth E. Train, *Optimal Regulation: The Economic Theory of Natural Monopoly* 115-40 (1992) (discussing efficiency properties of Ramsey prices); Bridger M. Mitchell & Ingo Vogelsang, *Telecommunications Pricing: Theory and Practice* 43-61 (1991). The sensitivity of demand is measured by the elasticity of demand, which is defined as the percentage change in the quantity of a service demanded for a one per cent change in price.

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Nos. 97-826, 97-829, 97-830 & 97-831

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Supreme Court of the United States
OCTOBER TERM, 1997

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Petitioners,
v.
IOWA UTILITIES BOARD, *et al.*,
Respondents.

AND RELATED PETITIONS

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

CONSOLIDATED BRIEF FOR THE UNITED STATES TELEPHONE ASSOCIATION AND THE RURAL TELEPHONE COALITION IN OPPOSITION

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RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Supreme Court Rules, the Rural Telephone Coalition ("RTC") and United States Telephone Association ("USTA") respectfully submit these disclosure statements.

RTC is comprised of the National Rural Telecom Association ("NRTA"), the National Telephone Cooperative Association ("NTCA"), and the Organization for the Promotion and Advancement of Small Telecommunications Companies ("OPASTCO"). Each of the associations in the RTC is a non-profit trade association representing the interest of facilities-based local exchange and exchange access providers. These companies are full members of the associations. Some of the associations also have international members who provide local exchange services in other jurisdictions, and associate members consisting of consultants, manufacturers, and other parties with interests in the local exchange carrier industry. Neither the RTC nor any of the associations have any parent companies, subsidiaries, or affiliates for whom disclosure is required by Rule 29.6.

USTA is a non-profit trade association representing the interest of facilities-based local exchange and exchange access providers. These companies are its full members. USTA also has international members who provide local exchange services in other jurisdictions, and associate members including consultants, manufacturers, banks and investors, and other parties with interests in the local exchange carrier industry. USTA has no parent companies, subsidiaries, or affiliates for whom disclosure is required by Rule 29.6.

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CONSOLIDATED BRIEF FOR THE UNITED STATES TELEPHONE ASSOCIATION AND THE RURAL TELEPHONE COALITION IN OPPOSITION

STATEMENT

Respondent United States Telephone Association ("USTA") is a non-profit trade association that represents the interests of more than 1000 facilities-based local exchange and exchange access providers, most of which are small and mid-sized local exchange carriers ("LECs"). Respondent Rural Telephone Coalition ("RTC") is an alliance composed of three national trade associations, the National Rural Telecom Association ("NRTA"), the National Telephone Cooperative Association ("NTCA") and

the Organization for the Promotion and Advancement of Small Telecommunications Companies ("OPASTCO"), which together represent the interests of more than 850 small and rural incumbent LECs.

In the court of appeals, USTA and RTC joined with other parties to challenge the validity of FCC rules governing the price and other central terms of interconnection agreements that must be reviewed and approved by State commissions. USTA and the RTC also separately challenged the validity of two FCC rules of special significance to small and rural carriers: (1) 47 C.F.R. § 51.405, which required State commissions to apply restrictive standards of proof when determining whether small and rural carriers should be relieved of undue burdens imposed by the Act; and (2) 47 C.F.R. § 51.303, which required State commissions to review and approve all interconnection agreements adopted by carriers prior to the effective date of the Telecommunications Act of 1996 ("the 1996 Act"). The Eighth Circuit vacated both of these regulations based upon its conclusion that the text of 47 U.S.C. § 251(f) and § 252(a)—which assigns States the responsibility for making exemption determinations and reviewing interconnection agreements—also vests States with exclusive jurisdiction to establish the rules governing these State proceedings. Pet. App. at 28a, 36a. The Commission and the other Petitioners have now sought review of these rulings as part of their broad-based challenge to the decision of the Eighth Circuit. *See* FCC Pet. at (I) (question 1); AT&T Pet. at (i) (question 1); MCI Pet. at (i) (question 2); ALTS Pet. at (i) (question 2); *see also* FCC Pet. at 9, 11. Petitioners nevertheless fail to provide this Court with any background concerning these regulations or the statutory provisions they implement. We accordingly do so here.[1]

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[1] This brief in opposition only addresses the Eighth Circuit's decision with respect to these two rules. USTA and RTC join the arguments set forth in the briefs of the Regional Bell Companies and GTE (the "Large LECs") and the Mid-Sized Local Exchange

1. Throughout much of this century, States have adopted specially tailored policies designed to maintain the investment incentives of the small and rural carriers that provide service to remote areas.[2] Providing universal service to rural areas has presented challenging policy issues for many decades because the high cost associated with the delivery of rural service makes it difficult for telephone companies to offer customers affordable rates or to provide investors with attractive rates of return. Small carriers that have made the substantial investment in rural markets are obligated to serve their entire local exchange service areas as "carriers of last resort." As a consequence, these small businesses are particularly vulnerable to "cream skimming" by new entrants that target only high-volume business users in the rural territories. *See, e.g.*, H.R. Rep. No. 81-246, at 8 (1949) ("1949 House Report") (observing that Congress imposed area-wide coverage requirements because telephone companies were "running their lines down the highways into the most profitable areas and relegating farmers in the less profitable service areas perpetually to a nontelephone hinterland"). Left unchecked, the loss of even one or two high-volume customers in a rural market will drive up the costs of serving the rural LEC's remaining residential customers and/or diminish the economic viability of the rural service providers. The efficiency and public policy justifications for introducing vigorous competition accordingly have been far less apparent in rural markets than in densely populated urban areas where vast economies of scale and lower cost services are possible.[3]

Carriers (the "Mid-Sized LECs") with respect to other aspects of the Eighth Circuit's opinion.

[2] *See, e.g., Northwestern Bell Telephone Co.*, 71 Pub. Util. Rep. (PUR) 1, 11 (S.D. PUC 1947) (stating that "it is the general policy of this Commission to encourage the extension of exchange service to every community and household of the state").

[3] *See* John C. Panzar & Steven S. Wildman, "Competition in the Local Exchange: Appropriate Policies to Maintain Universal

2. In enacting the Telecommunications Act of 1996, Congress fundamentally changed the nature of competition in the markets for local telecommunications services by removing many competitive barriers to entry. But Congress did not renounce decades of special policies designed to enable small companies to provide service and update their networks in rural areas, or the primacy of the States' role in fostering the success of these rural ventures. Congress' plan to give State commissions authority to prevent unchecked competition in rural markets is reflected in numerous provisions of the 1996 Act.

Under Section 253(a), States may not prohibit firms from providing "any interstate or intrastate telecommunications service" *except* in rural markets. In Section 253(f), Congress authorizes States to require any firm entering a market served by a rural telephone company to provide universal service throughout the market so as to prevent the entry of competitors seeking to "cream skim" rural markets. Congress then made the entry of a second carrier in rural markets even more difficult through the terms of its rules governing financial support for carriers providing universal service. Congress gave States authority to determine which carriers should be eligible to receive universal service funding in each market, and provided that only one carrier would be eligible for universal service funding in "an area served by a rural telephone company," unless the State commission makes an express finding that it would serve the "public interest" to authorize additional universal service carriers. 47 U.S.C. § 214(e)(2).

Congressional differentiation of competition policies to be administered by the States in rural markets is further reflected in Section 251(f), which establishes two statutory

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Service in Rural Areas," at 4-8, attached to Testimony of Lawrence C. Ware, Rural Telephone Coalition, House Energy and Commerce Subcommittee on Telecommunications and Finance, H.R. 3636 (Feb. 9, 1994) (hereinafter "Panzar").

mechanisms to relieve small and rural telephone companies of undue burdens. Section 251(f)(1) grants "rural telephone compan[ies]" [4] an exemption from the competitive obligations imposed on incumbent LECs by Section 251(c)—obligations that include mandatory requirements for incumbent carriers to provide competitors interconnection with their facilities and to make available unbundled network elements.[5] 47 U.S.C. § 251(f). States are given express authority to administer this exemption. State commissions—and not the FCC—must determine whether to terminate the Section 251(f)(1) exemption if a carrier makes a "bona fide request" for interconnection and files notice of the request with the State commission. The rural exemption only terminates if the "State commission determines" that "such request is not unduly economically burdensome," is "technically feasible," and is otherwise "consistent" with certain universal service provisions of Section 254. 47 U.S.C. § 251(f)(1)(A).

Congress also gave States authority to grant discretionary relief to any LEC (including a rural telephone company) that has "fewer than 2 percent of the Nation's subscriber lines installed in the aggregate nationwide" (referred to herein as "small companies"). These companies may petition a "State commission" for a suspension or modification of any requirement imposed by Section

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[4] The definition of a "rural telephone company" is established in 47 U.S.C. § 153(37).

[5] Congress recognized the need to include some type of exemption or waiver provision to create a "level playing field, particularly when a company or a carrier to which this subsection applies faces competition from a telecommunications carrier that is a large global or nationwide entity that has financial or technological resources that are significantly greater than the resources of the company or carrier." S. Rep. No. 104-23, at 22 (1995) ("Senate Report"); *see also* H.R. Rep. No. 104-204, pt. 1, at 74 (1995) ("House Report") (rural exemption necessary to avoid "significant costs associated with seeking a modification or waiver before the Commission"). Such concerns culminated in Section 251(f).

251(b) or Section 251(c). 47 U.S.C. § 251(f)(2). A petition filed under this section may be granted by the State commission if it finds that the suspension or modification is necessary to avoid a "significant adverse economic impact on users of telecommunications services generally," an undue economic burden, or a requirement that is "technically infeasible," to the extent consistent with "the public interest." 47 U.S.C. § 251(f)(2)(A), (B). The FCC is mentioned only once in Section 251(f): when a State commission terminates a rural carrier's exemption under Section 251(f)(1), it is directed to establish a compliance schedule consistent with Commission regulations. 47 U.S.C. § 251(f)(1)(B).

3. The 1996 Act also preserved State responsibility for regulating rural carriers' agreements with larger, non-competing LECs. For many years, rural telephone carriers have depended upon "co-carrier" relationships with larger companies to provide efficient service to rural subscribers. *See* Panzar at 34. Such joint arrangements between non-competing LECs have served to reduce modernization costs and preserve revenues for universal service. For example, Extended Area Service ("EAS") arrangements between rural LECs and their neighboring large LECs enable rural and urban subscribers to call each other without incurring long distance charges. The prices of shared service components for rural LECs under such agreements are generally lower than prices made available to requesting carriers in a competitive marketplace. *See id.* at 41.

Rural carriers entered into hundreds of agreements of this type prior to the effective date of the 1996 Act, and one of the questions at issue in this case is how these agreements are affected by the terms of the Act. As described in the opposition briefs of the Large and Mid-Sized LECs, Sections 251 and 252 of the Act seek to introduce competition through reliance on private party negotiations and State commission review and approval of interconnec-

tion agreements. Section 252(a)(1) provides that an incumbent local exchange carrier "may negotiate and enter into a binding agreement with the requesting telecommunications carrier" upon receipt of a "request for interconnection, services, or network elements pursuant to section 251." 47 U.S.C. § 252(a)(1). Section 252(e) in turn provides that "[a]ny interconnection agreement adopted by negotiation or arbitration" under Sections 251 or 252 "shall be submitted for State approval." 47 U.S.C. § 252(e)(1). The Act does not clearly say whether State commissions must require agreements "negotiate[d] and enter[ed] into" before the effective date of the Act to be submitted to them for review and approval, although it clearly does require submission of an agreement which was "negotiated" before the enactment date, but executed afterwards. 47 U.S.C. § 252(a)(1).

4. There is no dispute that Congress authorized States to adopt implementing regulations to fulfill their obligations to conduct exemption and suspension proceedings under Section 251(f) and interconnection approval proceedings under Section 252. *See* 47 U.S.C. § 261(b) (stating that "[n]othing in this part shall be construed to prohibit any State commission . . . from prescribing regulations . . . in fulfilling the requirements of this part [including Section 251(f) and Section 252(a)], if such regulations are not inconsistent with the provisions of this part"). The FCC confirmed this reading in its order by acknowledging that "we expect that states will interpret the requirements of section 251(f) through rulemaking and adjudicative proceedings." *First Report and Order* at ¶ 1251 (App. 2a). The FCC nevertheless decided to prevent States from adopting their own interpretations of central terms of Section 251(f) and Section 252(a) through rulemaking or adjudications. The Commission instead adopted "national rules" and directed States to render decisions that "conform to our rules." Pet. App. at 173a.

The national rule promulgated under Section 251(f) required State commissions to adhere to a restrictive interpretation of the standards for relief established under Section 251(f). First, Rule 51.405 displaced the three prerequisites for terminating an exemption established under Section 251(f)(1)—technical feasibility, undue economic burden, and consistency with universal service provisions—with a single "embellish[ed]" standard, Pet. App. at 28a, that required termination of any exemption absent proof that the request would impose an "undue economic burden." [6] Second, the FCC determined that an "economic burden" warranting relief could not include any "economic burden that is typically associated with efficient competitive entry." 47 C.F.R. § 51.405(c); Pet. App. at 307a. Third, once a bona fide request is made by a requesting carrier, the FCC's rule assigned the burden of proof to rural telephone companies, based on the Commission's view that "it is appropriate to place the burden of proof on the party seeking relief from otherwise applicable requirements," without analyzing the text of the relevant provisions. *First Report and Order* at ¶ 1263 (App. 2a-3a).

The national rule promulgated under Section 252(a) required State commissions to review and approve hundreds of preexisting agreements between non-competing, neighboring LECs, including EAS agreements. The FCC interpreted the language of Sections 252(a) and (e) to require approval, despite its acknowledgment that such agreements "were negotiated under very different circumstances, and may not provide a reasonable basis for interconnection agreements under the 1996 Act." *First Report and Order* at ¶ 170 (App. 1a-2a).

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[6] The FCC asserted in the Eighth Circuit that it did not intend to displace the other prerequisites for termination of a rural exemption, but the terms of the rule expressly provided otherwise. *See* 47 C.F.R. § 51.405(c) ("In order to justify continued exemption . . . an incumbent LEC must offer evidence . . . [of] undue economic burden . . . .").

5. The Eighth Circuit vacated the FCC's pricing regulations because they "exceeded" the FCC's jurisdiction. *Iowa Utilities Board v. FCC*, No. 96-3321 (8th Cir. July 18, 1997), Pet. App. at 1a, 8a. This determination was based upon an analysis of the text of the provisions governing the States' authority to regulate pricing in local exchange markets. *Id.* at 8a-27a. The Eighth Circuit also vacated non-price rules where the text of the 1996 Act established congressional intent to vest the States with exclusive jurisdiction.

The Eighth Circuit vacated the FCC's rules governing State rural exemption, suspension and modification proceedings because the "plain meaning of subsection 251(f)(1) (governing exemptions) and 251(f)(2) (governing suspensions and modifications) indicates that the state commissions have the exclusive authority to make these determinations." *Id.* at 28a. The court emphasized that "nothing in either of these provisions, or in the Act generally, provides the FCC with the power to prescribe the governing standards for such determinations." *Id.* In contrast to the "repeated and exclusive" references to State commission determinations in Section 251(f), the court of appeals found absolutely "no indication that state commissions must follow FCC standards" in conducting exemption, suspension or modification inquiries. *Id.* The court found that this conclusion was further confirmed by the fact that Congress had rejected both a Senate bill and a House bill giving the FCC concurrent jurisdiction with State commissions to administer these provisions. *Id.* at 29a. The court held that it would be "unreasonable to infer from subsection 251(d) or the other general rulemaking provisions cited by the FCC that Congress intended to put the Commission—the agency it decided to exclude from the exemption process—in a position to dictate the substantive standards governing the exemption process." *Id.* at 29a-30a. After resolving the issue based on the language of Section 251(f) alone, the court of appeals found that Section 2(b) created an additional ground for its decision.[7] *Id.* at 30a ("[S]ection 2(b)

bars" the FCC's rule "as well."). The court reasoned that "determinations of whether small or rural LECs should receive exemptions, modifications, or suspensions" of interconnection duties qualify as "practices or regulations" which are made "in connection with intrastate communication service" within the meaning of Section 2(b). *Id.* The court declined to address respondents' substantive challenges to the regulation in light of its jurisdictional holding. *Id.*

The Eighth Circuit also vacated the FCC's rule requiring State commissions to review and approve all preexisting interconnection agreements. The Eighth Circuit determined that "[n]othing" in Section 252 "can be read to authorize the FCC to issue regulations regarding which interconnection agreements must be submitted for state approval." Pet. App. at 35a. The court emphasized that Section 252 "establishes the procedures and standards that *state commissions* must follow when approving and arbitrating agreements under the Act." *Id.* (emphasis in original). Acknowledging the FCC's "grasp for some sort of statutorily-based jurisdiction over these interconnection agreements," the court of appeals nevertheless concluded that "section 2(b) forecloses the ability of the Commission to determine which interconnection agreements must be submitted for state commission approval." *Id.* at 36a, 35a. The court concluded that this issue must be resolved by State commissions. *Id.* at 36a & n.26.

The Eighth Circuit also rejected the FCC's attempt to compel States to conform their decisions to its "national rules" (Pet. App. at 173a) for an additional reason. As the Eighth Circuit explained, the FCC's order "purport[ed] to preempt any state policy that conflicts with an FCC regulation promulgated pursuant to section 251." Pet.

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[7] Section 2(b) of the Act provides that "nothing in this chapter shall be construed to apply or to give the [FCC] jurisdiction with respect to . . . charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communications service." 47 U.S.C. § 152(b); Pet. App. at 15a.

App. at 36a. The court reiterated its conclusion that the "FCC's authority to prescribe and enforce regulations to implement the requirements of section 251 is confined to the six areas in this section where Congress expressly called for the FCC's participation." *Id.* at 37a. The court found, in addition, however, that the statutory provisions governing the scope of FCC preemption of State rules, set forth in 47 U.S.C. § 251(d)(3) and § 261 "further constrain[] the FCC's authority." *Id.* The court emphasized that the plain language of Section 251(d)(3) established that the FCC could not preempt State commission orders establishing interconnection obligations so long as they are "consistent with the requirements of section 251" and do not "substantially prevent the implementation of the requirements of section 251 and the purposes of Part II." *Id.* The court explained that "[t]his provision does not require all state commission orders to be consistent with all of the FCC's regulations promulgated under section 251," because it is "entirely possible for a state interconnection or access regulation . . . to vary from a specific FCC regulation and yet be consistent with the overarching terms of section 251." *Id.* at 37a-38a. The FCC would accordingly have no basis to preempt such State rules merely because it had jurisdiction to speak on the subject.

REASON FOR DENYING THE WRIT

Petitioners ask this Court to conduct an expansive review of numerous issues of statutory interpretation resolved by the Eighth Circuit in accordance with settled principles. The three justifications they advance for conducting plenary review of the Eighth Circuit's decision are as unpersuasive with respect to the FCC's rules governing small carriers and preexisting LEC agreements as they are with respect to the FCC's pricing rules.[8]

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[8] Respondents USTA and RTC join the arguments set forth in the briefs of the Large LECs and the Mid-Sized LECs.

First, the court's conclusions that the FCC had no jurisdiction to displace the States' authority to implement and apply the rural exemption of Section 251(f), or to force State commissions under Section 252(a) to require the filing of thousands of carrier-to-carrier agreements (with no discretion to evaluate which agreements warrant submission), are firmly supported by the specific language, structure and purpose of those sections. Second, contrary to the FCC's assertion, the court of appeals' reading of Section 2(b) does not "conflict in principle" with other precedents, FCC Pet. at 11, and even if it did, the court's interpretation of 2(b) was not "[c]entral to [its] analysis of the Commission's statutory jurisdiction." *Id.* at 17. The Eighth Circuit plainly stated that its jurisdictional analysis did not depend upon its reading of Section 2(b).

Third, there are no "practical" considerations that warrant review. *Id.* at 22. In less than two years, more than a thousand interconnection agreements involving nearly 300 companies have been signed and approved by State commissions across the nation, and States have been conducting exemption and suspension proceedings without need of FCC guidance. Contrary to the FCC's claims (Pet. at 23), there is no reason to conclude that Congress was attempting to ensure that the FCC's rulemaking would culminate in binding, nationwide rules on the underlying issues of statutory interpretation. Congress unquestionably did not mandate these FCC rules; expressly confirmed the jurisdiction of State commissions to address these questions; and expressly preserved State rules that do not conflict with the terms of the Act from FCC preemption. There accordingly is no "Congress[ional] direct[ive]" to secure an immediate nationwide resolution of all these issues. *Id.* Rather the Act was designed to permit the States to consider these important questions in the context of competition issues now arising in their local markets.

1.a. The FCC contends that Section 251 "prescribes a set of new federal standards to govern the development

of competitive local telephone markets," citing Section 251(f), which Congress allegedly authorized it to interpret and implement. FCC Pet. at 11. In fact, few provisions in the 1996 Act more clearly illustrate Congress' plan to grant the States exclusive authority to implement certain provisions of the 1996 Act governing competition in intrastate markets. The court of appeals correctly concluded that the "plain meaning" of Subsections 251(f)(1) and (2) "indicates that the state commissions have the exclusive authority to make [rural exemption] determinations." Pet. App. at 28a. The text of Section 251 cannot reasonably be read to authorize the FCC to adopt regulations governing the standards applicable to State commission proceedings under Section 251(f). Subsection 251(f)(1)(B) "explicitly provides, '*The State commission* shall conduct an inquiry for the purpose of determining whether to terminate the exemption under subsection paragraph (A).'" *Id.* at 28a (emphasis added). The court emphasized that there are "[r]epeated and exclusive references to such state commission determinations . . . contained throughout subsection 251(f)," while "[i]n contrast, there is no indication that state commissions must follow FCC standards in conducting these inquiries." *Id.*

As the Eighth Circuit further found, Congress "is capable of clearly expressing its desire to grant the FCC authority . . . when in wishes to do so." *Id.* at 14a. Thus, for example, subsection 252(c)(1) requires a State commission to ensure that the resolution of "open issues" in arbitration proceedings conducted by State commissions under the terms of the Act "meet the requirements of section 251 of this title, *including the regulations prescribed by the Commission pursuant to section 251.*" 47 U.S.C. § 252(c)(1) (emphasis added).[9] Congress provided no

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[9] Under the statute, the FCC is specifically authorized to issue regulations under subsections 251(b)(2) (number portability), 251(c)(4)(B) (limitations on resale), 251(d)(2) (unbundled network elements), 251(e) (numbering administration), 251(g) (con-

such direction to the State commissions conducting exemption, suspension, and modification proceedings. Instead, Congress indicated that States were only required to enter orders establishing "an implementation schedule" for compliance "that is consistent in time and manner with Commission regulations" once they have concluded that the termination of an exemption is warranted. 47 U.S.C. § 251(f)(1)(B); *see* Pet. App. at 29a. The fact that Congress only directed State commissions to adhere to specified Commission regulations "[u]pon termination of [an] exemption" negates any inference that Congress impliedly authorized the FCC to adopt other rules governing a State commission's resolution of requests pertaining to exemptions under Section 251(f). 47 U.S.C. § 251(f)(1)(B).[10]

The FCC's claim that Congress intended rural exemption determinations to be subject to federal regulations is further undermined by the fact that Congress expressly rejected versions of Section 251(f) which gave the FCC concurrent jurisdiction with State commissions to administer the exemption and waiver provisions for small local exchange carriers. The Senate bill provided that the Com-

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tinued enforcement of exchange access), and 251(h)(2) (treatment of comparable carriers as incumbents). Pet. App. at 12a n.10, 29a n.23.

[10] Indeed, the interpretation of the 1996 Act that the FCC has advocated would in fact render this language of Section 251(f)(1)(B) superfluous. Under the Commission's reading of the Act, all of the State commission's determinations under Section 251(f) must "comply with the Commission's regulations." *First Report and Order* at ¶ 101, Pet. App. at 201a. But if the FCC already possesses broad authority to adopt regulations implementing Section 251(f) as it alleges—regulations which the States would be obligated to apply in resolving requests for relief under that section—it would have been completely unnecessary for Congress to direct the States to adopt an implementation schedule that conformed to Commission regulations. It is apparent, therefore, that Congress simply did not authorize the Commission to adopt any other regulations implementing Section 251(f).

mission *or* a state could provide small companies with relief from the obligations of Section 251. *See* S. 652, 104th Cong. § 251(i) (1996); Senate Report at 22. The House bill gave State commissions authority to administer exemption and waiver provisions for rural telephone companies, but also gave the FCC authority to grant waivers for any local exchange carrier with fewer than 500,000 access lines installed. *See* H.R. 1555, 104th Cong. § 242(e)-(g) (1996). Both of these bills were rejected in conference, and the States were given *sole* authority to conduct exemption, suspension and modification proceedings for all small carriers. *See* 47 U.S.C. § 251(f)(1)-(2). The FCC's effort to claim dual jurisdiction to control the resolution of exemption proceedings in State commissions after Congress deliberately excluded the FCC from the process was correctly rejected by the court of appeals. *See* Pet. App. at 29a; *Russello v. United States*, 464 U.S. 16, 23 (1983) (declining to adopt an interpretation at odds with changes in the language of a bill).

The language and history of Section 251(f) make its intent plain. Congress determined that State agencies are better situated to evaluate the special concerns of rural areas, and to administer provisions designed to shield small companies operating in their jurisdictions from unduly harmful effects of the new obligations. Under these circumstances, it is unreasonable to infer that Congress nevertheless meant to put the FCC—the agency it decided to exclude from the exemption process—in a position to dictate the substantive standards that states should apply in their own agency proceedings (let alone to rewrite the statutory standard).

The fact that FCC rules may promote national uniformity on selected issues is beside the point. *See* FCC Pet. at 22-23; *First Report and Order* at ¶¶ 53-62, Pet. App. at 165a-173a. If Congress believed that national uniformity in the administration of Section 251(f) was a paramount consideration, it would have granted the FCC exclusive jurisdiction to adjudicate these proceedings. It

did not do so. Congress instead chose to vest these decisions in 50 separate sovereigns, and did not even establish a right to direct review in federal district courts of State commission exemption or suspension determinations. *See* 47 U.S.C. § 252(e)(6) (limiting direct federal court review to State decisions approving interconnection agreements). There is simply no basis to infer that Congress empowered the FCC "to promulgate standards governing state commission determinations of exemptions and modifications." Pet. App. at 29a.[11]

b. Subsections 252(a) and (e) of the Act require interconnection agreements to be approved by State commissions. In its pursuit of increased competition at any cost, the FCC determined that States must review and approve *all* interconnection agreements that predated the passage of the Act. The FCC reached this conclusion even though the State of Wisconsin, for example, had interpreted Section 252(a) to exclude agreements executed before the effective date, and explained the unwarranted burdens the FCC's interpretation would impose on State commissions. Petition for Reconsideration by Public Service Commission of Wisconsin, *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98 (Sept. 30, 1996). Under this interpretation, hundreds of contracts negotiated under "very different" competitive circumstances. *First Report and Order* at ¶ 170 (App. 1a-2a), must be reviewed by State commissions. The Eighth Circuit correctly vacated the rule based upon its finding that State commissions—not the FCC—were given authority to interpret the scope of their own obligations under these sections.

As set forth in the court of appeals' opinion, the FCC's jurisdiction to adopt regulations implementing the 1996

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[11] The preemption provisions of the Act discussed *infra* at 22-24, further undercut the FCC's assertion that "nationally uniform interpretations" of interconnection or access obligations under the Act were either envisioned or intended by Congress. FCC Pet. at 23.

Act is limited in scope. Section 252 of the 1996 Act establishes the process and standards that *States* must follow when arbitrating and approving interconnection agreements. The FCC's role under this section is extremely circumscribed—indeed, it is limited only to stepping in to oversee the arbitration process in the event that a State commission refuses to act. *See* 47 U.S.C. § 252 (e)(5). The text and structure of Section 252 cannot reasonably be read to confer upon the FCC the authority to implement regulations specifying the obligations of interconnectors to submit their agreements for approval under Subsections 252(a) and (e). As the court found, these agreements "almost exclusively involve local intrastate telecommunication services," Pet. App. at 35a, where Congress has traditionally relied upon State commissions to regulate competition. The fact that Congress has established limited standards to guide the exercise of the States' discretion does not mean that the FCC is the final arbiter of how the States should implement those standards. The Eighth Circuit correctly determined that Congress assigned that role to the States.

2. The FCC and other Petitioners have attempted to construct an alleged "conflict[] in principle" among the circuits with respect to the court of appeals' conclusion that Section 2(b) of the Communications Act, 47 U.S.C. § 152(b), also constrained the FCC's ability to dictate every detail of local competition determinations. FCC Pet. at 20; *see* AT&T Pet. at 12-21. The agency argues first, that the court of appeals erred in applying 2(b) because Congress " 'straightforwardly' and comprehensively subjected competition in local telephone markets to" federal regulation, FCC Pet. at 17-18 (citing *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 377 (1986)), and second, that even if the Commission's authority to "implement the core provisions of Sections 251" were ambiguous, Section 2(b) would still pose no bar because "the regulatory subjects of Sections 251 and 252

are inextricably both interstate and intrastate in character." FCC Pet. at 19.

The flaws in the Commission's challenge to the Eighth Circuit's analysis of Section 2(b) are discussed in the opposition briefs of the Large LECs. Those arguments apply fully to the small company issues addressed here. As the court of appeals found, "determinations of whether small or rural LECs should receive exemptions, modifications, or suspensions of such duties also qualify as practices or regulations 'for or in connection with intrastate telecommunications service' that are outside of the FCC's jurisdiction by the operation of section 2(b)." Pet. App. at 30a (quoting 47 U.S.C. § 152(b)). Similarly, the court of appeals correctly determined that Section 2(b) "forecloses the ability of the Commission to determine which interconnection agreements" governing intrastate service "must be submitted for state commission approval." *Id.* at 35a. As the briefs of the Large LECs demonstrate, these conclusions do not conflict with the decisions of any other circuit.

Any error in the Eighth Circuit's Section 2(b) analysis would not, in any event, warrant review. The FCC's effort to characterize the court's interpretation of Section 2(b) as "[c]entral" to its "analysis of the Commission's statutory jurisdiction," FCC Pet. at 17, for purposes of creating an issue worthy of certiorari, does not withstand scrutiny. The Eighth Circuit clearly premised its decision on an independent analysis of the text of each statutory provision, and Section 2(b) was only cited as an additional reason for its determination—not the "central" reason. When interpreting the Section 251(f) rural exemption, for example, the court of appeals thoroughly analyzed the language and structure of that section in concluding that the "plain meaning" of Subsection 251(f)(1) and (f)(2) "indicates that the state commissions have the exclusive authority to make" rural exemption determinations, and that "nothing" in the text of Section 251(f),

"or in the Act generally, provides the FCC with the power to prescribe the governing standards for such determinations." Pet. App. at 28a. Only then did the court find that Section 2(b) stands as an independent bar to the exercise of FCC jurisdiction "as well." *Id.* at 30a.

3. Finally, the FCC believes that certiorari is justified because the Eighth Circuit's decision, on a "practical level," is somehow "imped[ing] the competition that Congress sought to bring to local telephone markets" by preventing a swift nationwide resolution of all central issues of statutory interpretation. FCC Pet. at 22. This argument failed when the FCC unsuccessfully requested this Court to vacate the Eighth Circuit's stay of the FCC's pricing rules. *See* FCC Application to Vacate Stay at 27, *FCC v. Iowa Utilities Board*, No. A-299 (Oct. 24, 1996). It should also fail now.

a. Contrary to the FCC's assertions, the Section 251-252 framework of private party negotiations and State commission arbitration crafted by Congress has been working well since the Act's passage to foster the emergence of local exchange competition. To date, *hundreds* of local interconnection agreements have been signed since the Act's passage, with new competitors emerging each day in local telephone markets. National Association of Regulatory Utility Commissioners, *Telecommunications Competition Report* at iii-iv (Sept. 1997). That process would be even more effective if the FCC had not decided, in the most intrusive manner possible, to inject itself into the private party negotiations and State commission arbitration process. Congress intended private parties first, and then the States, to be the impetus for the development of local competition. Congress did *not* invite the FCC to introduce more than 700 pages of binding federal guidance into Congress' "pro-competitive, de-regulatory" program.

b. The FCC has offered no evidence that the Eighth Circuit's decision has disrupted the State process for de-

ciding issues concerning the rural exemption or the submission of interconnection agreements. As a practical and policy matter, Congress' deference to the States with respect to local interconnection matters generally, and with respect to rural exemption and interconnection agreement filing issues in particular, makes perfect sense. The State commissions are the agencies with the particular knowledge and expertise regarding the status of local competition in their States, and the specific carriers that are either incumbent, emerging and or at risk when local competition is introduced.

Two examples illustrate the fact that Congress' scheme is working better without the FCC's mandatory directives to State commissions on these small company issues. The Alabama Public Service Commission recently considered the "financial and technical limitations of [Alabama's] small LECs"; found that the interconnection obligations imposed by Subsections 251(b) and (c) would impose undue economic burdens; and temporarily suspended those obligations pending further review of "the effects of competitive entry" on Alabama's rural carriers. *In re All Telephone Cos. Operating in Alabama,* Docket No. 24472 (LEXIS, Pub. Util. Rep. 4th, slip op.) (Oct. 8, 1996). Significantly, that determination was based upon a reasonable interpretation of the Act *without* reference to the FCC's "embellish[ed]" and restrictive standard of proof for rural exemption, suspension and modification proceedings, Pet. App. at 28a, which otherwise could have significantly impeded Alabama's ability to shape competition policy in accordance with the needs of Alabama's small carriers and their customers.[12] Similarly, some State

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[12] Congress established that State commissions could not terminate an exemption or deny a suspension or modification, when the imposition of certain obligations under Section 251 would be "unduly economically burdensome." *See* 47 U.S.C. § 251(f)(1)(A) and (2)(A)(ii). This was the standard that Alabama applied. Section 51.405(c) and (d) of the FCC's new rules, however, would have required proof of an "undue economic burden" other than an

commissions have been assessing what types of agreements should be filed under Section 252(a) pursuant to their own reasonable interpretations of the Act. Minnesota, for example, has commenced a proceeding to determine whether EAS agreements, which are of enormous importance to small and rural carriers, in fact represent the type of agreements that should be subject to Section 252(a) filing and approval requirements. *See In re US WEST Communications, Inc.*, Docket No. P-421, 1997 WL 634623 (Minn. P.U.C. June 24, 1997). Under the FCC's mandatory rules, that inquiry would have been foreclosed because the FCC determined that all pre-existing agreements, including EAS agreements, had to be filed

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"economic burden that is typically associated with efficient competitive entry." 47 C.F.R. § 51.405(c), (d) (emphasis added). Under this new "efficient competitive entry" standard—which appears *nowhere* in the statutory text—State commissions such as Alabama would have been required to disregard losses that would threaten the viability of a rural telephone company if such losses would be attributable to the entry of a more efficient competitor seeking to serve part of a rural market. *Compare* 47 U.S.C. § 613(d)(3), (e) (defining an "undue burden" in another section of the Communications Act to include *any* "significant difficulty or expense"); *Air Line Pilots Ass'n, Int'l v. Civil Aeronautics Bd.*, 494 F.2d 1118, 1124 (D.C. Cir. 1974), *cert. denied*, 420 U.S. 972 (1975) (interpreting similar phrase in statute creating small carrier exemption from economic regulatory provisions of the Federal Aviation Act to reflect intent to keep small carriers "economically viable"). That reasoning completely ignores the fact that Congress understood the need to give States substantial latitude to mitigate the impact of the Act on rural telephone companies and their customers. *See, e.g.*, 47 U.S.C. §§ 253(f), 214(e). The Commission's interpretation of Section 251(f) arbitrarily advanced one congressional policy—promoting competition—at the expense of another congressional policy—preserving the economic viability of rural telephone companies, and the interests of communities they serve, during this period of great change. *See Estate of Thompson v. Commissioner*, 864 F.2d 1128, 1134-36 (4th Cir. 1989) (rejecting agency interpretation that did not give full effect to congressional purpose of protecting family farms and small businesses). For this reason as well, the FCC's rule was properly vacated by the court of appeals.

with State commissions. *See* Pet. App. at 287a-88a (text of 47 C.F.R. § 51.303).

The actions taking place in the States illustrate the problem with the FCC's emphasis on the alleged practical and policy need for "nationally uniform interpretations" regarding local competition issues. FCC Pet. at 23. Congress' point in crafting the Section 251-252 regime in fact was (and is) just the opposite: except for certain discrete matters where federal involvement is required by the Act, local competition determinations generally are not and should not be "nationally uniform." Instead, they must be tailored to the specific carriers, and the specific economic and competitive circumstances, that exist in particular markets.

c. The FCC's case for certiorari places substantial reliance on the claim that the Eighth Circuit's interpretation of the FCC's jurisdiction frustrates congressional intent by preventing "a single court of appeals" from "resolv[ing]" the "most fundamental issues arising under the Act" within "a year or two" of its effective date. FCC Pet. at 23. Yet, there is no reason to believe that Congress shared the Commission's view that this rulemaking proceeding should culminate in uniform national rules even if Congress granted the FCC concurrent jurisdiction to address these issues.

First, there is no dispute that Congress expected States to adopt interpretive rules when conducting rural exemption and interconnection proceedings, and that Congress did not *require* the FCC to adopt rules on the statutory questions at issue here. Congress was accordingly content to allow these issues to be resolved through State proceedings conducted over time.

Second, as the Eighth Circuit held, Congress did not allow the FCC to establish nationally uniform standards which categorically preempt contrary State rules *even if* it had concurrent jurisdiction. The Eighth Circuit rejected

the FCC's view that its rules "preempt any [different] state policy" as "untenable." Pet. App. at 36a. The Commission's assertion that State decisions implementing Sections 251 and 252 must conform to FCC regulations, even where Congress did not say so, is refuted by Section 261 and Section 251(d)(3).

Section 261 authorizes States to adopt implementing regulations to fulfill its obligations under the 1996 Act, and provides that such regulations do not have to conform to Commission regulations. Section 261(b) is explicit: "[*n*]*othing in this part* shall be construed to prohibit any State commission . . . from prescribing regulations . . . in fulfilling the requirements of this part, if such regulations are not inconsistent with the provisions of this part." 47 U.S.C. § 261(b) (emphasis added). Congress only required States to conform their actions to "the Commission's regulations" if they seek to adopt "additional" regulations beyond those enacted to "fulfill [] the requirements of this part." *See id.*; 47 U.S.C. § 261(c). Section 251(d)(3) further confirms the fact that State commissions are not obligated to implement Section 251 in accordance with national regulations adopted by the FCC. Under that section, Congress prohibited the agency from "prescribing . . . regulations" that would "preclude the enforcement" of any state "regulation, order or policy" that is consistent with the policies and requirements of Section 251. 47 U.S.C. § 251(d)(3). If Congress' goal was nationwide uniformity, it presumably would have drafted a far broader preemption provision.

Third, Congress clearly did not create a scheme where federal district courts would "supply nationally uniform interpretations" of all of the provisions construed by the FCC in its rules. FCC Pet. at 23. Congress did not even grant federal district courts jurisdiction to conduct direct review of State commission determinations issued under Section 251(f). *See* 47 U.S.C. § 252(e)(6).

The FCC's vision of a congressional plan for nationwide resolution of all these statutory issues in a single proceeding simply cannot be reconciled with the terms of the Act. Instead, Congress adopted a program that permits States to develop reasonable interpretations of the Act in the course of conducting the proceedings Congress assigned to them. Short-circuiting that process in the name of litigation expediency undermines the State's role in the statutory scheme without any justification in the text of the statute.

CONCLUSION

For the reasons set forth, petitioners respectfully request this Court to deny the petitions for certiorari.

Respectfully submitted,

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APPENDIX

FROM *IN THE MATTER OF IMPLEMENTATION OF THE LOCAL COMPETITION PROVISIONS IN THE TELECOMMUNICATIONS ACT OF 1996*, FIRST REPORT AND ORDER, CC DOCKET NO. 96-98, FCC 96-325, ¶¶ 170, 1251, 1263 (AUGUST 8, 1996).

* * * *

170. Some parties have suggested that we provide parties an opportunity to renegotiate preexisting contracts. Parties, of course, may mutually agree to renegotiate agreements, but we decline to mandate that parties renegotiate existing contracts. In addition, as discussed below, commercial mobile radio service (CMRS) providers that are party to preexisting agreements with incumbent LECs that provide for non-mutual compensation have the option of renegotiating such agreements with no termination liabilities or contract penalties.[334] We believe that generally requiring renegotiation of preexisting contracts is unnecessary, however, because state commissions will review preexisting agreements, and may reject any negotiated agreement that "discriminates against a telecommunications carrier not a party to the agreement," or that "is not consistent with the public interest, convenience, and necessity."[335] We recognize that preexisting agreements were negotiated under very different circumstances, and may not provide a reasonable basis for interconnection agreements under the 1996 act. For example, non-competing neighboring LECs may have negotiated terms that simply are not viable in a competitive market. It would not foster efficient long-term competition to force parties to make available to all requesting carriers interconnection on terms not sustainable in a competitive environ-

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[334] *See infra*, Section XI.A.

[335] 47 U.S.C. § 252(e)(2)(A).

ment. In such circumstances, a state commission would have authority to reject a preexisting agreement as inconsistent with the public interest. If a state commission approves a preexisting agreement, that agreement will be available to other parties in accordance with section 252(i). Contrary to NYNEX's assertion, once a state approves an agreement under section 252(e), that agreement is "approved under" section 252.

* * * *

1251. We discuss below issues raised by the commenters, and establish some rules regarding the requirements of section 251(f) that we believe will assist state commissions as they carry out their duties under section 251(f). For the most part, however, we expect that states will interpret the requirements of section 251(f) through rulemaking and adjudicative proceedings. We may in the future initiate a Notice of Proposed Rulemaking on certain additional issues raised by section 251(f) if it appears that further action by the Commission is warranted.

* * * *

1263. Given the pro-competitive focus of the 1996 Act, we find that rural LECs must prove to the state commission that they should continue to be exempt pursuant to section 251(f)(1) from requirements of section 251(c), once a bona-fide request has been made, and that smaller companies must prove to the state commissions, pursuant to section 251(f)(2), that a suspension or modification of requirements of sections 251(b) or (c) should be granted. We conclude that it is appropriate to place the burden of proof on the party seeking relief from otherwise applicable requirements. Moreover, the party seeking exemption, suspension, or modification is in control of the relevant information necessary for the state to make a determination regarding the request. A rural company that falls within section 251(f)(1) is not required to make any showing until it receives a bona fide request for interconnection, services, or network elements.

We decline at this time to establish guidelines regarding what constitutes a bona fide request. We also decline in this Report and Order to adopt national rules or guidelines regarding other aspects of section 251(f). For example, we will not rule in this proceeding on the universal service duties of requesting carriers that seek to compete with rural LECs. We may offer guidance on these matters at a later date, if we believe it is necessary and appropriate.

Supreme Court, U.S.
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No. 97-829

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

MCI TELECOMMUNICATIONS CORPORATION,
Petitioner,

v.

IOWA UTILITIES BOARD, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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PETITIONER'S REPLY BRIEF

ARGUMENT

Although respondents cumulatively devote one hundred and fifty pages to opposing certiorari, they do not seriously contest that the petitions present questions of national importance that have not previously been decided by this Court. The case involves a profound jurisdictional dispute between federal and state regulators over the proper scope of their respective authority to implement the local competition provisions of the landmark Telecommunications Act of 1996, and an important substantive dispute about how new entrants such as MCI will be allowed to compete in local markets. Respondents' principal argument against plenary review of these issues is that the Eighth Circuit correctly resolved them. As the petitions for certiorari demonstrated, that is not so. In any event, this Court, and not a single court of appeals, should pronounce the last word on such matters of nationwide importance.

A. Respondents' Arguments Confirm That the Eighth Circuit's Decision to Invalidate Section 51.315(b) of the FCC's Rules Presents a Question of National Importance.

1. Most respondents do not deny that the invalidation of § 51.315(b) of the FCC's "combination" rules has severely set back prospects for local competition. Indeed the briefs in opposition are striking for what they do not say on this score. The State Commission Respondents and the National Association of Regulatory Commissioners ("the State Respondents"), for example, do not oppose certiorari on this issue. That is doubtless because these States recognize the importance of preventing the discriminatory conduct § 51.315(b) outlawed. Respondent GTE opposes certiorari on this question, but does not dispute that the Eighth Circuit's ruling is having enormous practical marketplace effects.

Only the Regional Bell Operating Company ("RBOC") respondents suggest that this issue is of "second level" importance (RBOC Brief in Opposition at 2 ("RBOC Br.")), but they have not sought to rebut the proof petitioners adduced about the decision's devastating effects. For example, the RBOCs do not deny that they are engaging in the discrimination permitted by the Eighth Circuit, or that their conduct has strangled local competition in its infancy. After all, the claim that the Eighth Circuit's invalidation of § 51.315(b) "effectively has killed off local competition" in much of the market was made not by petitioners but by independent telecommunications experts and investment analysts.[1] In other contexts (when it furthers their purposes), the RBOCs have frankly acknowledged the effect of the appeals court's ruling.[2] And the RBOCs say nothing about perhaps the most damning fact

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[1] *See* MCI's petition for certiorari at 13 n.16 ("MCI Pet.").

[2] *See* Reply Brief in Support of Application by BellSouth for Provision of In-Region, InterLATA Services in South Carolina, FCC CC Docket No. 97-208, at 20 (filed Nov. 14, 1997) ("AT&T gambled its local business on a misreading of the 1996 Act, and lost.").

of all: nearly two years after the Act's passage, incumbent monopolists still control 99% of the local market.

Indeed, as their very defense of the Eighth Circuit makes clear, whether incumbents can break apart existing combinations of network elements before providing them is an issue of central importance. GTE and the RBOCs argue at length that had the Eighth Circuit not invalidated § 51.315(b), new entrants would have been able to engage in purported "regulatory arbitrage . . . lead[ing] to massive pressure on basic service rates and enormous losses for incumbents." RBOC Br. at 22. They contend the Eighth Circuit's ruling was necessary to steer new entrants away from extensive use of unbundled network elements to enter local markets, forcing them instead to rely principally on resale, thereby protecting implicit universal service subsidies which they claim are built into the resale rates, but not into the rates for unbundled network elements. In view of the importance respondents attach to whether incumbents may break apart existing combinations of network elements before leasing them to new entrants, it is not plausible to argue that this is a "second order" issue unworthy of this Court's attention.

2. Nor have the incumbent local exchange carrier ("ILEC") respondents presented a persuasive argument that the Eighth Circuit decided the issue correctly. They make virtually no effort to defend the decision under *Chevron USA, Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984). That is no surprise; the decision is indefensible on those terms. Instead, respondents frankly argue policy, contending that the invalidation of § 51.315(b) was necessary to preserve implicit universal service subsidies. This argument is meritless: it holds local competition hostage to the completion of universal service reform, while Congress clearly intended local competition to come first.

First, the argument's premise is demonstrably false. Congress did *not* impose artificial costs on service through combinations of unbundled elements to impede this kind of competition until the completion of universal service

reform. Neither did the Eighth Circuit's equally invalid policy judgment rest on this ground. Instead, Congress expressly made all three forms of competitive entry (resale, facilities-based, and combinations of network elements) immediately available, and expressed no preference as between them. And it was Congress, not the FCC, that intended local competition through all three routes of entry to start "as quickly as possible," [3] while at the same time declining to make universal service reform a precondition for opening local markets to competition via any of these three entry strategies. Indeed, the incumbents' plea for protection of implicit universal service subsidies flies in the face of § 254 of the Act, which requires that "any [universal service] support mechanisms . . . should be explicit, rather than implicit as many support mechanisms are today." [4] In other words, the incumbents are arguing that the 1996 Act should be interpreted to protect the very implicit subsidies which Congress sought to extirpate. If the incumbent monopolists believe that universal service reform instead should precede widespread local competition, their complaint is with the Congress, and not with the FCC.

Second, the solution proposed by the monopolists bears no relation to the purported problem respondents have identified. The costs of pointless taking apart and recombining permitted by the Eighth Circuit's ruling are entirely unrelated to the costs of the alleged subsidies which the monopolists claim they wish to preserve.[5] Neither would

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[3] H.R. Rep. No. 104-204, 104th Cong., 1st Sess. at 89 (July 24, 1995).

[4] H.R. Conf. Rep. No. 104-458, 104th Cong., 2d Sess. at 131 (Jan. 31, 1996).

[5] As a result of the Eighth Circuit's ruling, incumbent monopolists will be able to impose these discriminatory costs whenever new entrants order any two or more elements in combination—not merely when new entrants seek to rely exclusively on unbundled elements to provide service. Thus, the incumbent can impose these discriminatory costs even if a new entrant has installed its own switch, and seeks only to lease two elements—the local loop to a

the discriminatory costs permitted by the Eighth Circuit ruling be phased out when universal service reform is completed.

Third, as a practical matter, there is no risk that the "cherry picking" respondents hypothesize would have any effect on the subsidies they assert justify their monopoly pricing before federal universal service reform is implemented on its scheduled date of January 1, 1999. Given the monopolists' overwhelming advantages of incumbency, competitors will not attract (or be able to serve) sufficient numbers of local customers in the twelve-month period before universal service reform should be completed. That is no doubt why Congress was not persuaded by these arguments, and mandated local competition in advance of universal service reform. Nor does the experience during the year that the combination regulation was in place before it was struck down by the Eighth Circuit support respondents' fear of "cherry picking:" new entrants have yet to make significant inroads on the monopolists' business and profits.

Fourth, and most importantly, it is clear that the Eighth Circuit was making fundamental decisions about national telecommunications policy, not following the plain meaning of § 251, when it invalidated § 51.315(b) of the FCC's rules. The Eighth Circuit accepted the incumbents' argument that it was important to add unnecessary costs to the provision of service through unbundled network elements in order to distinguish that service entry method from resale, even if that hobbled prospects for immediate local competition. But it is the very point of *Chevron* that such policy matters are left to the agency charged with implementing the law. That alone is sufficient reason for this Court to grant certiorari.

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subscriber's home and the interface box that attaches the loop to the inside wiring.

B. The Scope of the FCC's Authority to Administer the 1996 Act is a Matter of National Importance That Needs to be Settled Definitively by This Court.

1. Respondents have not advanced a persuasive defense of the Eighth Circuit's decision to strip the FCC of authority to implement the pricing requirements of § 251. To begin with, respondents' defense rests on an implausible characterization of the 1996 Act. As respondents would have it, the Eighth Circuit simply effectuated Congress' desire to avoid federal intrusion "on the States' traditional jurisdiction exclusively to oversee intrastate telephone service" by granting the States "considerable latitude to make individual policy choices" about pricing methodologies. RBOC Br. at 5, 20; *see also* GTE Brief in Opposition at 22 ("GTE Br."). Leaving aside the substantial constitutional difficulties that would be inherent in any such effort to deputize the States to set national policy (*see* MCI Pet. at 26), § 251 itself is a massive intrusion on "the States' traditional jurisdiction," supplanting state law with comprehensive and detailed federal requirements designed to foster competitive markets —including express federal requirements governing price. *E.g.*, 47 U.S.C. §§ 251(c)(2), (c)(3), (c)(4), 252 (d). Moreover, Congress indisputably gave the FCC authority to prescribe binding national rules governing many important requirements of § 251, including all the substantive unbundling requirements of § 251(c)(3), and many of the resale requirements of § 251(c)(4). FCC rules in those areas intrude on the States' traditional intrastate authority just as much as did the pricing rules invalidated by the Eighth Circuit. A plausible defense of the Eighth Circuit's ruling therefore cannot rest on broadbrush invocations of federalism; it must explain why Congress would have chosen to deny the FCC authority to implement one important subset of the federal requirements of § 251 while granting the FCC authority to implement other important requirements of the very same provision. Respondents have not even attempted such a defense.

To the contrary, in cases under § 252(e)(6) of the Act reviewing state commission arbitration decisions, the ILEC respondents have uniformly sought to *deny* state commissions the very latitude they now assert § 251 confers. As respondent SBC Communications Inc. explained in demanding *de novo* review of state commission interpretations of § 251, allowing state commissions interpretive latitude "would not advance uniform application of federal law from one State to the next," and could risk "50 different interpretations in 50 different states." [6] Respondent US West has likewise pressed for *de novo* review because of "the need for uniform construction of federal law," and because no state commission has "the nationwide perspective required to implement *federal* telecommunications policies." [7] Respondent GTE has likewise argued that state commission judgments are entitled to no deference, for the same reasons.[8]

The principal issue on which the ILEC respondents have pressed their plea for nationwide uniformity is the *pricing requirement of § 251*—the very matter they here contend the Eighth Circuit properly left to the States. Indeed, the ILEC respondents have uniformly challenged state commission decisions to apply forward-looking cost methodologies, on the ground that § 251 unambiguously requires state commissions to use embedded cost methodologies that prevailed during the monopoly era Congress sought to end.[9]

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[6] *Southwestern Bell Telephone Company v. AT&T Communications of the Southwest*, No. A-97-CA-132-SS, Motion for Summary Judgment of Southwestern Bell Telephone Company at 17 (W.D. Tex. filed Apr. 30, 1997) (*"SWB Motion"*).

[7] *US West Communications Inc. v. Thoms*, No. 4-97-CV-70082, US West's Opening Brief at 8-9 (N.D. Iowa filed May 12, 1997).

[8] *GTE Southwest, Inc. v. Wood*, No. M-97-078, Brief in Support of Motion for Summary Judgment at 16 & n.5 (S.D. Tex. filed Oct. 31, 1997) (*"GTE Motion"*).

[9] Respondent GTE, for example, contends that the Texas Commission's choice of a forward-looking TELRIC methodology "is a flat violation of the Act" because it does not guarantee GTE

The defense of state prerogatives advanced by the ILEC respondents in this Court as a reason to deny certiorari is thus unalloyed cynicism. They waive the banner of "decentralized decisionmaking" here, GTE Br. at 22, only because it suits their purpose of upholding the Eighth Circuit's decision to invalidate the procompetitive forward-looking cost methodology imposed by the FCC. In truth, however, the ILEC respondents agree with petitioners that § 251 should be read to impose a uniform federal pricing methodology. They disagree only over which branch of the federal government should impose it—the FCC in the exercise of its authority under § 251(d)(1) "to establish regulations to implement the requirements of [§ 251]," or the federal courts in the exercise of their authority under § 252(e)(6) to ensure that state arbitration decisions "meet the requirements of Section 251"—and over what that uniform pricing methodology should be.

The very fact that the ILEC respondents have advanced such arguments across the country in § 252(e)(6) litigation is a powerful reason why the petitions for certiorari should be granted. If, as petitioners contend here and as the ILECs have contended in federal district courts from Florida to California, the 1996 Act does not guarantee the States any significant discretion to make fundamental choices about pricing methodologies, then the essential premise of the Eighth Circuit's decision denying the FCC authority over pricing methodologies is invalid.

Furthermore, the existence of this nationwide ILEC campaign to impose a uniform federal embedded cost methodology refutes respondents' assertion that all methodological questions about price have been "settled" in the States. As a result of the Eighth Circuit's ruling, the pricing issue is anything but settled. Restoring the FCC's pricing rules would, however, go a long way toward set-

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recovery of its embedded costs. *GTE Motion* at 38-39. Respondent SBC Communications Inc. is likewise arguing in Texas that the state commission's "TELRIC methodology similar to the FCC's . . . ignores the plain language of § 252(d)(1)." *SWB Motion* at 22-23.

tling the issue. Federal courts would have a single standard to apply in resolving these dozens of pending cases. And, because (as respondents stress) most States have adopted methodologies modeled on the FCC's vacated regulations, reimposing the FCC's pricing rules would not have the disruptive effect claimed by respondents. To the contrary, reimposing the FCC's pricing rules would vindicate most States' choice of pricing methodologies, and end the turmoil generated by the ILECs' nationwide campaign to invalidate forward-looking pricing. Moreover, as to the significant minority of states that have *not* in substance adopted forward-looking pricing methodologies, review is warranted to assure compliance with the substantive requirements of the Act.

2. Although the State respondents' defense of the Eighth Circuit is not so cynical, neither have they offered anything approaching the compelling defense of the ruling below that would be necessary to justify a denial of certiorari in a case of such nationwide importance. Petitioners have not ignored the Eighth Circuit's "plain meaning" ruling. To the contrary, the petitions for certiorari have all argued that the Eighth Circuit fundamentally misread § 251(d)(1)— which authorizes the FCC "to establish regulations to implement the requirements of [§ 251]"—in concluding that this provision granted no substantive rulemaking authority.

In this regard, respondents have not offered any convincing reason in the statutory text for reading § 251(d)(1) as solely a time limit. According to the State respondents, if Congress had wanted to grant rulemaking authority, it would have instead drafted "plainer" language stating "that the FCC rules extended to all regulations necessary to implement section 251." State Respondents' Brief In Opposition at 10. Such a nuanced view of the requirements of "plain meaning" can hardly justify denying the FCC authority to implement the pricing requirements of § 251. And respondents fail even to acknowledge the most obvious difficulty with their position. If

§ 251(d)(1) does not confer rulemaking authority on the FCC to implement any requirements of § 251, what is the source of the FCC's authority to issue the regulations respondents concede the FCC has authority to issue? None of the specific provisions to which respondents point provides anything like the express grant of rulemaking authority respondents claim is needed. At most these provisions presuppose the existence of rulemaking authority, and condition the FCC's exercise of that authority. That is doubtless why no respondent quotes any of these provisions to support the proposition that they unambiguously grant rulemaking authority.

Second, respondents insist that because Congress gave state commissions the authority to set "rates," by negative implication it could not have intended to have the FCC establish a national methodology to be used in setting those rates. RBOC Br. at 13. But respondents acknowledge that the Act in fact is silent on this point, *id.*, and they studiously avoid the legal point made in the petitions: when an issue of statutory construction turns on the implications to be drawn from legislative silence, *Chevron* requires that the agency's interpretation be given deference. This the Eighth Circuit plainly did not do.

Thus, the Eighth Circuit's ruling is so seriously open to question that it cannot stand as the last word on the scope of the FCC's authority to implement this "unusually important legislative enactment." *Reno v. American Civil Liberties Union*, 117 S. Ct. 2329, 2337 (1997).

CONCLUSION

The petition should be granted.

Respectfully submitted,

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Nos. 97-826 (and consolidated cases)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

AT&T CORP., ET AL.,

Petitioners,

v.

IOWA UTILITIES BOARD, ET AL.,

Respondents.

AT&T CORP., ET AL.,

Petitioners,

v.

CALIFORNIA, ET AL.,

Respondents.

And Related Petitions

On Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

BRIEF FOR RESPONDENT COMPETITION POLICY INSTITUTE IN SUPPORT OF PETITIONER

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51 pp

QUESTIONS PRESENTED

1. Whether the Eighth Circuit erred in holding that the Federal Communications Commission ("FCC") lacked jurisdiction under the Communications Act of 1934, 47 U.S.C. § 151 *et seq.* (as amended), to promulgate the "interconnection" pricing rules of its *First Report and Order* implementing the landmark Telecommunications Act of 1996.

2. Whether the court of appeals properly found that the FCC's "rebundling" rules for "unbundled network elements" under section 251(c)(3) of the Act, 47 U.S.C § 251(c)(3), are consistent with the plain meaning of the statute.

3. Whether in prescribing rule 51.315(b), 47 C.F.R. § 51.315(b), the FCC appropriately exercised its administrative authority by construing the nondiscrimination requirements of the Act to prohibit incumbent local telephone companies from disassembling already combined network elements before leasing them to competing local carriers.

LIST OF PARTIES AND AFFILIATES

The parties to the proceedings in the Eighth Circuit are listed in Pet. App. at 1a-4a, 73a-79a, 92a.

Pursuant to Supreme Court Rule 29.6, Respondent in Support of Petitioner states as follows:

The Competition Policy Institute ("CPI") is an independent, non-profit organization that advocates state and federal policies to promote competition in telecommunications and energy services in ways that benefit consumers. CPI is advised by a committee of consumer representatives from around the country and receives its funding primarily from new entrants in the market for local telephone service. CPI has no parent companies, subsidiaries, or affiliates.

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And Related Petitions

On Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

BRIEF FOR RESPONDENT COMPETITION POLICY INSTITUTE IN SUPPORT OF PETITIONER

The Competition Policy Institute ("CPI") submits this brief in support of petitioners FCC, AT&T, MCI and ALTS for review of the judgment of the United States Court of Appeals for the Eighth Circuit in these cases.

OPINIONS BELOW

The principal opinion of the Court of Appeals for the Eighth Circuit in *Iowa Utilities Board v. FCC* (Pet. App. 1a-

67a),[1] as amended by the court's order on rehearing (Pet. App. 69a-72a), is reported at 120 F.3d 753. The Federal Communications Commission ("FCC") order reviewed by the Eighth Circuit—First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996* (excerpts of which are reproduced at Pet. App. 131a-337a)—is reported at 11 FCC Rcd. 15,499 (1996).

JURISDICTION

The judgment of the court of appeals in *Iowa Utilities Board* was entered on July 18, 1997. A subsequent order in that case, granting rehearing in part and denying rehearing part, was issued on October 14, 1997. Pet. App. 69a-72a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The most relevant portions of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, appear at Pet. App. 93a-130a.

STATEMENT OF THE CASE

On February 8, 1996, the Telecommunications Act of 1996 ("the Act" or "the 1996 Act"), Pub. L. No. 104-104, 110 Stat. 56 (pertinent provisions codified at 47 U.S.C. §§ 251-76), was signed into law. This landmark legislation, the first comprehensive revision of the Communications Act since its enactment in 1934, was designed by Congress to "open[] *all* telecommunications markets to competition."

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[1] References to "Pet. App." are to the Appendix filed by petitioner AT&T in No. 97-826.

H.R. Conf. Rep. No. 104-458, 104th Cong., 2d Sess. 1, 113 (Jan. 31, 1996) ("Conf. Rep.") (emphasis added). The Federal Communications Commission ("FCC") was directed to implement the critical local telephone competition provisions of the 1996 Act. 47 U.S.C. § 251(d)(1). The petitions before this Court seek review of the Eighth Circuit decisions vacating and upholding certain FCC regulations implementing the 1996 Act. *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd. 15,499 (1996) ("*First Report and Order*") (excerpts printed at Pet. App. 131a-337a); *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd. 19,332 (1996) ("*Second Report and Order*") (excerpts printed at Pet. App. 338a-353a).

1. Prior to passage of the 1996 Act, little if any competition had developed in local telecommunications markets. As a result of the antitrust settlement in *United States v. AT&T*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd mem. sub nom. Maryland v. United States*, 460 U.S. 1001 (1983), competition developed rapidly in the market for long-distance services. The *AT&T* settlement was founded on the theory that local telephone service was a "natural monopoly." Nearly fifteen years later, local telephone companies (referred to as "local exchange carriers") continue to retain monopolistic control over the provision of local telecommunications services. Consequently, telephone customers virtually never have a choice of providers for local phone service, preventing consumers from obtaining the many benefits attending competitive markets. These local monopolies are largely regulated by state public utility commissions and the FCC. Earlier this decade, some states sought to bring the benefits of competition to their local telecommunications markets, but these efforts were hindered

by the opposition of incumbent local exchange carriers and the lack of a national policy framework. *See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* Notice of Proposed Rulemaking, CC Docket No. 96-98, FCC 96-182, 11 FCC Rcd. 14,171, ¶ 5 (April 19, 1996).

2. With the 1996 Act, Congress established a "national policy framework" designed to bring the benefits of competition to local telephone consumers throughout the country. Conf. Rep. at 1, 13. Congress amended Title II of the Communications Act of 1934, 47 U.S.C. § 151 *et seq*., to establish baseline federal policies to allow local competition to develop nationwide. In order to ensure consistency and uniformity in implementation of this national policy framework, the FCC was charged with ensuring that the Act's requirements were met. At the same time, in order to reflect the particularities of service at the local level, state commissions were also given a substantial role under the Act. This balanced regulatory approach ensures the development of a uniform national policy that rationally accounts for differing conditions at the local level.

There are three different means of competitive entry into local telecommunications services permitted under the 1996 Act. 47 U.S.C. § 251. Each mode of entry will attract a different kind of competitor, thus maximizing the likelihood of producing competitive local markets "as quickly as possible." H.R. Rep. No. 104-204, 104th Cong., 1st Sess. 89 (July 24, 1995) ("H. Rep."). First, competing local carriers can "interconnect" their own networks with the facilities of the existing, incumbent local carriers. Interconnection is especially important to facilities-based competitors, who are unlikely in the short run to have constructed local telephone networks connecting every single customer. Second, because local telecommunications

competition will not develop if new entrants are required to build their own facilities before initiating service, the Act entitles competitors to enter the local market by leasing pieces of the existing local exchange networks, referred to as "unbundled network elements" (switches, local telephone "loops," directory assistance, etc.), from incumbent carriers. Third, consistent with the FCC's traditional rules governing telecommunications services, other carriers are authorized to "resell" services of the incumbent local exchange carrier, thus allowing new competitors to offer a complete array of services immediately upon entry into the local telephone marketplace.

The principal provisions of the Act promoting local telephone competition are sections 251 and 252. Section 251 establishes specific obligations of incumbent local exchange carriers with respect to each mode of local telephone entry: interconnection, unbundled network elements and resale. Interconnection and "access to network elements on an unbundled basis" must both be offered to all competing telecommunications carriers on rates, terms and conditions that are "just, reasonable, and nondiscriminatory." 47 U.S.C. §§ 251(c)(2)(D), (c)(3). Incumbents are "required to offer for resale at wholesale rates any telecommunications service" sold to end user customers. *Id.* § 251(c)(4)(A). To enforce these obligations, the FCC is required to "establish regulations" implementing "the requirements of this section." *Id.* § 251(d)(1). And to facilitate the rapid movement of local markets towards competitive entry, Congress directed the FCC to "complete all actions necessary" to promulgate these implementing regulations "within 6 months." *Id.*

Section 252 sets forth the procedures that competitors and individual incumbent carriers must follow in order to meet the core requirements of section 251. 47 U.S.C. § 252.

Carriers must first negotiate an "interconnection agreement," and where negotiations fail to result in an expeditious agreement, state commissions are directed to arbitrate interconnection disputes. State commission resolution of issues presented for arbitration by the carriers must meet the requirements of section 251 and the FCC's implementing regulations. 47 U.S.C. § 252(c)(1). State commissions are charged with responsibility to "determine," consistent with the requirements of section 251, rates for interconnection, unbundled elements and resale. 47 U.S.C. §§ 252(d)(1), (d)(3). Section 252(d) provides that these rates are to be based on the "cost" of the service. In the event that a state commission does not fulfill its statutory role, the FCC is directed to assume these responsibilities. 47 U.S.C. § 252(e)(5). Once interconnection agreements are approved, they are subject to review by the federal courts, but not state courts, to determine if the requirements of sections 251 and 252 have been met. 47 U.S.C. §§ 252(e)(4), (e)(6).

Finally, in section 271 of the Act, Congress provided the former Bell Companies, called Regional Bell Operating Companies, with an incentive for opening their local markets. Once a regional company demonstrates that it has successfully complied with the requirements of section 271, the FCC is directed to permit the incumbent to provide long-distance services if it concludes (with the advice of the Department of Justice) that such long-distance entry is in the "public interest." 47 U.S.C. § 271. The FCC is directed to review such petitions to determine if they satisfy a specified fourteen-point checklist that references, *inter alia*, the requirements of sections 251 and 252. 47 U.S.C. § 271(c)(2)(B). In addition, the FCC must fill in where state commissions fail to carry out their statutory role and must ensure that the requirements of sections 251 and 252 are met

prior to approval of a Regional Bell Operating Company's petition to provide long-distance services.

Thus, Congress distributed jurisdictional responsibility for ensuring the development of local competition between both state and federal regulatory agencies. The FCC must implement section 251's requirements, the states must review, arbitrate and approve interconnection agreements, and the federal courts are charged with judicial review of those state-approved agreements.

3. On August 8, 1996, the FCC met the six-month statutory deadline to implement the requirements of section 251 and issued its *First Report and Order*. This order provided substantial detail and guidelines for implementation of the Act's requirements. Among the regulations enacted by the FCC was the establishment of pricing guidelines for setting rates for interconnection, unbundled network elements and resale. The FCC's rules defined the basic costing and pricing methodology to be used for determining whether rates for interconnection and unbundling were "just, reasonable, and nondiscriminatory" as required by sections 251(c)(2) and 251(c)(3). Likewise, the Commission established a methodology for determining resale rates under section 251(c)(4).

The FCC also defined the "network elements" that incumbent carriers are required to unbundle pursuant to section 251(c)(3). In establishing unbundling rules, the FCC implemented regulations to ensure that incumbent carriers allow competitors to combine, or "rebundle," network elements. Specifically, the FCC held that incumbent carriers must allow competitors to combine leased elements to provide finished telecommunications services. These regulations also prohibit discriminatory behavior by the incumbent in providing access to its network as required by section

251(c)(3). The FCC ruled that in order to prevent discrimination and anticompetitive conduct by incumbent carriers, incumbents may not break apart already combined network elements before leasing them to competing local carriers. 47 C.F.R. § 51.315(b). This ensures that incumbents cannot retard competitive local entry by imposing on their competitors the cost and delay of integrating network elements that are already combined in the incumbent's own telecommunications network.

4. Petitions for judicial review of the FCC's *First Report and Order* were filed by incumbent carriers in several federal courts and consolidated and assigned by lottery to the United States Court of Appeals for the Eighth Circuit. *See* 28 U.S.C. § 2112(a)(3). These petitions challenged a number of rules, including the FCC's pricing rules and the agency's requirements with respect to rebundling and disassembly of unbundled network elements.

On July 18, 1997, the Eighth Circuit issued its decision. Without reaching the merits of the FCC's pricing rules, the court of appeals found that these rules exceeded the agency's jurisdiction on the ground that section 252 gives state commissions exclusive authority to set prices for interconnection, unbundled elements and resale. Pet. App. 11a-12a. On rehearing, the Eighth Circuit invalidated the FCC's rule 51.315(b), which it had initially left intact, holding that the Act entitles an incumbent carrier to disconnect previously combined elements. *Id.*

5. Following the Eighth Circuit's decisions, petitions for certiorari were filed by numerous parties seeking review of the judgment. Cross Petitions were filed by several opposing carriers requesting review of certain other aspects of the Eighth Circuit's ruling. This Court accepted certiorari

and consolidated all the petitions and cross petitions seeking review of the court of appeals' judgment.

SUMMARY OF THE ARGUMENT

In enacting the Telecommunications Act of 1996, Congress affirmatively sought to alter the *status quo* by establishing a "national policy framework" to accelerate the development of local telephone competition. The new regulatory scheme fashioned by Congress expressly recognizes the unique character of interconnection, unbundling and resale, and thus eschews reliance on the interstate/intrastate jurisdictional allocation traditionally used for regulation of telecommunications services.

Because the local telephone network encompasses both intrastate and interstate components that are not within the exclusive jurisdiction *either* of the FCC or state public utility commissions, the 1996 Act contemplates shared federal/state responsibility for implementing measures to open local telephone markets to competition. Thus, section 251 directs the FCC to "establish regulations" implementing the requirements for interconnection, including pricing. Section 252, on the other hand, directs state commissions to arbitrate interconnection agreements and to "determine" the prices for interconnection, unbundled network elements and resale based on the "cost" of the service. This shared responsibility over pricing is fully consistent with Congress's desire for a nationwide policy to promote competition at the local level "as quickly as possible."

The best way the local telecommunications competition envisioned by Congress can occur on a national basis is with a single definition of "cost" that is implemented uniformly for individual states and local exchange carriers nationwide. The states continue to have a substantial role in

furthering and maintaining the national policy of local competition, circumscribed by the Act's requirements and the FCC's implementing regulations.

The Eighth Circuit's decision to grant complete pricing authority to the states is based on several errors: (1) it ignores the explicit language and structure of the Act giving the FCC authority over rates; (2) it incorrectly assumes that interconnection, unbundled network elements and resale are solely "intrastate" services; (3) it improperly substitutes the Eighth Circuit's interpretation of the 1996 Act for that of the FCC, thereby ignoring this Court's rulings on deference to administrative agencies; and (4) it incorrectly applies section 2(b) of the Communications Act, 47 U.S.C. § 152(b)(1), in a manner that conflicts with the authority affirmatively granted the FCC under section 251. Because section 251 authorizes the FCC to "establish regulations" for interconnection, unbundled network elements and resale—including definitions of "just and reasonable" rates under sections 251(c)(2)-(3) and wholesale rates under section 251(c)(4)—neither section 252 nor section 2(b) is a jurisdictional barrier to promulgation by the FCC of rules defining interconnection "cost" for purposes of state "determination" of interconnection rates in arbitrations.

The Eighth Circuit properly concluded that the definitions of unbundled network elements, and the FCC's rule allowing competitors to "rebundle" network elements, fall within the Commission's statutory jurisdiction in light of the clear statutory jurisdiction for the agency to promulgate unbundling rules. However, the court of appeals erred in overturning on rehearing the provisions of the *First Report and Order* prohibiting incumbents from disassembling already combined unbundled network elements. The FCC's rule is a reasonable interpretation of the statutory language that is entitled to deference by the appellate court.

ARGUMENT

I. THE COURT OF APPEALS' DECISION IS INCONSISTENT WITH THE 1996 ACT'S MODEL OF SHARED JURISDICTIONAL AUTHORITY BETWEEN THE FCC AND STATES FOR INTERCONNECTION PRICING

The 1996 Act creates a model of regulatory jurisdiction that is specially fashioned to meet the congressional goal of a rapid transition to competitive local telecommunications under a national policy framework. Section 251 requires the FCC to "establish regulations" to "implement[ ]" the provisions governing interconnection, unbundling and resale, including the requirement that rates be "just, reasonable, and nondiscriminatory." 47 U.S.C. §§ 251(c)(2), (c)(3), (d)(1). Section 252 provides that state commissions are to "determin[e]" interconnection prices, based on the "cost" of the respective service, in resolving interconnection arbitrations. 47 U.S.C. §§ 252(d)(1), (d)(3). Congress clearly intended that both the FCC and the states would have authority over pricing issues. By allowing section 252 to supersede section 251, the Eighth Circuit rendered meaningless the affirmative "rates" provisions of the latter. The court of appeals' judgment therefore accords exclusive authority over pricing to the states in a manner that cannot be squared either with the language and structure of the Act or with the congressional objective of establishing a national policy framework to promote local telephone competition.

A. Congress Established a Unique Regulatory Structure and a National Policy Framework to Open Local Telephone Markets to Competition

In overturning key facets of the FCC's *First Report and Order*, the Eighth Circuit did not reach the substantive

merits of the FCC's pricing rules, but rather based its decision on the erroneous conclusion that the FCC lacked jurisdiction to promulgate any pricing rules. Specifically, the court held that the traditional interstate/intrastate jurisdictional allocation originally enacted in 1934, *see Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355 (1986), also applies to sections 251 and 252 of the 1996 Act. Pet. App. 22a-23a. Consequently, the Eighth Circuit failed to recognize that the language, structure and purpose of the 1996 Act create new shared federal/state regulatory responsibilities for opening local telephone markets to competition.

This dual regulatory approach is readily apparent when the statutory provisions of the Act are read as a whole. Yet, rather than discern the congressional scheme, the Eighth Circuit simply parsed certain statutory sections in isolation. The resulting decision is not only contrary to settled principles of statutory interpretation and judicial deference, but undermines the overall scheme and function of the Act.

There is no question that Congress intended to establish a new "pro-competitive, de-regulatory *national* policy framework" for the communications industry. Conf. Rep. at 1, 113 (emphasis added). Nor is there any disagreement that the central goal of the Act was to create "competition as quickly as possible." H. Rep. at 89. Thus, the Act's "major components * * * were designed to promote competition in the local telephone service market." *Reno v. ACLU*, 117 S. Ct. 2329, 2337-38 (1997). In an effort to jump start competition, Congress directed federal and state regulators to work together to implement the provisions governing access by competitors to the local telephone network. In other words, the "national policy framework" of the Act contemplates shared federal and state responsibility

for introducing competition through interconnection, unbundling and resale.

As discussed more fully in Section I.B, Congress's intent to create a shared system of federal and state responsibility for opening local markets to competition is evident when the local competition provisions of the Act are viewed as a whole.

> When interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute . . . and the objects and policy of the law, as indicated by its various provisions, and give to it such a construction as will carry into execution the will of the legislature. *Kokoszka v. Bedford*, 417 U.S. 642, 650 (1974).

The Eighth Circuit violated this well-settled principle of statutory construction by viewing the language of section 252(d) (states "determine" interconnection rates) in isolation from the balance of the 1996 Act.

As directed by the Act, the FCC "establishes regulations" necessary to implement local competition under section 251. 47 U.S.C. § 251(d)(1). Section 251 includes provisions requiring that rates be "just, reasonable, and nondiscriminatory" 47 U.S.C. §§ 251(c)(2), (c)(3). The FCC then hands off responsibility to the states, pursuant to section 252, to examine and "determin[e]" the specific rates, terms and conditions actually incorporated in individual interconnection agreements. 47 U.S.C. § 252(d). State commissions thus implement both rate and non-rate provisions of Act, in accordance with section 251 and the FCC's regulations, in the context of carrier-specific interconnection

arbitrations. Requiring compliance with FCC rules is essential to maintain a national policy framework. This dual regulatory approach allows the FCC to establish uniform national rules that ensure compliance with section 251's requirements, while permitting states to set specific prices that take into account the particular "costs" of each local area and incumbent local carrier and to approve the actual interconnection agreements.

Consequently, the Eighth Circuit's insistence on maintaining traditional intrastate/interstate jurisdictional roles thwarts the congressional goal of opening local markets to competition in a nationally consistent fashion. Granting exclusive interconnection pricing authority to the states on grounds that unbundling and interconnection are "fundamentally intrastate," Pet. App. 22a-23a, as the Eighth Circuit reasoned, in fact strips the FCC of any ability to ensure consistent, uniform application of section 251's requirements in the hundreds of interconnection agreement arbitrations supervised by state commissions. Under the Eighth Circuit's decision, the "national policy framework" and uniformity sought by Congress can only be achieved through Supreme Court review of federal section 252(e)(6) actions challenging state arbitration proceedings.[2] This highly unusual approach to statutory interpretation—in essence delegating to state regulatory commissions the ability to interpret a federal statute—cannot be assumed in the absence of some affirmative manifestation by Congress. The law is clear that state commissions are due no deference when interpreting a

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[2] *See* 47 U.S.C. § 252(e)(6)("In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate federal district court to determine whether the agreement or statement meets the requirements of section 251 and this section.").

federal statute. *E.g., Orthopaedic Hosp. v. Belshe,* 103 F.3d 1491, 1495-96 (9th Cir. 1996).

B. The Local Competition Provisions of the Act Contemplate Shared Federal/State Authority

1. Sections 251 and 252 Create a "New Model" of Jurisdictional Authority for Interconnection

Sections 251 and 252, read together, clearly establish that Congress sought to eschew the traditional intra-state/interstate jurisdictional regulatory scheme in favor of a new, shared jurisdictional model that would more rapidly permit the development of local competition on a consistent national basis. Indeed, the first line of the legislative history of section 251 makes explicit reference to a "new model" of interconnection. Conf. Rep. at 121. Consequently, and deliberately, neither section 251 nor section 252 ever refers to unbundling, interconnection or resale as either "intrastate" or "interstate," the traditional line of jurisdictional demarcation under the original 1934 Act. *See Smith v. Illinois,* 282 U.S. 133 (1930); 47 U.S.C. § 152(b)(1).

Congress chose this "new model" because the unique character of interconnection, unbundled network elements and resale defies reliance on traditional interstate/intrastate jurisdictional allocation. The same copper telephone "loops," whether made available via interconnection, unbundling or resale, will be used by competing carriers to provide both intrastate and interstate telecommunications services. Nothing in the Act limits their use; nothing requires carriers to purchase some unbundled network elements for interstate services and another set of unbundled elements for intrastate services. Instead of dividing telephone facilities and regulation along intrastate and

interstate lines, as under the 1934 Act (which limited the FCC to regulating "interstate" communications), sections 251 and 252 establish joint jurisdiction over unbundling, interconnection and resale because those services and facilities will be used on an intrastate and interstate basis.

The omission of any reference to "intrastate" or "interstate" interconnection services is significant. Under sections 251 and 252, both state and federal regulators undertake responsibilities that they could not have performed under the traditional 1934 Act regime. Thus, for example, the FCC establishes rules to implement unbundling, interconnection and resale for incumbent local exchange carriers, regardless of whether these services or facilities are used for intrastate or interstate purposes. 47 U.S.C. § 251(d). Likewise, states must approve interconnection agreements that apply to provision of services for *both* intrastate and interstate communications, 47 U.S.C. § 252(e), and must "determine" prices for both intrastate and interstate use of interconnection, unbundled network elements, and resale.

The Eighth Circuit held that state commissions enjoy exclusive jurisdiction over prices for unbundled network elements, interconnection and resale. In the court of appeals' view, the FCC lacks jurisdiction to set pricing because it assumed that interconnection is "fundamentally intrastate." Pet. App. 22a. Yet the court failed to examine the *consequences* of its assumption, namely that pricing under the Act, if left solely to state commissions, gives state commissions jurisdiction over *interstate* communications services. There is no authority anywhere in the Act or its legislative history for the proposition that states can regulate interstate services. Indeed, the Communications Act elsewhere grants the FCC exclusive jurisdiction to regulate interstate telecommunications services. And where interstate and intrastate services are inextricably mixed, as here, the courts

have long permitted FCC *preemption* of state regulatory authority. *See North Carolina Util. Comm'n v. FCC*, 552 F.2d 1036, 1045 (4th Cir. 1977)("*NCUC II*"); *accord Illinois Bell Tel. Co. v FCC*, 883 F.2d 104, 116 (D.C. Cir. 1989); *Computer & Communications Indus. Ass'n v. FCC*, 693 F.2d 198, 215-16 (D.C. Cir. 1982); *National Ass'n of Reg. Util. Comm'rs v. FCC*, 737 F.2d 1095, 1114-15 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1227 (1985). *See, e.g., North Carolina Util. Comm'n v. FCC*, 537 F.2d 787, 791-94 (4th Cir. 1976); *National Ass'n of Reg. Util. Comm'rs v. FCC*, 880 F.2d 422, 431 (D.C. Cir. 1989).

Congress's omission of any "intrastate" or "interstate" language in sections 251 and 252 was deliberate. Other provisions of the Act demonstrate that where Congress wanted to maintain the interstate and intrastate jurisdictional scheme, it did so. For instance, in the Act's provisions concerning pay-per-call services, *see* 47 U.S.C. § 228, and payphone compensation, *see* 47 U.S.C. § 276, Congress explicitly stated that the provisions would apply to all "interstate and intrastate" calls. Likewise in section 254, Congress explicitly maintained the intrastate/interstate distinction for universal service, and fashioned new regulatory rules for determinations concerning those jurisdictional parameters. *See* 47 U.S.C. § 254(f).

These differences demonstrate unequivocally that Congress could and did maintain the distinction between interstate and intrastate services where it intended such distinctions to be preserved. Congress's failure to use such traditional language in the 1996 Act's central provisions on interconnection confirms Congress's expressed intent to fashion a "new model" of shared regulatory jurisdiction. *See* Conf. Rep. at 121. The court of appeals' failure to consider the language and structure of sections 251 and 252, in context, is thus the fatal flaw in its holding that section

252(d) accords exclusive interconnection pricing to state commissions.

2. The Eighth Circuit Improperly Read Section 252's Pricing Language in Isolation from the Rest of the Statute

The court of appeals erred in failing to construe section 252's pricing language in harmony with the rest of the statute. *See Kokoszka*, 417 U.S. at 650. Looking solely at section 252, the Eighth Circuit reasoned that

> subsection 252(d) refers exclusively to the determinations by state commissions of the just and reasonable rates, and it provides statutory standards for the state commissions to follow when setting the rates, *thus negating any need for additional FCC standards or guidelines.* Pet. App. 14a (emphasis added).

Accordingly, the court held that the FCC's pricing rules supplant state commissions' ability to "establish" or "determine" rates as directed in section 252(d). Pet. App. 21a n.19. This logic is incorrect.

The Eighth Circuit's conclusion "that the Act *plainly* grants the state commissions, not the FCC, the authority to determine the rates involved in the implementation of the local competition provisions of the Act," Pet. App. 14a (emphasis added), is wrong. The court of appeals' opinion fails to address the critical issue of whether the FCC's rules prevent the state commissions from "determining" or "establishing" rates under section 252(d). The fact that "the Act directly and straightforwardly assigns to the states the authority to set prices regarding the local competition provisions of the Act in subsection 252(c)(2) and 252(d),"

Pet. App. 17a, in no way precludes the FCC from establishing a uniform federal pricing *methodology*.

The methodology set out in the FCC's *First Report and Order* effectively implements the requirements of section 251 that access to interconnection and unbundled network elements be provided "on *rates*, terms and conditions that are just reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement *and the requirements of this section and section 252*," 47 U.S.C. §§ 251(c)(2)(D), (c)(3) (emphasis added). By defining "based on cost," the FCC's rules that ensure that states make rate determinations based on a single, uniform costing methodology. *See, e.g., First Report and Order* ¶¶ 618, 625. This methodology does *not* "determine" or "establish" the actual rates, *id.* ¶ 618, but rather leaves the rate-making function to states, which are best positioned to make such fact- and record-dependent determinations.

Interpreting the 1996 Act to support this sort of bifurcated pricing jurisdiction is consistent with the common usage of the language employed by Congress. Under section 251, the FCC is required to "implement" the provisions of the Act. In contrast, under section 252, state commissions must "establish" or "determine" rates for interconnection and unbundled network elements. *First Report and Order* ¶ 618. The Eighth Circuit's reading of the statute equates "determine" with "implement," implying that Congress wanted states to define the pricing standards, as well as set actual interconnection prices, under section 252. Yet this approach turns the common meaning of the statutory language on its head.[3]

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[3] This Court has repeatedly looked to dictionary definitions where statutory ambiguities require it to discern Congress's intent. *See,*

Dictionaries define these terms very differently. *Implement* is defined as "[t]o carry into effect; fulfill; accomplish . . . [t]o provide what is needed for; supplement." FUNK & WAGNALLS STANDARD DICTIONARY 635 (1978). *Determine* is defined as "to fix conclusively or authoritatively" or "to settle or decide by choice of alternatives or possibilities" or "to fix the form, position or character of beforehand" or "to bring about as a result" or "to find out or come to a decision about by investigation, reasoning, or calculation." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 346 (1984); *accord*, FUNK & WAGNALLS STANDARD DICTIONARY 349 (1978)("to settle or decide, as an argument, question or debate. . . . to ascertain or fix, as after thought or observation. . . . to cause to reach a decision. . . . to regulate; fix or decide causally."). *Establish* is defined as "to settle or fix firmly; make stable or permanent." *Id.* at 434. Thus, the terms "determine" and "establish" both connote the setting or fixing of particular rates, or selecting actual values.[4] By authorizing the FCC to "implement" the Act's pricing provisions, Congress must therefore have intended that the agency "supplement" the bare-bones language of the

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e.g., *United States v. LaBonte*, 117 S. Ct. 1673 (1997)(Thomas, J.) (defining "maximum" sentencing guidelines); *Allied-Bruce Terminix Companies v. Dobson*, 513 U.S. 265 (1995)(Breyer, J.)(defining what "involves" and "affects" commerce); *Hubbard v. U.S.*, 514 U.S. 695 (1995)(Stevens, J.)(defining what "shows" congressional intent); *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179 (1995)(Scalia, J.)(definition of "marketing").

[4] Because it permits states to decide what the statutory "cost" standard for interconnection prices means in the context of arbitration proceedings, the Eighth Circuit's interpretation essentially equates "determine" with "define." However, *define* is a much broader term, meaning "to determine or identify the essential qualities or meaning of" or "to discover or set forth the meaning of" or "to make distinct, clear or detailed in outline." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 334 (1984); *accord* FUNK & WAGNALLS STANDARD DICTIONARY 336 (1978 ("to state the meaning of (a word or phase)").

Act's interconnection pricing standards by "providing what is needed" for states to "determine" prices, namely defining the "cost" standard of section 252(d).

This bifurcated approach to pricing also reflects Congress's desire to promote some degree of national uniformity. The statutory "standards" referred to by the Eighth Circuit are not self-executing; without regulations interpreting and defining the statutory language, the pricing standards alone are imprecise. The term "based on cost" in section 252(d)—the pricing standard for interconnection and unbundled network elements—is subject to widely disparate, and inconsistent, interpretations. In telecommunications regulation, "cost" has historically assumed many meanings, including basic methodological differences such as whether incumbent local exchange carriers should recover historical, embedded costs or forward-looking costs, and under what methodology such costs should be measured.[5] Therefore, contrary to the court of appeals' reasoning, the language of section 252(d) does not "negate" the need for FCC rules, but instead shows that without guidelines on such fundamental methodological concerns, there can be no hope of a nationally uniform framework for local telephone competition.

3. The Structure of the 1996 Act Confirms Congress's New Model of Shared Federal/State Jurisdiction

The structure of sections 251 and 252 reveals a strong and significant interrelationship. Throughout section 251,

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[5] James C. Bonbright et al., PRINCIPLES OF PUBLIC UTILITY RATES 109 (1988)("'Cost' like 'value' is a word of many meanings, with the result that people who disagree, not just on minor details but on major principles of ratemaking policy, all may subscribe to some version of the principle of service at cost.")

there are cross-references to section 252, *see, e.g.*, 47 U.S.C. §§ 251(c)(1), (c)(2)(D), (c)(3), and section 252 likewise cross-references the requirements in section 251. *See, e.g.*, 47 U.S.C. §§ 252(a)(1), (c)(1), (d)(1)-(3), (e)(2)(B), (f). For instance, unbundled network elements must be priced at "just, reasonable, and nondiscriminatory rates" that are "in accordance with . . . the requirements of section 252." 47 U.S.C. § 251(c)(3). It is clear from these cross-references that Congress intended both federal and state commissions to have a role under the local competition provisions of the Act.

Consequently, even though the mandate for states to "determine" interconnection prices in section 252(d) does not require such prices to be set "in accordance with" section 251, Pet. App. 13a-14a, it does provide that states are to "determin[e]" prices "for purposes of" section 251's "just, reasonable, and nondiscriminatory" rates requirement. 47 U.S.C. § 252(d).[6] Furthermore, section 252(c)(1) requires that states "ensure" that their interconnection arbitration decisions "meet the requirements of section 251, including the regulations prescribed by the Commission." 47 U.S.C. §

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[6] The Eighth Circuit found it significant that section 252(d) does not contain any reference to the FCC's section 251 rules. Pet App. 13a. Yet section 252(d) itself is constrained by section 252(c), which *does* contain explicit references to both section 251 and the FCC's rules. A state does not always determine the prices; if the parties to a negotiation agree on prices, the state reviews the agreement under section 252(e)(2)(A). 47 U.S.C. § 252(e)(2)(A). States only step forward to "determine" prices if the parties cannot agree and ask the state to arbitrate. Section 252(c) states that "in resolving by arbitration . . . *any* open issues . . . a State commission shall (1) ensure that such resolution and conditions meet the requirement of section 251, including the regulations prescribed by the Commission." 47 U.S.C. § 252(c)(emphasis added). "[A]ny open issues" includes pricing issues. *See* section 252(c)(2). Thus, the cross-reference in section 252(c) to the FCC's rules also applies to state determinations of "cost" under section 252(d), and state cost decisions must, accordingly, be consistent with the FCC's section 251 rules.

252(c)(1). In light of these express interrelationships between sections 251 and 252, the Court cannot infer that Congress intended to create a pricing-specific exception to the requirement that state implementation of decisions must comply with the requirements of section 251 and the FCC's rules. While Congress could have been more expansive in delineating the federal and state regulatory roles, the evident interrelationship between the two sections establishes Congress's intent that *both* federal and state agencies participate in pricing decisions, regardless of "interstate" or "intrastate" use of interconnection, unbundling, and resale.

Interpreting the statutory language of sections 251 and 252 to establish shared jurisdiction over opening local telephone markets to competition is consistent with the Congressional purpose of establishing a national communications policy framework for local competition. *See infra,* Section I.B. Competitors need to know what the rules are before rolling out service; states have experience holding hearings and conducting cost studies for telecommunications services. Thus, by permitting the FCC to set generic pricing requirements for "just and reasonable rates," while authorizing states to "determine" prices in specific arbitration proceedings, Congress efficiently allocated work to the agency best equipped to implement the 1996 Act most expeditiously.

II. THE EIGHTH CIRCUIT WAS REQUIRED TO DEFER TO THE FCC'S INTERPRETATION OF PRICING JURISDICTION UNDER THE 1996 ACT

A. The Eighth Circuit Erred in Concluding That the 1996 Act "Plainly" Leaves All Pricing Jurisdiction to the States

The 1996 Act does not expressly state precisely how jurisdiction over its pricing provisions for interconnection and unbundled elements will be allocated. The Eighth Circuit acknowledged that it must defer to agency interpretations "if they are consistent with the plain meaning of a statute or are reasonable constructions of ambiguous statutes," Pet. App. 8a (citing *Chevron USA Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-45 (1984)), but incorrectly concluded that the grant of section 251 rulemaking authority "plainly" did not extend to pricing methodologies for interconnection. Pet App. 14a. The Eighth Circuit likewise improperly found that section 251's rulemaking provisions are solely time constraints, not substantive grants of regulatory authority. Pet. App. 10a. Based on this erroneous substitution of its own statutory interpretation for that of the agency, the Eighth Circuit concluded that "the FCC exceeded its jurisdiction in promulgating the price rules regarding local telephone service." Pet. App. 9a-10a.

1. The Act's Language is Ambiguous with Regard to Jurisdiction Over Pricing

While the 1996 Act clearly sets forth that both the FCC and state commissions have a role over pricing, the Act does not plainly provide how this joint responsibility shall be implemented. Section 251 indicates an FCC role, requiring the FCC to "complete all actions necessary to establish

regulations to implement the requirements" of section 251, including the "just and reasonable rates" requirements in sections 251(c)(2) and (c)(3). 47 U.S.C. § 251(d)(1). Section 252 indicates a state role, directing states to "establish any rates for interconnection, services, or network elements." 47 U.S.C. § 252(c). But neither section provides that either the FCC or the states have *exclusive* jurisdiction for setting interconnection prices. Thus, in the absence of express language, the Court must examine the language, structure and purpose of Act to discern congressional intent, *Kokoszka*, 417 U.S. at 650, and should defer to the agency's interpretations if they are a "reasonable construction" of the statute. *Chevron*, 467 U.S. at 842-45.

2. The FCC Reasonably Interpreted the Ambiguous Statute

It is a "dominant, well-settled principle of federal law" for courts to grant "[j]udicial deference to reasonable interpretations by an agency of a statute that it administers." *National RR Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 417 (1992); *see Chevron*, 467 U.S. at 842-43. The FCC's promulgation of interconnection pricing rules is a fair reading of ambiguous statutory language. Pursuant to section 251(d)(1), the FCC was directed by Congress to "establish regulations to implement the requirements" of section 251. 47 U.S.C. § 251(d)(1). Congress did not limit the FCC's implementation authority only to particular enumerated subsections, as it could and would have if it intended the result adopted by the Eighth Circuit.

Accordingly, the grant of FCC rulemaking authority requires the FCC to promulgate regulations implementing *all* of section 251's requirements. These regulations necessarily include rules for setting "just and reasonable" rates for interconnection, unbundled network elements and resale that,

in light of the additional "cost" standard of section 252(2), meet the requirements of *both* sections 251 and 252. Indeed, section 251(c)(2)(D) states that interconnection prices must be "just, reasonable, and nondiscriminatory in accordance with . . . *the requirements of this section and section 252.*" 47 U.S.C. § 251(c)(2)(D)(emphasis added); 47 U.S.C. § 251(c)(3)(same). It would therefore have been foolhardy, and perhaps unlawful, for the FCC to define a methodology for "just and reasonable" interconnection rates without acting in harmony with the "based on cost" standard of section 252.

Section 251(d)(1), like a "necessary and proper" clause, is an affirmative grant of authority to develop rules for all of section 251, including "rates, terms, and conditions." *See* 47 U.S.C. §§ 251(c)(2), (c)(3). Contrary to the court of appeals' reasoning, the fact that the Act does not specifically state that the Commission is authorized to promulgate pricing rules, *see* Pet. App. 11a, is irrelevant; section 251 gives express authority to the FCC to promulgate *all rules* necessary to "implement" its terms consistent with section 252. This is precisely what the FCC did in setting pricing guidelines in the *First Report and Order.*

The FCC's interpretation is reasonable because Congress could not have intended that the agency be allowed to define "just and reasonable" interconnection rates in a way that conflicts with the section 252 standard that states must apply in arbitrations. Indeed, the FCC's guidelines ensure that the Act is implemented such that congressional intention, policy and objectives are fulfilled. *See Kokoszka,* 417 U.S. at 650. Had the FCC failed to refer to section 252 that could, and likely would, have led to inconsistent results. *California v. FCC*, 567 F.2d 84, 86 (D.C. Cir. 1977)(federal policy must supersede individual state policies where inconsistent state policies are likely to result.) The FCC's pricing guidelines are the only way to ensure this congressional

intent is realized. Thus, the Eighth Circuit's conclusion that "nowhere in section 251 is the FCC authorized specifically to issue rules governing the rates for interconnection, unbundled access, and resale, and the transport and termination of telecommunications traffic," Pet. App. 12a, fails to comport not only with Congress's directives to the agency in section 251, but also with the clear and uncontested congressional intent to create a uniform national policy framework for opening local markets to competition.

3. The Eighth Circuit Erred in Concluding that Section 251 Creates Only a Timing Constraint

The Eighth Circuit's jurisdictional analysis rests on a faulty reading of a key portion of section 251. The court of appeals concluded "that subsection 251(d)(1) operates primarily as a time constraint, directing the Commission to complete expeditiously its rulemaking regarding only the areas in section 251 where Congress expressly called for the FCC's involvement." Pet. App. 12a.

This conclusion is wrong for two reasons. First, section 251(d)(1) requires the FCC "within 6 months after the enactment of the [1996 Act]," to "complete all actions necessary to establish regulations to implement the requirements" of section 251, including the pricing requirements of section 251(c). 47 U.S.C. § 252(d)(1). Nothing in this language limits the provision to the procedural issue of timing alone. By its terms, section 251(d)(1) is both a six-month deadline *and* a substantive grant of authority to implement the provisions of section 251.

Second, even if section 251(d)(1) can be read as "primarily" a procedural clause, it is sufficiently ambiguous

that the Eighth Circuit should have deferred to the agency's conclusion that section 251(d)(1) is an affirmative grant of rulemaking authority.[7] *Chevron*, 467 U.S. at 843-45. The court of appeals did not (and could not) conclude that the rulemaking provision is only a timing constraint, because without the directive in section 251(d)(1), there would have been no agency obligation to promulgate regulations for the Act's non-price provisions (many of which the Eighth Circuit upheld). Furthermore, the six-month limitation can just as easily be seen as an implementation of the congressional goal to introduce local telephone competition "as quickly as possible," by requiring the FCC to rapidly fashion a "national policy framework" fleshing out the statutory language, as an implicit constraint on federal jurisdiction. Finally, in section 251, Congress *did* "expressly call[] for the Commission's involvement" in interconnection pricing. The Eighth Circuit's flawed "plain meaning" analysis begs the real question of the scope and extent of that involvement.

B. Congress Did Not Alter the Agency's General Authority To Implement Its Enabling Statute

The FCC always has enjoyed general rulemaking authority to issue rules implementing the Communications Act of 1934. Under section 201(b) of the Communications Act, the FCC has authority to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act." 47 U.S.C. § 201(b); *see*

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[7] *Chevron* deference extends to agency interpretations of jurisdictional provisions. *See EEOC v. Commercial Office Products Co.*, 486 U.S. 107, 115-16 (1988) (upholding EEOC interpretation of the jurisdictional provisions in § 706 of the Civil Rights Act of 1964 under *Chevron* standard of review).

also 47 U.S.C. §§ 154(I), 303(r); *National Broadcasting Co. v. United States,* 319 U.S. 190, 219 (1943). This authority extends to *all* of "the provisions of" the Act. 47 U.S.C. § 201(b). Thus, the Eighth Circuit's decision marks the first time that a court has held that, despite section 201(b), the FCC lacks authority to implement key substantive provisions of the federal telecommunications law.

Rather than create a wholly separate statute when it created the local competition provisions of the 1996 Act, Congress chose to amend Title II of the Communications Act. Congress could have, but did not, limit the Commission's authority under section 201(b) to implement the provisions of the Act. Thus, the provisions of the 1996 Act, as part of Title II, fall squarely within the Commission's section 201(b) rulemaking authority, giving the FCC independent authority to implement the provisions of sections 251 and 252 the Act.

Furthermore, the Eighth Circuit's interpretation would lead to administrative inefficiency. Under the court of appeals' view, the FCC cannot adopt rules to enforce a provision of the Communications Act unless the provision specifically authorizes the agency to engage in rulemaking. A section of the Communications Act with no reference to FCC rules would be enforceable only by the courts. This result, which essentially bypasses the FCC, ignores the basic function of administrative agencies under our constitutional system of separation of powers. The untoward consequence of the Eighth Circuit's reasoning is thus to throw into question hundreds of agency enabling statutes where Congress has granted general, but not section-specific, rulemaking powers, and to encourage Congress to "micro-manage" legislation that is best left to administrative agencies to interpret and apply in light of rapidly changing

real-world considerations the legislature cannot be expected to know or predict.

C. The Court of Appeals Incorrectly Applied the "Fence" of Section 2(b) to Overturn Congress's Intent

1. The Eighth Circuit Erred in Concluding That the Services at Issue Were "Intrastate" Under Section 2(b)

Section 2(b) of the Communications Act provides that "nothing in this [Act] shall be construed to apply or give the Commission jurisdiction with respect to * * * charges, classifications, practices, services, facilities or regulations for or in connection with intrastate communication service." 47 U.S.C. § 152(b). The Eighth Circuit concluded that this provision "is hog tight, horse high and bull strong," and bars the FCC from "intruding on the states' intrastate turf." Pet. App. 23a. This conclusion is erroneous.

Section 2(b)'s limitation of FCC action applies only to "intrastate" services. *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 335, 373 (1986). Ignoring the considerable federal caselaw on this point, the Eighth Circuit assumed, without record or legislative history support, that interconnection and unbundled elements are intrastate services and facilities subject to section 2(b). Pet. App. 15a. This assertion is untrue, since "[t]he same loop that connects a telephone subscriber to the local exchange necessarily connects that subscriber into the interstate network as well." *NARUC v. FCC*, 737 F.2d at 1113.[8] The court of appeals'

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[8] *Accord Public Serv. Comm'n of Maryland v. FCC*, 909 F.2d 1510, 1515 (D.C. Cir. 1990); *Public Utils. Comm'n of Texas v. FCC*, 886 F.2d 1325, 1333 (D.C. Cir. 1989); *Illinois Bell Tel. Co. v. FCC*, 883 F.2d

judgment must fail because its entire analysis is based on the faulty premise that interconnection is a traditional "local" telephone service subject to state public utility commission jurisdiction under *Smith v. Illinois*, 282 U.S. 133, 148 (1930).

The Eighth Circuit simply *assumes*, with pure *ipse dixit* reasoning, that because of the word "local" (as in "local exchange carriers"), the FCC's pricing rules must apply only to intrastate services.

> [T]he prices that incumbent local exchange carriers may charge their new competitors for interconnection, unbundled access, and resale—the service and facilities that will enable competitors to provide competing *local* telecommunications services—as well as the rates for the transport and termination of telecommunication traffic qualify as "charges . . . for or in connection with intrastate communications service." Pet. App. 15a (emphasis in original).

Yet this assumption is inappropriate for determining jurisdiction. As other courts have repeatedly held, "'the key issue[] . . . is the nature of the communications which pass through the facilities, not the physical location of the lines.'" *California v. FCC*, 567 F.2d 84, 86 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1010 (1978) (citation omitted). There are no limits on a carrier's use of interconnection, unbundled network elements and resale. In any event, there is no record substantiation for the Eighth Circuit's conclusion, and the court should not have acted as a fact-finder on this point. To the contrary, interconnection, network elements, and resale

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104, 115 (D.C. Cir. 1989).

will be used—and in fact are already being used—for both intrastate and interstate telecommunications services.

2. The Eighth Circuit Failed to Recognize the Significant Role Preserved for the States by the 1996 Act

Contrary to the Eighth Circuit's view, the shared federal/state jurisdiction scheme in the 1996 Act preserves a significant and important role for state regulatory commissions. Allowing the FCC to define costing standards for purposes of section 252(d) does not make state commissions into ministerial actors. Rather, it reflects a recognition that rate-setting determinations are complex and highly evidence-dependent. Thus, the Act places these decisions in the purview of state commissions, which have far more experience in ratemaking proceedings than the FCC. In order to make specific rate "determinations," state commissions must sift through a vast amount of cost data in order to ensure that the rates set are cost-based.

There is nothing in the FCC's rules that requires a state commission to attach a pre-ordained number to interconnection rates. Establishing a costing methodology, in this case a forward-looking pricing model, does not dictate specific interconnection, network element or resale prices for state commission adoption. For instance, the FCC's rules allow states to determine cost of capital, depreciation and other factors to "plug into" the forward-looking pricing model, because the financial state of carriers and the costs of providing service will sometimes vary from state to state.

In setting "proxy" rates, of course, the FCC actually prescribed particular rates for unbundled network elements and interconnection to be used as "default" prices if a state commission were unable to undertake the full cost analysis

necessary to determine rates within the prescribed statutory timeframe for arbitrations. *First Report and Order* ¶ 619. In this respect, the FCC overstepped its authority because it actually "established" or "determined" prices by setting actual proxy rates for use in lieu of state-determined rates. This issue is moot, however, because the proxy rates applied only where states could not adopt costing methodologies to set prices within the Act's time constraint on state-supervised interconnection arbitrations. Thus, the FCC's use of proxies is not a ground for affirming the court of appeals.

III. THE COURT OF APPEALS CORRECTLY UPHELD THE FCC'S INTERPRETATION OF THE ACT'S "REBUNDLING" PROVISIONS, BUT ON REHEARING IMPROPERLY STRUCK DOWN THE FCC'S RULE PROHIBITING DISASSEMBLY

A. The Eighth Circuit Correctly Concluded That the FCC's Rebundling Rule Complies with the Plain Meaning of the Act

It is undisputed that section 251 grants the FCC authority to promulgate federal unbundling rules. *See* 47 U.S.C. § 251(d)(1). Rather, the issue raised by incumbent carriers[9] before this Court is whether the FCC's implementation of section 251 contravenes the Act's requirement that incumbent local exchange carriers "shall provide such

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[9] Conditional Cross-Petition of Regional Bell Companies, *Ameritech Corp. v. FCC*, No. 97-1075 (question 1); Conditional Cross-Petition, *GTE v. Midwest, Inc. v. FCC*, No. 97-1087 (question 1); Conditional Cross-Petition of USWest, *US West, Inc. v. FCC*, No. 97-1099 (question 1); Conditional Cross-Petition of the Mid-Sized Local Exchange Carriers, *The Southern New England Telephone Co. v. FCC*, No. 97-1141 (question 1).

unbundled network elements *in a manner that allows* requesting carriers to combine such elements in order to provide telecommunications service." 47 U.S.C. § 251(c)(3) (emphasis added). The FCC's rule 51.315(b) allows a competing carrier to combine leased network elements to provide a full retail, or "finished," telecommunications service. *First Report and Order* ¶ 356. As the Eighth Circuit concluded, this "rebundling" rule comports with Congress's expressed intent and should be upheld. Pet. App. 54a.

1. The FCC's Rebundling Decisions Must Be Upheld In Light of the Plain Language of Section 251(c)(3)

Where a statute is clear by its language, courts will defer to an administrative agency's implementing interpretation that is consistent with the statute. *Chevron*, 467 U.S. at 842-43. Because section 251(c)(3) expressly contemplates that competing carriers may "combine" unbundled network elements leased from incumbent local carriers in order to "provide . . . telecommunications service," 47 U.S.C. § 251(c)(3), on this point the court of appeals correctly deferred to the FCC. Pet. App. 55a-56a. The agency's interpretation is compelled by the 1996 Act, while the arguments of the Cross Petitioners seek to add language that does not exist in the 1996 Act.

Nothing in the language or structure of the Act precludes the FCC's rule. Cross Petitioners each assert that competing carriers should not be permitted to offer "finished services" through leased unbundled elements without providing any facilities of their own. *See generally* US West Petition at 5-6; Ameritech Petition at 14-22. They argue that section 251(c)(3)'s requirement to provide "nondiscriminatory access to unbundled network elements at any

technically feasible point" is inconsistent with the FCC's rule, reasoning this language would become a "fiction" if no facilities are provided by the competitor. Ameritech Cross-Petition at 18; *accord* US West Petition at 5.

The crucial flaw in this argument is that section 251 merely ensures that the requested access be provided wherever a requesting carrier seeks such access so long as it is "technically feasible." 47 U.S.C. § 251(c)(3). Had Congress intended to limit competitors to unbundled elements only in conjunction with their own facilities, as Cross Petitioners insist, then Congress could, and would, have included such a restriction expressly. Congress did not, and therefore this restriction cannot be read into the text.[10]

Likewise, permitting competitors to provide finished services through combinations of leased network elements in no way obviates the distinctive entry modes established in the Act. *See supra* pp. 4-5. Cross Petitioners contend that the FCC's rule undermines the "incentive" for facilities-based entry. *See* Ameritech petition at 15; US West Petition at 4-5. Yet, despite incumbent carriers' protests, very real and substantial distinctions still exist between the use of network elements to provide telecommunications services and entry through resale, and each mode of entry retains its own advantages and disadvantages. For instance, carriers reselling incumbents' services are left offering only the services that are already provided to local customers. On the other hand, by purchasing unbundled network elements,

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[10] *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980) (holding that when Congress explicitly states its will "that language must ordinarily be regarded as conclusive"); *see also United States v. American Trucking Ass'ns*, 310 U.S. 534, 543 (1940) ("There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes.").

competitors are free to enhance or embellish the service offering, provide different service packages and distinguish their offerings from those of the incumbents to provide customers with a variety of service alternatives. As the Eighth Circuit also found, "unbundled access has several disadvantages that preserve resale as a meaningful alternative." Pet. App. 56a.

Cross Petitioners' reliance on isolated phrases in the legislative history to suggest a congressional "preference" for one form of entry over another similarly fails. *See, e.g.*, Ameritech Cross-Petition at 18-19. First, reliance on legislative history when the statutory language is clear is unnecessary and improper.[11] The statutory language is clear. Second, contrary to the incumbent carrier assertions, neither the Act nor the legislative history exhibits a congressional bias toward facilities-based competition. *See* Ameritech Cross-Petition at 18-19. Rather, Congress created several avenues for entry into the local market. As the Eighth Circuit recognized, it is not correct to presume that "the Act's exclusive goal is facilities-based competition." Pet. App. 59a. Therefore, even if the FCC's rebundling rule would suppress development of facilities-based competition, Cross Petitioners' remedy must come through a congressional amendment, not from this Court.

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[11] *See Blum v. Stenson*, 456 U.S. 886, 896 (1984) ("We look first to the statutory language and then to the legislative history if the statutory language is unclear."); *Unexcelled Chemical Corp. v. United States*, 345 U.S. 59, 63 (1953)(concluding that investigation of legislative history is improper where "the words Congress used . . . are too precise for extended argument").

2. The Cross-Petitioners Inappropriately Ask This Court to Substitute Its Judgment for That of the Expert Agency

The Cross Petitioners' principal argument for prohibiting rebundling has no basis in the statutory language. Cross Petitioners complain that rebundling elements allows competitors to "capture" their most "profitable customers without providing service more efficiently or investing one cent in competitive network facilities." Ameritech Cross-Petition at 15; *see* GTE Cross-Petition at 6. Even if true, this argument should be addressed to Congress, not the Court.

When competitors enter the market through access to network elements, the 1996 Act requires that incumbents charge prices that are "based on cost." 47 U.S.C. § 252(d)(1). Resale services are to be priced at a discount off the incumbent's retail prices that reflects the costs that will be "avoided" by the incumbent carrier. 47 U.S.C. § 252(d)(3). In the competitive market envisioned by Congress, prices for telecommunications services will be driven toward costs. Consequently, as competition develops and prices move toward cost, the retail offerings of incumbents would also move toward cost.[12] Correspondingly, as retail rates decline, wholesale rates for resale of incumbent services would likewise decline toward cost. Clearly, over time with the development of competition, these rates would converge with those paid for use of unbundled network elements. Thus, to the extent a price

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[12] Incumbents contend that movement of prices toward costs in the retail environment would undermine the policy goal of universal service. *E.g.*, Ameritech Petition at 23. However, Congress provided that the FCC address this issue separately in section 254. 47 U.S.C. § 254. Thus, any demonstrable failure of local rates to recover costs would be appropriately recovered through universal service reform.

differential persists between the use of unbundled elements and resale, that differential represents residual monopoly profits that do not reflect the true costs of service or prices that would occur in a competitive local telephone marketplace.

Without any hook to the language of the 1996 Act, the incumbent local carriers are asking this Court to substitute another policy rationale for the will of Congress. *See Tennessee Valley Auth. v. Hill,* 437 U.S. 153, 194 (1978) ("Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute."). The intent of Congress to allow rebundling of unbundled elements is unmistakable; to overturn the FCC's rule would be to allow the judiciary to rewrite section 251 in derogation of Congress's expressed goals.[13]

B. The Eighth Circuit Erred in Overturning on Rehearing the FCC's "Disassembly" Rule 51.315(b)

Section 251 requires that incumbents provide "nondiscriminatory access" to unbundled network elements "in a manner that allows requesting carriers to combine such elements in order to provide" telecommunications service. 47 U.S.C. § 251(c)(3). In promulgating rule 51.315(b), the FCC concluded that the "nondiscrimination" requirement bars incumbent carriers from pulling apart previously joined network elements for the purpose of imposing anticompetitive costs on new entrants that request access to those elements. *First Report and Order* ¶ 293; 47 C.F.R. §

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[13] *See Mobil Oil Corp. v. Higginbotham,* 436 U.S. 618, 626 (1978)("[W]e have no authority to substitute our views for those expressed by Congress in a duly enacted statute.").

51.315(b). The agency held that the ability of requesting carriers to "rebundle" elements did not preclude this requirement, since it is one "manner" in which competitors could "combine" elements. On rehearing, however, the Eighth Circuit found that the statutory language precluded the FCC's interpretation and vacated the rule. Pet. App. 52a-53a. This holding is not supported by the language of the Act and must be reversed.

First, as the FCC correctly determined, to permit incumbent carriers to break apart elements that competitors purchase would be discriminatory and anticompetitive, in contravention of the statutory requirement that incumbent local carriers must provide unbundled elements in a *nondiscriminatory manner*. The Eighth Circuit's opinion never addresses this critical statutory requirement. As the FCC found, local carriers do not pull apart network elements to provide them to their own retail operations. *See First Report and Order* ¶ 296. Rather, typically they simply provide service using the existing, combined elements. *Id.* Further, there is no technical reason to disassemble elements that will just be recombined. *Id.* Thus, the FCC's rule 51.315(b) prevents incumbents from imposing the unnecessary cost and delay on their competitors that is not imposed on its own provision of service, and is necessary to meet the statutory requirement of nondiscrimination.

Second, while section 251 clearly grants expansive access to unbundled network elements, 47 U.S.C. § 251(c)(3), the statute does *not* directly address the specific "manner" in which those elements must be provided. When implementing this requirement, as directed by section 251(d), the FCC therefore determined that section 251 requires incumbent local carriers to recombine network elements. That determination must receive deference as a reasonable interpretation of an ambiguous statute, and the

reviewing court is precluded from substituting its own policy goals for those of the FCC. *Chevron*, 467 U.S. at 843-44. The Eighth Circuit violated this well-settled precept of judicial review when it overturned the FCC's recombination rule based on its differing statutory interpretation.

The Eighth Circuit purported to rely on the plain language of section 251, stating that the Act requires competitors, not incumbents, to "combine" elements. *See* Pet. App. 53a. The statutory language does not, however, preclude competitors from "combining" elements *through the incumbent*.[14] Because the FCC's rule did not directly *conflict* with section 251, the Eighth Circuit was bound to uphold it. *Chevron*, 467 U.S. at 843-44.

Moreover, as discussed *supra*, Section II.B, the FCC has generic rulemaking authority under the Communications Act to require carriers to combine network elements, so long as such a requirement is not inconsistent with the statutory language.[15] As discussed above, this language is essential to implement the nondiscrimination requirements of the Act and does not in fact "collapse" the "careful distinctions Congress has drawn" between market entry through unbundled network elements and resale. *See supra*, pp. 4-5.

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[14] The Eighth Circuit's observation that the incumbent carriers do not wish to combine elements is irrelevant to this analysis. Pet. App. 52a-53a. By that reasoning, most of the requirements of the Act, which are aimed at breaking the incumbents' local monopoly, would be overturned. Under settled principles of judicial review, however, the court is precluded from substituting its judgment for that of the expert agency, unless the agency's rules conflict with the statutory language. *Chevron*, 467 U.S. at 842-43. No such conflict exists, and incumbent intransigence does not raise such a conflict.

[15] *See Second Computer Inquiry*, 77 F.C.C.2d 384, 442-444 (1980), *aff'd sub nom., Computer and Communications Industry Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982)(establishing unbundling requirements under its general statutory authority).

Thus, the Eighth Circuit erred in vacating the FCC's rule 51.315(b), and must be reversed.

CONCLUSION

The judgment of the court of appeals should be reversed in part as to the FCC's pricing rules and rule 51.315(b), and affirmed in part as to the FCC's "rebundling" rule.

Respectfully submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

MCI TELECOMMUNICATIONS CORPORATION,
Petitioner,
v.
IOWA UTILITIES BOARD, *et al.*,
Respondents.

ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES, *et al.*,
Petitioners,
v.
IOWA UTILITIES BOARD, *et al.*,
Respondents.

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA,
Petitioners,
v.
IOWA UTILITIES BOARD, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF RESPONDENT GST TELECOM, INC. IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

The questions presented are identified in the Briefs filed by Petitioners.

LIST OF PARTIES AND AFFILIATES

The parties to the proceedings in the Eighth Circuit are identified in the Briefs filed by Petitioners.

Pursuant to Supreme Court Rule 29.6, Respondent states as follows:

GST Telecom, Inc., is wholly owned by GST USA, Inc., which is wholly owned by GST Telecommunications, Inc., a publicly held Canadian Corporation, whose common stock is traded over the American and Toronto Stock Exchanges.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

Nos. 97-829, 97-830, 97-831

MCI TELECOMMUNICATIONS CORPORATION,
Petitioner,

v.

IOWA UTILITIES BOARD, *et al.*,
Respondents.

ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES, *et al.*,
Petitioners,

v.

IOWA UTILITIES BOARD, *et al.*,
Respondents.

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA,
Petitioners,

v.

IOWA UTILITIES BOARD, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF RESPONDENT GST TELECOM, INC. IN SUPPORT OF PETITIONERS

Respondent GST Telecom, Inc., respectfully submits this Brief in Support of Petitioners.

OPINIONS BELOW

The opinions below are identified in the Briefs filed by Petitioners. They are reproduced in the Petitioners' Appendix.[1]

JURISDICTION

The basis for this Court's jurisdiction is set forth in the Briefs filed by Petitioners.

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are identified in the Briefs filed by Petitioners. They are reproduced in the Petitioners' Appendix.

STATEMENT OF THE CASE

Respondent GST Telecom, Inc. (GST), vigorously supports the various petitioners, especially the Federal Communications Commission (FCC), who have requested that this Court undo the Eighth Circuit Court of Appeals' policy foray into the joyously dynamic and utterly technical world of competitive telecommunications. In essence, the Court of Appeals stepped into the vortex of telecommunications reform set into motion by the Telecommunications Act of 1996 (Act), Pub. L. No. 104-104, 110 Stat. 56, and, seizing upon disparate statutory elements that might have appeared comfortably traditional, apparently engaged in an act of interpretation without regard to

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[1] Petitioners' Appendix (hereinafter "Pet. App.") refers to the appendix to the petition for a writ of certiorari in *AT&T Corp., et al. v. Iowa Utilities Board, et al.*, Docket No. 97-826, which seeks review of the same judgment as Petitions for Writ of Certiorari filed by Petitioners Association for Local Telecommunications Services, *et al.*; MCI Telecommunications, Inc.; and Federal Communications Commission and United States of America, and which has been adopted by said petitioners.

the 1996 Act's design as a whole. Unfortunately, the Court of Appeals failed to recognize that this heavily brokered body of reform legislation more closely compares to a grand mosaic where the whole masterfully exceeds the sum of its parts.[2] *Iowa Utilities Board v. FCC*, 120 F.3d 753 (8th Cir. 1997).[3]

Consistent with Congress's general desire to "encourage the rapid deployment of new telecommunications technologies" and "secure lower prices and higher quality services for American telecommunications consumers," 110 Stat. 56, 56 (1996), the overall legislation constitutes a comprehensive plan for displacing local telephone monopolies with competition and choice. Without a doubt, the legislation also constitutes a no-nonsense approach to catapulting a new class of telecommunications providers—competitive local exchange carriers (CLECs)—into the local exchange marketplace. Thus, Congress dramatically altered the national telecommunications landscape when it redefined the status quo through four key provisions that ended more than six decades of the old guard's co-dependence on captive rate-payers in the non-competitive local exchange environment.

The Act's key provisions (1) conferred explicit authority on the FCC to complete all actions necessary to establish regulations that would govern interconnection agreements between incumbent local exchange carriers (ILECs) and CLECs; (2) established a procedural

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[2] Indeed, in an *amici* filing submitted to the Court of Appeals to counterbalance a prior *amici* filing by four members of the House, six members of the House and Senate confirmed that "the Act was the product of many successful compromises among a variety of competing views and interests, and reflects the customary give and take of the legislative process." Brief of Amici Curiae Bliley, *et al.* at 3, *Iowa Utilities Board v. FCC*, 120 F.3d 753 (8th Cir. 1997) (No. 96-3321). Excerpts of the Brief have been lodged with the Court.

[3] The text of the Court of Appeals' decision has been submitted to the Court in Pet. App. at 1a-67a.

framework requiring state public utility commissions (PUCs) to arbitrate failed interconnection negotiations between ILECs and potential competitors; (3) conferred jurisdiction on the FCC to preempt enforcement of any legal requirement that would interfere with the ability of any telecommunications service provider to provide any interstate or intrastate telecommunications service; and (4) established a basis for permitting the Bell operating companies (BOCs)—who presently qualify as the nation's preeminent ILECs—to petition the FCC for authority to provide long distance telephone services. *See generally* 47 U.S.C. §§ 251, 251(d)(1), 252, 253, and 271.

As the FCC and the other various petitioners have demonstrated, the Court of Appeals—at the behest of a consortium of ILECs and state PUCs—invalidated a number of central rules the FCC adopted pursuant to its congressional mandate to establish implementation regulations governing interconnection. Looking backwards to pre-Act rulings governed by the question of whether telephone service amounted to interstate or intrastate service, the Court of Appeals was somehow persuaded that the FCC's pricing methodology governing interconnection qualified as purely intrastate regulation beyond the FCC's jurisdiction limits.[4] (Pet. App. at 8a-24a.) In another surprising instance, the Court of Appeals substituted its policy judgment for the FCC in vacating the so-called "pick and choose" rule, which entitled CLECs to select the more favorable terms an ILEC may have extended to other parties in prior interconnection agreements. (Pet. App. at 24a-27a.) Finally, on rehearing, the Court of Appeals vacated an FCC rule that prohibited ILECs from

[4] Prior to the Act, the notion of FCC interstate jurisdiction related to long distance toll traffic that crossed state lines, while intrastate jurisdiction applied to in-state long distance toll traffic and local exchange service. On its face, the Act has blurred this "traditional" jurisdictional dividing line into extinction, as it expressly places the FCC at the helm of establishing interconnection rules to implement local exchange competition.

separating preexisting combined network elements. (Pet. App. at 70a-71a.) As a result of this most recent ruling, competitors providing service through purchased combinations of an ILEC's unbundled network elements can no longer obtain these elements on a less costly combined basis.

To avoid belaboring this Court with overly redundant briefings, respondent GST adopts and incorporates by reference the citations, arguments, and statutory and case analyses submitted by the FCC and the various other petitioners. GST's briefing aims to support and supplement the petitioners' compelling filings with a ground-level CLEC perspective as to what the Act means and why the Court of Appeals (1) erred in determining the FCC exceeded its jurisdictional limits in establishing a pricing methodology governing interconnection; and (2) abused its discretion in vacating the FCC's pick and choose rule, which falls within the ambit of both congressional intent and the plain language of § 252(i).[5] 47 U.S.C. 252(i).

SUMMARY OF ARGUMENT

The Court of Appeals erred in holding that the FCC exceeded its jurisdiction in establishing pricing principles relating to interconnection, as the plain language of sections 251(c)(2) and 251(c)(3), when read *in pari materia*

[5] Conducting business as a CLEC throughout the Western United States and Hawaii, GST has relied upon the dictates of the Act to deploy local exchange switches and fiber optic networks in states ranging from Idaho, to New Mexico, to California, to Hawaii, and in cities from Boise and Spokane, to Tucson and Honolulu, to name but a few. More significantly, GST epitomizes what the future of telecommunications is all about as it integrates a full panoply of services into a "one-stop shop," where consumers obtain their local, long distance, and data services from the same carrier over the same network facilities. CLECs like GST, however, still require dominant carriers to provide reasonably priced, nondiscriminatory interconnection and unbundled network elements, so GST's customers can place telephone calls to customers who subscribe to competing carriers.

with section 251(d)(1), compels the FCC to adopt such pricing standards. *See* 47 U.S.C. §§ 251(c)(2), 251 (c)(3), and 251(d)(1). In essence, the plain language of section 251(d)(1) unambiguously empowers the FCC to complete "all actions necessary to establish regulations to implement" section 251, which features express requirements relating to pricing at sections 251(c)(2) and 251 (c)(3). Section 251—and the panoply of FCC interconnection regulations it anticipates—easily qualify as the heart of the Act. Thus, in adopting a pricing methodology to prevent the former monopolists from imposing unreasonable costs for interconnection, the FCC complied with the dictates of the Act and fulfilled congressional intent.

To reach its erroneous conclusion, the Court of Appeals, looking backward to pre-Act "tradition" that limited FCC jurisdiction to interstate toll traffic, failed to apprehend that the Act, in its totality, constitutes a comprehensive paradigm shift that renders the former interstate-intrastate dichotomy meaningless. Indeed, as a body of reform legislation calculated to integrate regulated local exchange monopolists into unregulated local markets, the Act codifies the interconnection process as a matter of national law and policy. In misapprehending the breadth and purpose of this ground-breaking statutory design, the Court of Appeals erred as a matter of law in limiting the FCC's jurisdiction on the issue of pricing principles.

Finally, the Court of Appeals abused its discretion when it vacated the FCC's "pick and choose" rule, which, as a matter of the FCC's informed policy judgment, permitted new entrants to obtain "any interconnection, service, or network element provided under an [existing] agreement" without having to accept all other terms of such an agreement. *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* 11 FCC Rcd. 15,499 (1996) (First Report and Order), Pet. App. at 261a-268a. Such a rule would have impeded the ILECs' tendency to discriminate against new entrants in the pricing of facilities—especially where the new en-

trants stand at the mercy of the ILECs' bottleneck control and superior bargaining power. The Court of Appeals should have given deference to the FCC's greater contextual experience in adopting such a rule, which was also consistent with the congressional intent expressed at section 252(i).

ARGUMENT

I. THE COURT OF APPEALS ERRED AS A MATTER OF LAW IN DETERMINING THAT THE FCC EXCEEDED ITS JURISDICTIONAL LIMITS IN ESTABLISHING A PRICING METHODOLOGY TO CALCULATE THE COSTS INCUMBENT CARRIERS INCUR IN OPENING THEIR FACILITIES TO COMPETITORS.

A. The Court of Appeals Erred in Favoring Pre-Act Section 2(b)(1) Over a Comprehensive Array of Interconnection Provisions That Plainly Empower the FCC To Establish Pricing Principles Relating to Interconnection Under the Act.

First and foremost, the Court of Appeals' opinion frustrates section 251's fundamental purpose of advancing the Act's goals. Section 251—as a matter of federal law—establishes a mandatory duty requiring the ILECs to (1) provide competing carriers with nondiscriminatory network interconnection; (2) provide unbundled network elements at just, reasonable, and nondiscriminatory prices; and (3) resell services to other carriers at wholesale rates on a nondiscriminatory basis. *See generally* 47 U.S.C. §§ 251(c)(2), 251(c)(3), and 251(c)(4). Even more significantly, section 251(d)(1) directs the FCC to "complete all actions necessary to establish regulations to implement the requirements" of section 251 within six months of enactment.

The plain language of section 251(d)(1), in particular, gives rise to three critical policy inferences germane to this case. First, this provision imposes a no-nonsense, six-

month time line that confirms Congress's commitment to bring about network interconnection among competing carriers on a fast-track basis. For all intents and purposes, Congress ordered the FCC to embark upon an all-out, light-speed mission to promulgate a sweeping body of revolutionary regulations grounded in technical requirements and antitrust considerations.[6] Secondly, in commissioning the FCC, a federal agency, to promulgate the interconnection rules, Congress ordained that interconnection in the local exchange constitutes a matter of compelling national interest.

Finally, and most pertinent of all, the plain language of section 251(d)(1) unambiguously establishes the FCC as *the* regulatory body broadly empowered to complete "all actions necessary" to establish the regulations envisioned under section 251, including, presumably, the express requirements set forth at sections 251(c)(2) and 251(c)(3). Among other things, these subsections require that the ILECs provide interconnection and unbundled network elements "on rates, terms, and conditions that are just, reasonable and nondiscriminatory"—especially as they relate to the requirements set forth in sections 251 *and* 252. Thus, the Court of Appeals should not have held that the FCC exceeded its jurisdiction in establishing pricing principles relating to interconnection, as the plain language of sections 251(c)(2) and 251(c)(3), when read in conjunction with section 251(d)(1), compels the FCC to adopt such pricing standards.

For any new CLEC having to contend with unyielding ILECs and uncertain state PUCs, section 251(d)(1) presents distinctively straightforward policy implications that help to explain why Congress looked to the FCC to establish the Act's interconnection rules. Aside from its obvi-

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[6] The six-month deadline also signaled the ILECs not to slow roll or otherwise retard the work of the FCC, which, in a monumental display of government alacrity and efficiency, rose to the occasion in enlightened and decisive fashion. *See* First Report and Order, Pet. App. 131a-337a.

ous goal of achieving national coherence and uniformity—thereby avoiding regulatory fragmentation—in the interconnection process, the overall legislation diplomatically takes into account the likely reality that, in the wake of the Act, too many state PUCs would face capability issues that would retard the process. As it turned out, following enactment, many state PUCs found themselves underbudgeted, understaffed, uncertain and even unwilling to contend with the paradigm shift wrought by the Act.[7] Others made their way to the Court of Appeals to defend both their "turf" and a largely meaningless pre-Act intrastate "tradition" that no longer prevails in the post-Act era of federally imposed local competition—to say nothing of integrated telephony service providers.

Significantly, by its plain terms, the Act authorizes the FCC to preempt any state access or interconnection order that is inconsistent with section 251 or substantially prevents section 251's implementation. In this regard, the Act establishes a minimum federal standard relating to interconnection-related issues, which dovetails with the FCC's jurisdiction and its authority under the Act to preempt any state or local law or rule that imposes a requirement that may prohibit or have the effect of prohibiting the ability of any entity to provide interstate *or* intrastate telecommunications service. 47 U.S.C. §§ 251(d)(3),

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[7] After more than two years since enactment, some state PUCs have only fairly recently opened cost dockets relating to pricing and interconnection issues. Though such regulatory delays hardly qualify as extraordinary in a context accustomed to monopoly precepts, they are frustrating to investors and murderous to the business case of competitive companies. The Act as a whole, however, contains critical short-term deadlines, demonstrating that Congress meant business in tearing down the time barriers to entry that might impede competitive intrastate telecommunications service. Thus, instead of leaving the job to 50 state PUCs of varying degrees of commitment and ability to wrangle with it, Congress assigned the fast-track interconnection rule-making to the single federal agency with the expertise and wherewithal to ensure timely compliance.

253(a) and 253(d). Again, taken as a whole, the plain language of the Act underscores the FCC's agency expertise and broad powers to construe and implement the Act's interconnection requirements—whether they relate to interconnection pricing policies or to conditions surrounding unbundled access—and to construe and preempt legal and economic barriers to entry.

Despite the Act's comprehensive plan to bring about competition, compel interconnection, and expand the FCC's inherent antitrust role in integrating former regulated monopolists into unregulated local markets, the Court of Appeals resorted to traditional principles of public utility regulation to limit the FCC's jurisdictional authority under the Act. That is, the Court of Appeals looked to section 2(b)(1), a holdover provision from the Communications Act of 1934. Adopted 64 years ago when local exchange telecommunications was considered a natural monopoly, section 2(b)(1) generally precludes the FCC from asserting jurisdiction with respect to "charges" or "regulations" for or in connection with intrastate communication service. Even though the 1996 Act expressly and unambiguously empowers the FCC to compel interconnection and the offering of unbundled network elements "on rates, terms, and conditions that are just, reasonable, and nondiscriminatory," the Court of Appeals determined that the FCC could not exercise this authority unless Congress expressly overrode or modified section 2(b)(1) as it related to limiting the FCC's intrastate authority. *See generally* 47 U.S.C. §§ 2(b)(1), 251(c)(2)(D), 251(c)(3), and 251(d)(1); and *Iowa Utilities Board v. FCC*, Pet. App. at 16a-17a. The Court of Appeals then unreasonably concluded that "the Act does not demonstrate an unambiguous grant of intrastate authority to the FCC." Pet. App. at 17a.

Even if the interconnection requirements that are the subject of the FCC Orders were purely intrastate in character—which Petitioners have persuasively shown they are not—the Court of Appeals' reliance on section 2(b)(1)

would still be misplaced. Given that section 251 expressly empowers the FCC to "complete all actions necessary to establish regulations to implement the requirements" of section 251, and the very same section 251 expressly mandates that ILECs provide interconnection and access to unbundled network elements "on rates, terms, and conditions that are just, reasonable and nondiscriminatory," the Court of Appeals erred in ignoring plain language that empowers the FCC to promulgate pricing principles governing the interconnection process.

B. The Court of Appeals Failed To Apprehend That the Act Dramatically Redefined the States' Role in Implementing Interconnection.

While the Act at section 251 places the FCC in the central role of fashioning federal regulations and enforcing congressional intent as it relates to interconnection in both the interstate *and* intrastate contexts, Congress also saw fit to transform dramatically the role of the state PUCs. Under the old monopoly paradigm, the state PUCs served as public interest watchdogs ensuring that the ILECs spent their money prudently and enjoyed a reasonable and fair rate of return. Thus, in subjecting the monopolists to cost justification and analyzing their requests for rate increases, the state PUCs sought to keep the ILECs solvent while at the same time protecting consumers from unreasonable pricing. Over the years, under the auspices of federal regulations that established elaborate accounting procedures and cost allocation methods, the whole system evolved into a complex game of cat and mouse where the ILECs inundated state regulators with reams of accounting data and an onslaught of "expert" testimony that promoted intricate and outcome-determinative methodologies for computing the desired result. One way or another, either the consumer or the taxpayer paid for this costly exercise, while the reviewing courts astutely left the whole mess to the regulators to set pricing policies and cross-examine the numbers.

Under the Act, however, the state PUCs now preside over the procedural framework that subjects the ILECs to an arbitration process if the parties fail to reach an interconnection agreement within less than six months of initiating interconnection negotiations. 47 U.S.C. § 252(b). Still serving as public interest watchdogs, the state PUCs must now ensure that the ILECs, who enjoy lopsided bargaining power and control the local loops, do not engage in anticompetitive behavior and abuse their bottleneck control over the local exchange market.[8] As the FCC rightly contended in its petition for certiorari, the Act has linked the FCC and state PUCs in "concurrent and complementary pricing roles in fostering competition in local telephone markets," FCC Pet. at 15. In this relationship, the state PUCs must consider specific facts and issues presented for arbitration, and ensure that, in resolving any open issues and imposing conditions upon the parties to the agreement, "such resolution and conditions meet the requirements of section 251, *including the regulations prescribed by the [FCC] pursuant to section 251.*" 47 U.S.C. § 252(c)(1) (emphasis added). Thus, as the other petitioners aptly argued to the Court of Appeals, the FCC and the state PUCs share significant collaborative partnership responsibilities in achieving the Act's goals—with the FCC establishing the overall principles that the state PUCs must apply to ensure that ILEC rates are "just, reasonable, and nondiscriminatory."

Accordingly, the Court of Appeals had no basis to limit the FCC's jurisdictional authority to fashion rules relating to the interconnection process, and should have rejected the jurisdictional issue as an unfounded collateral attack on substantive and well-grounded telecommunications policy that was squarely within both the mandate of the Act and the ambit of the agency's expertise. By convincing the Court of Appeals that the FCC's "pricing" policies jurisdictionally belonged on the "traditional" side of the

[8] "Local loop" refers to the wires that extend from the carrier's switch to the customer's telephone.

intrastate equation, the ILECs and state PUCs effectively blocked the FCC from implementing interconnection and unbundling rates based on a forward-looking cost standard that represented the most just, reasonable and nondiscriminatory basis for developing competitive markets consistent with the purposes of the Act in general, and section 251 in particular.

Even more disconcertingly, if the Eighth Circuit's decision is allowed to stand, the ILECs will have opened the door to the historical abuses associated with playing the numbers and advocating stacked methodologies that will support the recovery of their "embedded costs"—in each and every state PUC. Many state PUCs have already adopted the FCC's forward-looking cost approach, and others will be expected to follow, but the issue will not go away, bringing about more delays and endless litigation. Thus, while the Court of Appeals may have viewed the case presented as a turf battle, its erroneous decision derailed a substantive interconnection policy, thereby impeding the Act's momentum and the nation's prospects for effective long-term competition.

C. The Court of Appeals' Erroneous Decision Undermines the Balance of Interests That Congress Established To Ensure a Rapid Transition to Competition.

To be sure, as part of the compromise process that surrounded the give and take of the Act's legislative genesis, the BOCs, who dominate the nation's local exchange service areas, hardly walked away from the table with hat in hand expressing melancholy regrets of Paradise Lost. To the contrary, in exchange for their cooperation in opening long-established networks and local loops to potential competitors, the Act allows the BOCs to enter the lucrative long distance business upon demonstrating compliance with the Act's competitive checklist at section 271(c)(2)(A). Given the BOCs' long-standing dominance in the local exchange market, generations of loyal local service customers will be expected to sign on as

BOC long distance customers as well, giving the BOCs an extraordinary incentive to slow roll any CLEC desiring both interconnection and a running start in developing market share. This provision warrants mention and the Court's consideration for two compelling reasons: first, given that the Act sets the stage for the integration of local and long distance services through the nation's dominant carrier facilities, it dispels any lingering doubt on the question of whether the Court of Appeals erred in hanging its hat on pre-Act notions of intrastate turf; second, it reinforces, once again, the time-sensitive exigencies structured into the Act and demonstrates why Congress was uncompromising in giving the FCC broad powers to get the job done.

II. THE COURT OF APPEALS ABUSED ITS DISCRETION IN VACATING THE FCC'S "PICK AND CHOOSE" RULE, AND ALSO FRUSTRATED CONGRESSIONAL INTENT EMBODIED IN THE PLAIN LANGUAGE OF SECTION 252(i).

Finally, in throwing out the FCC's "pick and choose" rule, the Court of Appeals, responding to what it perceived as the probable carrier behavior in negotiating interconnection agreements, simply substituted its own uninformed policy judgment for Congress's due deliberation. Section 252(i) provided the FCC with the statutory basis to establish a requirement permitting CLECs to select the more favorable terms an ILEC has extended to other parties in prior interconnection agreements, but—remarkably—the Court of Appeals concerned itself with whether such an approach would "discourage the give-and-take process that is essential to successful negotiations." Pet. App. at 26a.

Section 252(i), however, plainly requires the ILECs to "make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and con-

ditions as those provided in the agreement." 47 U.S.C. § 252(i). Petitioners have cogently explained why the Court of Appeals' interpretation constitutes a patent violation of the doctrines established by this Court in *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984). From a CLEC perspective, given the ILECs' superior bargaining power, bottleneck control, and consistent tendency to discriminate against new entrants, the FCC reasonably construed section 252(i) to give new entrants the right to obtain "any interconnection, service, or network element provided under an [existing] agreement" without having to accept all other terms of such an agreement. Pet. App. at 261a-268a. Moreover, in a legislative discussion of an earlier version of section 252(i), Congress confirmed that such a requirement was, among other things, necessary to "prevent discrimination among carriers." *See* S. Rep. No. 104-23 at 21-22 (1995). Thus, to the extent that the Court of Appeals' view rests on the assumption that ILECs negotiate fairly, it reflects contextual inexperience at odds with congressional intent, the FCC's agency expertise, and this CLEC's day-to-day reality in contending with the ILECs' friendly but ponderous foot-dragging in providing interconnection—which, given their motive to delay competition, they have raised to the level of performance art.

More problematically, in vacating the "pick and choose" rule, the Court of Appeals not only abused its discretion, but undermined the FCC's inherent antitrust role in integrating former regulated monopolists into unregulated local markets.

CONCLUSION

For the reasons stated, Respondent GST Telecom, Inc., requests that this Court reverse the Eighth Circuit Court of Appeals on the issues presented by Petitioners MCI Telecommunications Corporation; the Association for Local Telecommunications Services, *et al.*; and the Federal Communications Commission and United States of America.

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Petitioners,

v.

CALIFORNIA, *et al.*,
Respondents.

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United States Court of Appeals
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QUESTIONS PRESENTED

The Telecommunications Act of 1996 was enacted to "shift monopoly [local telephone] markets to competition as quickly as possible." To that end, it adopts new federal requirements that allow new entrants to use essential facilities and services that are controlled by the incumbent local monopolists. This case concerns the authority of the Federal Communications Commission ("FCC") over these new requirements of the Communications Act, and the substantive validity of two regulations that the FCC has determined are crucial to opening local markets to competition. The questions presented are:

1. Whether, despite the explicit grants of authority to the FCC, the Eighth Circuit correctly held that the FCC has no "jurisdiction" either to enforce or to adopt regulations to implement myriad new federal requirements of the Communications Act, that the pricing and some non-pricing requirements of the Act are within the exclusive jurisdiction of state utility commissions to implement, and that the FCC's authority over the remaining non-pricing requirements is limited to adopting narrow interpretative rules?

2. Whether, despite the FCC's undisputed findings that the rule is essential to local competition and supported by the ordinary meaning of the terms of the Act, the Eighth Circuit lawfully invalidated the FCC regulation that allows new entrants to obtain and use existing combinations of network elements and that precludes incumbent monopolists from breaking those elements apart in order to impose additional costs and service outages on their competitors?

3. Whether, despite its acknowledgment that the rule is supported by the Act's terms, the Eighth Circuit lawfully invalidated the FCC's most-favored-nation rule on the basis of its "belief" that the FCC was wrong in holding that the rule would better foster negotiations and more effectively promote the Act's goals?

LIST OF PARTIES AND AFFILIATES

The parties to the proceedings in the Eighth Circuit are listed in the captions of the decisions below, see Petitioners' Appendix A, 1a-4a; Appendix D, 73a-79a, and in Appendix E of the Petitioners' Appendix.

Pursuant to Supreme Court Rule 29.6, petitioners state as follows:

ACC Corporation has no parent company. It has a subsidiary, ACC TelEnterprises, Ltd., which has issued stock to the public.

AT&T Corp. has no parent company. It has an equity interest in the following publicly traded companies:

LIN Television Corporation;
American Mobile Satellite Corporation;
PriCellular, Inc.;
Novell, Inc.;
Lanser Wireless Inc. (Canada); and
SmartTone Telecommunications Holdings Ltd. (Hong Kong).

AT&T owns an interest in the following non-publicly traded company, which has public debt outstanding:

AT&T Credit Holdings, Inc.

America's Carriers Telecommunications Association ("ACTA") is a national association with over 200 members, the core membership of which is comprised of small to mid-sized telecommunications carriers providing competitive long distance services on a regional and national basis. ACTA has not issued shares or debt securities to the public. ACTA does not have

any parent companies, subsidiaries or affiliates that have issued shares or debt securities to the public.

Competitive Telecommunications Association ("CompTel") is an industry association representing the nation's competitive telecommunications carriers, with over 200 members. CompTel has not issued securities to the public, and it does not have any publicly-owned parents, subsidiaries, or affiliates.

Excel Telecommunications, Inc. ("Excel") is a wholly owned subsidiary of Excel Telephone, Inc. which, in turn, is wholly owned by Excel Communications, Inc., a publicly traded company. Excel has no non-wholly owned subsidiaries.

General Communications, Inc. ("GCI") is a publicly traded corporation. GCI, Inc., a wholly owned subsidiary of GCI, is an issuer of publicly traded debt securities. MCI owns 19.3% of the equity of GCI and Kearns-Tribune, Corporation owns 0.9% of the equity of GCI.

Sprint Corporation has no parent companies. Its only nonwholly owned subsidiary is Central Telephone Company (which in turn has wholly owned subsidiaries).

Telecommunications Resellers Association ("TRA") is an incorporated trade association representing over 650 resale carriers and their underlying product and service providers. TRA has no parent companies or subsidiaries.

WorldCom, Inc. ("WorldCom"), a Georgia corporation, is organized for the purpose of engaging in telecommunications and related businesses. WorldCom common stock is traded on The Nasdaq National Market ("NASDAQ") under the symbol "WCOM," and its depositary shares also are traded on NASDAQ under the symbol "WCOMP." On January 29, 1998, WorldCom completed the acquisition by merger of Brooks

Fiber Properties, Inc. (former NASDAQ: BFPT). On January 31, 1998, WorldCom completed the acquisition by merger of CompuServe Corp. (former NASDAQ: CSRV), and its acquisition of ANS Communications, formerly a wholly-owned subsidiary of America Online Inc. (NYSE: AOL). On November 10, 1997, WorldCom announced a definitive agreement to merge with MCI Communications Corp., a publicly held corporation (NASDAQ: MCIC). The two companies expect the merger to close sometime in mid-1998. As of April 3, 1998, WorldCom has no parent companies, subsidiaries, or affiliates that issue shares or debt securities to the public.

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The initial opinion of the Eighth Circuit reviewing the FCC's *First Report* is reported at 120 F.3d 753 (Pet. App. 1a) and the opinion granting in part and denying in part the petitions for rehearing (Pet. App. 69a) is reported at 120 F.3d 820. The opinion of the Eighth Circuit reviewing the FCC's *Second Report* (Pet. App. 73a) is reported at 124 F.3d 934. The FCC's *First Report* and its *Second Report* in its local competition rulemaking are reported at 11 F.C.C.R. 15499 (1996) and 11 F.C.C.R. 19392 (1996) and reproduced at Pet. App. 131a-353a and the Joint Appendix (J.A. 13-223).

JURISDICTION

The Eighth Circuit's order granting in part and denying in part petitions for rehearing of its decision on the FCC's *First Report* was entered on October 14, 1997. The Eighth Circuit's decision on the FCC's *Second Report* was entered on August 22, 1997. AT&T Corp. filed its petition for a writ of certiorari on November 17, 1997. This Court granted the petitions and cross-petitions filed by AT&T and others on January 26, 1998. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are 47 U.S.C. §§ 151, 152, 154(i), 160, 201, 208, 251-261, 303(r) (Pet. App. 93a-130a), and § 271 (reproduced in the appendix to this brief).

STATEMENT OF THE CASE

This case arises under the provisions of Title II of the Communications Act (47 U.S.C. §§ 251-276) that were enacted in the landmark Telecommunications Act of 1996. Pub. L. No. 104-104, 110 Stat. 56 (1996). These new federal requirements are intended to promote competition in "all telecommunications

markets"[1] primarily by "shift[ing] monopoly [local telephone] markets to competition as quickly as possible."[2] 47 U.S.C. §§ 251-62. In this regard, the 1996 Act made one radical and fundamental change in state and federal authority over telecommunications: it invalidates the state law prohibitions on competing local intrastate services that alone had previously prevented the Federal Communications Commission ("FCC") and federal antitrust authorities from opening local markets to competition. *Id.* § 253. Correlatively, the Act establishes new mechanisms to allow the States to advance the policy of "universal service" that had provided the only legitimate reason for their earlier legal entry barriers. *Id.* § 254.

However, the questions in this case arise under other sections of the Act: the provisions of §§ 251 and 252 in which Congress took additional steps to assure that new local service providers could rapidly acquire the capabilities that they need to offer services in competition with the monopoly of an incumbent local exchange carrier ("LEC"). These provisions allow new entrants to obtain essential facilities that a LEC controls under rates, terms, and conditions that are nondiscriminatory and cost-based, and to use the facilities to provide the competing services that § 253 authorizes. To implement §§ 251 and 252, the FCC adopted rules that would do no more than enable new entrants to use a LEC's essential facilities at the same economic cost, and other terms and conditions, that the LEC itself enjoys.

In the decisions before the Court, the Eighth Circuit vacated a number of these rules. First, it held that the FCC lacks jurisdiction over the Act's pricing requirements that are the single most important determinant of whether local competition

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[1] Joint Explanatory Statement of the Comm. of Conference, H.R. Conf. Rep. No. 104-458 at 113 (1996), reprinted in 1996 U.S.C.C.A.N. 124, 124.

[2] H.R. Rep. No. 104-204, at 89 (1995), 1996 U.S.C.C.A.N. 10, 55.

can develop as well as over certain non-pricing requirements.

Second, in those areas where the Eighth Circuit upheld the FCC's jurisdiction, it vacated FCC rules that give effect to the Act's explicit requirements and that are essential to the creation of the competition that Congress intended. Foremost, the Eighth Circuit vacated the FCC rule that implemented the requirement of "nondiscriminatory access to network elements on an unbundled basis" by allowing new entrants to obtain network elements in the same combined forms that the LECs provide them to themselves. This decision has led LECs to insist on a right to rip out existing physical connections among elements, thereby preventing the only form of local exchange competition that is today feasible on a widespread basis. The Eighth Circuit also vacated a rule that merely requires LECs to provide all new entrants with elements on the same terms.

As explained in detail below, these holdings are contrary to the Act's terms, structure, and purposes. However, the Eighth Circuit's jurisdictional and nonjurisdictional holdings also rest on a pervasive misunderstanding of the regulatory background against which the 1996 Act was passed and of how this Act did and did not change the law. In particular, the Eighth Circuit has interpreted the 1996 Act amendments to the Communications Act to (1) deny the FCC the jurisdiction over local exchange facilities that it already had under the Act's other provisions and (2) permit the discrimination against providers of interstate or intrastate services that was prohibited under the prior FCC regulations and federal antitrust decrees that § 251(g) requires the FCC to enforce until it adopts "supersed[ing]" regulations.

1. Local Telephone Service And The FCC And State Regulation Of It Prior To The 1996 Act.

Local telephone service is provided through a network that contains seven types of facilities or "network elements" that are

connected to one another physically and (through software in central control facilities) logically. But at the most basic level, a local telephone network consists of telephone wires -- called "local loops" -- that are strung along telephone poles or buried beneath city streets in cables and that connect each home or business in the area to an "end office switch." That switch will, directly or through other switches, route a call over transport facilities and other wires to the party being called.

All the jurisdictional issues in this case can be addressed by focusing on one network element: the "local loop." Like all other facilities in local networks, a local loop can be used to place and receive either calls that begin and end in the same State ("intrastate services") or calls that begin and end in different States ("interstate services"). Under the original Communications Act of 1934, regulatory authority over local loops and other facilities was generally divided between States and the FCC depending on how the loop was being used. States generally exclusively regulated the facility when used to provide intrastate services and the FCC had exclusive regulatory jurisdiction when the loop was used to provide interstate services, which were defined to include any service or facility that cannot be severed into interstate and intrastate components for purposes of the FCC's regulation.

This jurisdictional division resulted from § 2 of the Communications Act and the limited scope of the provisions that then comprised Title II of this Act. While § 2(a) gives the FCC jurisdiction over interstate services, § 2(b) provides that "no provision of the Act shall be construed to apply or to give the [FCC] jurisdiction" over rates and other conditions of intrastate services, and Title II of the Act then applied only to the rates, terms, and conditions of the interstate services of communications common carriers. 47 U.S.C. §§ 201-208.

In *Louisiana Public Service Commission* v. *FCC*, 476 U.S.

355 (1986), the Court thus held that the FCC lacked the authority to prescribe depreciation charges that would bind States in setting rates for intrastate services. The Court held that no provision of the Act unambiguously gave the FCC authority to prescribe depreciation charges that apply to rates for intrastate services. *Id.* at 379. The Court further concluded that the FCC's authority over interstate services could not justify its order, for another provision of the Act (§ 221) separated LEC investment in local loops and other facilities between interstate and intrastate services and allowed States and the FCC to apply their own depreciation rates to the portion of the LEC investment allocated to its jurisdiction. *Id.* at 375.

By contrast, it was equally well-settled under § 2 and the original terms of Title II (and their statutory predecessors) that the FCC had jurisdiction over local loops and other local exchange facilities in two circumstances. The first is when LEC networks are used to provide the "exchange access" service of originating or terminating interstate long distance calls, which are interstate services over which the FCC exclusively regulates the rates, terms, and conditions. See, *e.g.*, *Smith* v. *Illinois Bell Tel. Co.*, 282 U.S. 133 (1930); *NARUC* v. *FCC*, 746 F.2d 1492 (D.C. Cir. 1984). More than 20% of the LECs' $100 billion in annual revenues are from interstate exchange access services, and 25% of the LECs' investment in local loops is today allocated to interstate services. 47 C.F.R. § 36.154(c).

Second, the FCC had exclusive jurisdiction over a local loop and associated switching and transport facilities when a customer obtained it as part of a "private line," "private network," or other service in which a customer essentially "leases" an entire loop for a flat monthly charge and in which the customer will use the loop and the associated facilities or services to place both interstate calls and intrastate calls. Because the "service" obtained by the customer inherently encompasses both interstate and intrastate uses and cannot be

separated into components, the entire service is classified as an "interstate" service over which the FCC regulated rates, terms, and conditions.[3] This same principle was also applied to uphold the FCC's jurisdiction to require LECs to unbundle competitively priced telephone sets and other "customer premises equipment" ("CPE") from their local loops and to provide standard interfaces on their loops that equally accommodate other vendors' CPE. See *infra*.

At the same time, because of § 2(b) of the Communications Act and the limitations on the original scope of Title II, the FCC then had no authority to preempt state law entry barriers and to authorize the customer of the dedicated loops, CPE, or other facilities to use them to offer intrastate services in competition with LECs. Thus, the FCC's CPE and private network regulations operated only to establish rates, terms, and conditions under which a customer could obtain the loop and other associated facilities for its own use -- except in any States that authorized competing intrastate local services.

But until shortly before the 1996 Act was passed, virtually no State had authorized this competition for intrastate services. As courts had found, network externalities and the enormous economies of scale that characterize some or all of the components of local telephone networks meant that it was a natural monopoly and that no firm could make the "prohibitive capital investment" required to duplicate them. *See United States* v. *Western Elec. Co.*, 673 F. Supp. 525, 538 (D.D.C. 1987). However, the States prohibited competing intrastate local services even for the customers and services for which it was commercially possible. The reason is that they concluded that selective competition would undermine the system of

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[3] *See, e.g.*, 47 C.F.R. § 36.154(a)(subcategory 1.2); *MTS and WATS Market Structure*, 4 F.C.C.R. 5660 (1989); *California* v. *FCC*, 567 F.2d 84 (D.C. Cir. 1977) (per curiam).

"universal service" in which certain LEC services were provided at rates that were far in excess of their costs in order to support allegedly below-cost rates for rural or other customers.

2. The FCC's Pre-1996 Efforts To Foster Competition.

LECs also historically used their monopolies over local exchange facilities to prevent competition in the provision of (1) the telephone sets, business telephone systems, and other customer premises equipment that can be plugged into local loops, (2) the long distance services that can, through highly complex interactions with LEC transmission and switching equipment, be competitively provided by multiple firms, and (3) any competing local services that were authorized. The LECs foreclosed this competition first by refusing to allow interconnection of competing firms' services or products and then, when interconnection was ordered, denying the new firms access at the same economic costs and other terms and conditions that the LECs' products and services enjoyed.

For example, the FCC initially sought to introduce competition into the provision of customer premises equipment by invalidating LEC prohibitions against a customer's interconnection and use of other firms' equipment. The LECs responded by imposing requirements that made it more expensive and complicated for customers to use a LEC's local network if they obtained CPE from a LEC competitor. These discriminatory interconnection requirements were found (over 13 years later) to have been a "sham" imposed solely to raise rivals' costs. *See Litton Sys., Inc.* v. *AT&T*, 700 F.2d 785, 794-802 (2d Cir. 1983). In 1975, the FCC prescribed interface standards for local loops that were intended to apply without discrimination to all customer premises equipment. *See id.* at 795-98. In 1980, the FCC ordered LECs to unbundle their customer premises equipment from their monopoly local services by stating separate prices for each and giving customers

the option of using another vendor's CPE. It further ordered LECs to provide their CPE at competitively set prices and free of state rate regulation which was thereby preempted.[4]

Although customer premises equipment was then said to be used for intrastate services 97% of the time, courts of appeals upheld each of these regulations against claims that they invaded the States' exclusive jurisdiction under § 2(b). The courts concluded that the equipment at issue and the local loops were used to provide interstate as well as intrastate services, and that there was no practical basis for the FCC to regulate only the interstate uses.[5] These holdings were cited with approval in *Louisiana* (*see* 476 U.S. at 375-76 n.4), and courts of appeals uniformly followed them after *Louisiana* was decided in 1986.[6] At the same time, as with the case of the FCC's regulations of dedicated loops and private network services, the FCC's CPE regulation did not -- and could not then -- preempt State law prohibitions against competing local exchange services, so these FCC regulations, too, only assured that a customer could interconnect non-LEC switching and other equipment for use with that customer's own telephone services.

Beginning in the 1970s, the FCC also sought to foster competition in the provision of interstate long distance services

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[4] *Second Computer Inquiry*, 77 F.C.C.2d 384, 388, 443-44 (1980), *aff'd CCIA* v. *FCC*, 693 F.2d 198 (D.C. Cir. 1982).

[5] *NCUC* v. *FCC*, 537 F.2d 787, 790 (4th Cir. 1976); *NCUC* v. *FCC*, 552 F.2d 1036 (4th Cir. 1977); *CCIA* v. *FCC*, 693 F.2d 198, 214-15 (D.C. Cir. 1982).

[6] *See, e.g., PUC of Texas* v. *FCC*, 886 F.2d 1325, 1333-34 (D.C. Cir. 1989)(Silberman, J.); *California* v. *FCC*, 39 F.3d 919, 931-2 (9th Cir. 1994); *NARUC* v. *FCC*, 880 F.2d 422, 431 (D.C. Cir. 1989) (because it would be impracticable to have "'two separate phone systems with one being used wholly intrastate, unbundled cost-based pricing for a piece of equipment at the federal level necessarily precludes any other result by the states.'").

by imposing interconnection, unbundling, and resale duties on LECs and their long distance affiliates.[7] In the early 1990s, the FCC further sought to foster competition with the LECs' interstate exchange access services. It ordered LECs to unbundle their exchange access services by giving customers the choice of using some LEC network components and not others and stating separate prices for the different components. The FCC also ordered LECs to permit competing exchange access carriers to interconnect at specific points and to "co-locate" their facilities (either physically or "virtually") with those of the LEC at FCC-approved rates.[8] Under settled principles, new entrants would have had a right to use these same interconnection and co-location arrangements to provide intrastate exchange and exchange access services if they had been authorized under state law -- as they generally were not.

3. The Antitrust Decrees And Their Preemption Of State Regulation.

In 1974, the United States had filed a suit under the Sherman Act against the then-integrated Bell System. The suit charged that the Bell Operating Companies or "BOCs" (which collectively served 80% of the nation) had used their local monopolies to favor their then-affiliate AT&T and to impede competition in long distance and other markets.

The Justice Department presented detailed evidence that the

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[7] *See, e.g., Specialized Common Carriers*, 29 F.C.C.2d 870 (1971); *Local Distribution Facilities*, 46 F.C.C.2d 413 (1974); *Resale and Shared Use*, 60 F.C.C.2d 261 (1976); *Private Line Interconnection*, 60 F.C.C.2d 939 (1976); *MTS and WATS Market Structure*, 81 F.C.C.2d 177 (1980); *Exchange Network Facilities for Interstate Access*, 90 F.C.C.2d 202 (1982).

[8] *See, e.g., Expanded Interconnection*, 7 F.C.C.R. 7369 (1992), *rev'd in part, Bell Atlantic* v. *FCC*, 24 F.3d 1441 (D.C. Cir. 1994)(holding the FCC then had no statutory authority to order physical co-location).

BOCs had discriminated against Bell System competitors in pricing and providing the essential facilities that the BOCs controlled. For example, the Department claimed that the BOCs had engaged in "price squeezes" against long distance competitors by imposing charges for monopoly exchange access services that were in excess of the economic cost that they and the Bell System's long distance affiliate incurred in using the same local facilities. *See United States* v. *AT&T*, 524 F. Supp. 1336, 1355, 1357, 1364-1370 (D.D.C. 1981). The Department also introduced evidence that the local exchanges are so complex and dynamic, and so dependent on the subjective judgment of the employees that manage them, that neither existing forms of utility regulation nor after-the-fact antitrust remedies could prevent these abuses.

In 1982, the Bell System consented to a Decree (the "MFJ") that granted the structural relief that the United States had sought. It required that the BOCs transfer their long distance facilities and other competitive assets to AT&T and that the reconstituted BOCs then be (1) divested from AT&T, (2) precluded from providing either interstate or intrastate long distance services (or manufacturing equipment) so long as they had local monopolies and (3) required to provide exchange access to providers of interstate and intrastate services on an unbundled basis under nondiscriminatory terms and conditions at cost-based rates (the "equal access" requirement). *United States* v. *AT&T*, 552 F. Supp. 131, 226-34 (D.D.C. 1982), *aff'd sub. nom. Maryland* v. *United States*, 460 U.S. 1001 (1983). An antitrust decree that contained the same equal access requirements, but less stringent separation requirements, was also entered against the nation's next largest LEC, GTE. *United States* v. *GTE Corp.*, 603 F. Supp. 730, 737-46 (D.D.C. 1984).

Over 30 States had intervened and opposed entry of the MFJ on jurisdictional grounds. They asserted that because the MFJ's requirements applied not only to interstate services but also to

intrastate services and the facilities used to provide them, the MFJ encroached upon the States' exclusive jurisdiction over intrastate services under § 2(b) of the Communications Act and violated the state action exception to the antitrust laws of *Parker* v. *Brown*, 317 U.S. 341 (1943), and its progeny. These States thus claimed both that the MFJ's requirements could not be implemented without their prior approval and that they would also have the authority to undo its requirements by ordering the divested BOCs to behave inconsistently with the MFJ's requirements with respect to intrastate services. The district court rejected these claims because the MFJ's provisions would promote competition in interstate services that were outside state regulation as well as any intrastate services that used the same BOC facilities. *See United States* v. *AT&T*, 552 F. Supp. at 153-160. This Court summarily affirmed these holdings. *Maryland* v. *United States*, 460 U.S. 1001 (1983).

Under the antitrust decrees and *Parker* v. *Brown*, States continued to control whether other carriers would be permitted to compete in the provision of intrastate exchange, intrastate exchange access, or intrastate long distance services. 552 F. Supp. at 159 n.117. However, when such services were authorized, the decrees' equal access requirements governed the LECs' provision of exchange access to the new entrants and preempted any inconsistent state regulations unless the antitrust decrees' provisions were waived. The decrees' equal access requirements were further held to prohibit a LEC from pricing and provisioning essential facilities in a manner that favored itself over competitors who provide local switching services, public telephone services, or any other authorized intrastate or interstate telecommunications services. *United States* v. *Western Elec. Co.*, 846 F.2d 1422, 1427-29 (D.C. Cir. 1988); *id.* 583 F. Supp. 1257 (D.D.C. 1984).

Further, federal courts had to rule on the BOCs' many requests for authority to provide long distance services under

the MFJ's standards, and were required to determine the sufficiency of state and federal regulations to eliminate the BOCs' monopoly power or to prevent its use to impede competition in long distance services. *United States* v. *Western Elec. Co.*, 673 F. Supp. 525, 544-546, 567-579 (D.D.C. 1987), *aff'd on this ground*, 900 F.2d 283, 289-92, 300-01 (D.C. Cir. 1990) (per curiam). Courts gave substantial deference to the Department of Justice on these questions, but no deference to the FCC or state regulators. See *id.*, 900 F.2d at 297-98.

4. The 1996 Act And Its Local Competition Provisions.

In the 1996 Act, Congress enacted a comprehensive scheme designed to (1) develop competition in local exchange and exchange access services and (2) relieve the BOCs from long distance restrictions only after local competition developed.

The provision of the Act that radically changes state and federal authority over telecommunications is § 253. It expressly invalidates any state law, regulation, or order that "prohibits" or has the "effect" of prohibiting any person from providing any telecommunications services. Section 253 thus assures that any firms that have obtained facilities and services that can be used to provide exchange services will have the right to do so. Correlatively, § 254 addresses the states' only legitimate reasons for having previously prohibited competition in intrastate local services. It adopts a new system in which surcharges will be imposed on all providers of telecommunications services to fund the costs of providing universal service to rural or other customers. Similarly, Congress also protected the States' historic interest in regulating rates of intrastate exchange and toll services to assure that they are not excessive.[9]

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[9] No section of the Act deprives States of this authority, and by deciding (in the Conference Committee) to delete the language from the House and Senate (continued...)

The provisions that are directly at issue in this appeal are §§ 251 and 252, which require incumbent LECs to provide new entrants with additional facilities and capabilities needed to provide all or some of the services that LECs offer. In particular, they impose duties on all incumbent LECs (save those rural LECs who receive exemptions under § 251(f)) that are designed to allow new entrants to enter part of the local market in a limited way and to enter the entire market in one of two different ways.

The provision that allows limited immediate entry into part of the local telephone business is § 251(c)(4), which permits resale of LEC services. In particular, it allows new entrants to obtain the LECs' existing retail services at wholesale rates (computed by subtracting from the LECs' retail rates the costs that they avoid when services are provided only at wholesale), and then only to "resell" the LECs' own retail services in competition with them. Because § 251(c)(4) does not enable a new entrant to offer the "exchange access" services that represent over 20% of LECs' revenues, it only permits entry into part of the market.

Section 251 establishes two other modes of entry that allow new entrants to enter the entire local telephone market and to compete with the full range of services that LECs offer. Section 251(c)(2) allows a firm that has connected some individual customers to its own alternative local exchange facilities to interconnect with a LEC's network and exchange traffic with it. But because the time and expense of constructing redundant facilities is so great -- and its economics so uncertain -- it could not lead to broad based competition for years or decades.

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[9] (...continued)
bills that made §§ 251-262 an exception to § 2(b), Congress assured that the FCC could not preempt state authority to regulate the rates for local exchange services, intrastate exchange access services, and intrastate long distance services on the "ancillary" and "protective" jurisdiction theories endorsed in *The Shreveport Rate Case*, 234 U.S. 342 (1914).

Most pertinently for present purposes, § 251(c)(3) requires LECs to provide access at rates, terms, and conditions that are just, reasonable, nondiscriminatory, and cost-based to any or all of the seven separate "network elements" that constitute the LECs' monopoly exchanges.[10] By authorizing new entrants to obtain access to network elements at cost, Congress intended to eliminate the insurmountable cost advantages that LECs would otherwise have by allowing new entrants to share in whatever economies of scale inhere in particular LEC facilities.

While these duties are subject to the general enforcement provisions of the Communications Act, the 1996 Act also adopts provisions designed to assure their rapid implementation. In particular, § 251(d)(1) required the FCC to adopt regulations to implement the requirements of § 251 by August 8, 1996. Section 252 further establishes a procedure and strict time deadlines through which competing carriers may obtain the interconnection arrangements that are required by § 251. Most pertinently, if negotiation fails to resolve all issues, § 252 entitles a new entrant to arbitrate "open issues" before the pertinent state commission if it is willing to do so or before the FCC if the state commission is not, and requires a decision in the arbitration within nine months of the beginning of the negotiations. §§ 252(b)(1), (b)(4)(C), (e)(4) & (e)(5).

In arbitrating open issues, state utility commissions and the

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[10] The network consists of (1) a network interface device located at each customer's premises, (2) the local loop that connects the customer premises to a switch, (3) switches, (4) interoffice trunks ("transport facilities") that connect switches to one another, (5) operator and directory assistance systems that are connected to switches, (6) signaling systems that are connected to each switch, determine the most efficient path for each call to take and provide the necessary routing information to the switches, and (7) operations support systems that, among other things, direct those physical and logical connections among the foregoing elements that are required to establish and maintain telephone service for any customer.

FCC are required to ensure that their decisions "meet the requirements of § 251, including the regulations prescribed by the [FCC] pursuant to section 251." § 252(c)(1). When state commissions make determinations under this section, the Act provides that an aggrieved party may bring an action in an appropriate federal district court to determine whether the arbitrated agreement "meets the requirements of section 251 and this section [252]." § 252(e) (6).

Finally, the Act transfers jurisdiction to the FCC over provisions of the MFJ and GTE antitrust decrees. First, § 251(g) provides that the requirements of these decrees that the BOCs and GTE provide equal access to interstate and intrastate competitors on an unbundled basis and at cost-based rates are to be enforced as FCC regulations until the FCC adopts "supersed[ing]" regulations under § 251. Second, the 1996 Act also transferred to the FCC jurisdiction over the core of the MFJ's long distance and manufacturing restrictions on BOCs. Section 271 provides that the FCC cannot grant a BOC long distance authority in any State unless and until the FCC -- after giving "substantial weight" only to the Justice Department's evaluation (*see* § 271(d)(2)) -- "finds," among other things, that the BOC is offering access to unbundled network elements "in accordance with the [pricing and other] requirements of sections 251(c)(3) and 252(d)(1)" of the Act (§ 271(c)(2)(B)(ii)) and that the authorization is "consistent with the public interest." § 271(d)(3)(C).

5. The FCC's Local Competition Rules And The Decisions Under Review.

The FCC adopted rules to implement the local competition requirements of §§ 251 and 252 of the Act in two separate rulemaking orders that were issued on August 8, 1996. The LECs and a number of state utility commissions filed petitions for review of these orders, which were consolidated in the

Eighth Circuit. It initially stayed the FCC's "pricing" and so-called "pick and choose" regulations. Following briefing and argument, the Eighth Circuit vacated both sets of regulations and also a number of the FCC's other rules.

The Court held that the FCC lacked "jurisdiction" to adopt regulations to implement the pricing requirements of § 251(c) and § 252(d) that are critical to the statutory scheme, and it vacated FCC rules that, among other things, had prohibited States from establishing rates under methodologies that would foreclose competition through price squeezes. J.A. 147-171 (¶¶ 704-739). The Eighth Circuit also held that the FCC lacked jurisdiction over some of the Act's non-pricing requirements (*e.g.*, § 251(b)(3)'s duty of dialing parity). Because the Eighth Circuit believed that the FCC's authority over § 251 was limited to adopting rules that interpret the six subsections of § 251 that mention the FCC, the Eighth Circuit further vacated several of the FCC's nonpricing rules that did not interpret these terms. Pet. App. 46a, 50a-52a & 52a-53a.

The Eighth Circuit also invalidated two FCC rules that were adopted as interpretations of the Act's terms and found essential to the Act's implementation. Most critically, after initially upholding it and over the opposition of the state commissions, the Eighth Circuit, on rehearing, vacated the rule (47 C.F.R. § 51.315(b)) that provides that "an incumbent LEC shall not separate requested network elements" that LECs access in combined form. Pet. App. 71a. The Eighth Circuit also invalidated the FCC rule (§ 51.809(a)) that implements § 252(i) by allowing new entrants to obtain any facility or service under the same terms contained in any approved agreement -- without necessarily subscribing to the entire agreement.

Finally, four days before the petitions for certiorari were granted, the Eighth Circuit also issued a writ of mandamus that orders the FCC to defer to state pricing determinations when

ruling on a BOC's application for long distance authority under § 271 of the Act. Under this order, the FCC will be obligated to grant an application even when the FCC would independently conclude that BOCs are pricing essential facilities at artificially high levels that violate the requirements of §§ 251(c) and 252(d) and that also mean a BOC would defeat the "public interest" by engaging in a price squeeze against long-distance competitors. Although § 271 requires the FCC to deny applications in that circumstance and § 402(b)(6), (9) gives the D.C. Circuit exclusive jurisdiction over § 271 decisions, the Eighth Circuit ordered the FCC to defer to States to assure that its § 271 decisions do not have an "effect" on state pricing determinations under § 252. *Iowa Utils. Bd.* v. *FCC*, 135 F.3d 535, 543 (8th Cir. 1998), *petitions for certiorari pending*.

INTRODUCTION AND SUMMARY OF ARGUMENT

As amended by the 1996 Act, the Communications Act represents a comprehensive national scheme that both (1) protects the historic state interests that formerly led the States to prohibit or limit competition in intrastate local telephone services and (2) preempts all state law entry barriers and provides for the rapid implementation of new federal requirements to assure that new entrants may provide whatever forms of competing local telephone services are feasible.

The historic state interests are protected by two features of the Act that are not directly at issue in this case. Section 254 establishes a new mechanism that fully protects the States' historic policies of fostering "universal service" by creating a new system of explicit funding of any subsidized below-cost rates for rural and other customers. In particular, it requires the funding of universal service through "competitively neutral" surcharges on the revenues of all providers of telecommunications services, and § 254(f) permits individual States to increase those surcharges if they wish to fund greater

subsidies for specified customers. Section 254 thus eliminates the need for the prohibitions on competition which had been justified to assure that above-cost rates could be maintained for some services in order to fund the subsidies for other services.

At the same time, the Act protects the historic state interests of assuring that customers of intrastate services are not charged excessive rates. See p. 12, n.9, *supra*. Thus, while the local competition provisions of the Act allow new entrants to use their existing or newly-acquired service capabilities to offer intrastate exchange as well as interstate exchange access services, each state utility commission will maintain the ability to regulate all carriers' rates for all intrastate exchange, intrastate exchange access, and other intrastate services.

The revolutionary provision enacted by the 1996 Act is § 253, which preempts any state laws that prohibit or have the effect of prohibiting any firm from offering any intrastate or interstate telecommunications services. By itself, § 253 allows firms to use the capabilities that they acquired under earlier FCC regulations or antitrust consent decrees to offer intrastate exchange and exchange access services in any State, regardless of whether it is authorized by state law. Section 251(g) further gives the FCC jurisdiction over the equal access requirements of the MFJ and GTE antitrust decrees until such time as the FCC adopts "supersed[ing]" "regulations." Far more significantly, §§ 251 and 252 give new entrants additional access, interconnection, and resale rights and establish strict time tables and procedures designed rapidly to implement the new arrangements and to minimize entry costs for new entrants.

To apply the new federal requirements to local conditions, the Act allows for proceedings in 50 different States followed by federal district court actions. It is thus essential to the Act's goal of rapid implementation of the new federal requirements that there be federal regulations that define these requirements

in advance of the conclusion of the state proceedings and federal district court review. That is why § 251(d) requires the adoption of federal regulations to implement § 251's requirements within six months of the 1996 Act's enactment. Indeed, because state commission determinations are reviewable in federal courts which can give no deference to a state commission's interpretations of federal law, States will be reversed if they fail to follow the interpretation of the Act that best effectuates its terms and purposes. Thus, States have no legitimate interest in initially establishing prices and other terms of interconnection agreements on the basis of their own varying interpretations of federal requirements.

The decisions of the Eighth Circuit to vacate the FCC's critical rules wreak havoc on this carefully constructed scheme. The pricing and other rules that were vacated on jurisdictional grounds are within the FCC's explicit authority, and the rules that were vacated on the merits were compelled by the statute's terms, structure and purposes -- and were, in all events, reasonable. See *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984).

First, the Eighth Circuit's decision to vacate all the FCC's pricing and a number of its non-pricing rules on jurisdictional grounds is erroneous. Sections 201, 303, and other provisions of the Act unambiguously give the FCC authority to adopt rules to "carry out" all "the provisions" of the Act, not merely those involving "interstate services" and the six subsections of § 251 that allude to the FCC. Thus, § 251(d) required the adoption of rules implementing § 251 by August, 1996. Further, even if the FCC's general rulemaking authority were limited to interstate services, the jurisdiction over interstate services encompasses the arrangements at issue here in which new entrants obtain local loops and other facilities on an unseparated basis in order to provide interstate as well as intrastate services. Finally, because the FCC's authority under the Act is not limited to

construing the terms of six subsections of § 251, the Eighth Circuit's erroneous jurisdictional ruling also led it to apply an erroneous legal standard in reviewing the rules that it found the FCC had jurisdiction to adopt.

Second, the Eighth Circuit erred in vacating the FCC rule that provides that, except upon request, "an incumbent LEC shall not separate requested network elements that the incumbent LEC currently combines." This rule is compelled by the terms of § 251(c)(3), for it requires LECs to provide "nondiscriminatory access to network elements [in the plural] on an unbundled basis at any technically feasible point [in the singular]." § 251(c)(3). By its terms, the only way this duty can be discharged is if a new entrant can obtain access to combinations of elements at a single point, and it further would be manifest discrimination -- and impermissibly to raise a rival's costs -- for the LEC to access elements in their combined form, but require new entrants to incur the delay and costs of combining elements that LECs separate solely to frustrate competitors. As dictionaries, prior regulatory decisions, and LECs' own prior arguments establish, the Eighth Circuit is simply wrong that providing elements on an "unbundled" basis requires a LEC artificially to disconnect them from one another, and the FCC's interpretation was, in all events, a reasonable one under *Chevron*.

Third, the Eighth Circuit similarly had no basis to vacate the so-called "pick and choose" rule. It implements § 252(i)'s requirement that any firm may obtain individual elements on the same terms set forth in another interconnection agreement -- without necessarily subscribing to the entire contract.

I. THE FCC HAS AUTHORITY TO ADOPT RULES IMPLEMENTING §§ 251 AND 252.

The Eighth Circuit invalidated the FCC's regulations

implementing the pricing and many of the non-pricing requirements of §§ 251 and 252 on the ground that the FCC lacks "jurisdiction" over all the provisions of those sections and that the FCC's rulemaking authority is here limited to construing the terms of the six subsections of § 251 that refer to the FCC. On this basis, the Eighth Circuit vacated the FCC regulations defining (1) the LECs' and the arbitrators' obligations in pricing interconnections, network elements, wholesale rates for resale, and co-location arrangements under §§ 251(c) and 252(d) of the Act; (2) the LECs' duty to provide "dialing parity" under § 251(b)(3); (3) the LECs' duty to file contracts with other LECs under § 252(a)(1); (4) the conditions in which rural LECs can be exempted from § 251's duties under § 251(f); and (5) the FCC's authority under § 208 to decide complaints that either challenge the terms on which a LEC provides interconnection or that seek to enforce the LEC's duty to comply with its interconnection agreements.[11] Subsequent to the decisions under review here, the Eighth Circuit also held that, despite the terms of § 271(d), the FCC must defer to state pricing determinations in ruling on BOC applications for long distance authority. *Supra*, pp. 16-17.

These jurisdictional holdings rest on three grounds. First, the Eighth Circuit concluded that the "plain language" of the Act establishes that the FCC has authority to implement and enforce only those provisions of the Act that govern "interstate services" or that specifically mention the FCC. Second, it concluded that §§ 251 and 252 govern intrastate and not interstate services, and that § 2(b) of the Act would require the Eighth Circuit's jurisdictional holding even if the Act's terms were ambiguous. Third, although §§ 10, 208, 271, and other

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[11] Because it believed that the FCC's authority over the rest of § 251 is limited to construing the terms of six subsections, the Eighth Circuit also vacated several rules (§§ 51.305(a), 311(c), 315(c)-(f) & 317) which were not adopted as interpretations of the Act's terms. *See* I.D, *infra*.

provisions of the Act both presume that the FCC has authority over all §§ 251's and 252's requirements and expressly grant the FCC the authority to interpret and apply these requirements in making other determinations, the Eighth Circuit held that these other provisions could and must be construed to deny this authority to the FCC in order to protect the States' jurisdiction.

Each of these three grounds is contrary to the unambiguous terms of the Act and its structure. Because §§ 251 and 252 unambiguously "apply" to the intrastate as well as the interstate aspects of the new arrangements and because the Act unambiguously "give[s]" the FCC "jurisdiction" over these provisions, the Eighth Circuit was also wrong in concluding that § 2(b)'s rule of construction supported its holdings.

A. Congress Vested the FCC With Regulatory Authority Over All Provisions of the Communications Act.

First, Congress unambiguously granted the FCC jurisdiction to adopt rules to implement all the requirements of §§ 251 and 252. It did so by expressly and deliberately codifying these and related provisions in Title II of the Communications Act (47 U.S.C. §§ 251-76). Congress thereby directed that these provisions would be enforced and administered in accordance with the Act's remedial and procedural provisions for which the FCC is responsible and accountable to Congress.[12]

Indeed, two separate provisions of the Communications Act expressly and unambiguously grant the FCC jurisdiction to

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[12] Congress' decision to include the terms of §§ 251 and 252 within the FCC's organic statute was deliberate. Whereas Congress directed that new §§ 251-261 be inserted in the U.S. Code as amendments to the Communications Act, *see* § 101(a), Pub. L. 104-104, 110 Stat. at 61, Congress specified that other provisions of the 1996 Act would be codified in other titles of the U.S. code. § 601(b)(3), 110 Stat. at 143, § 701(b)(1), 110 Stat. at 147-48.

"prescribe such rules and regulations as may be necessary . . . to carry out the provisions of this Act." 47 U.S.C. §§ 201(b); *accord*, § 303(r). In addition, other provisions of the Act authorize the FCC not only to "enforce and execute" all "the provisions of this Act" (*id.* § 151; *accord*, § 208), but also to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions." *Id.* § 154(i). This Court has thus held that the FCC has authority to adopt any rule that is not inconsistent with the Act's provisions and that reasonably implements them.[13]

Further, the local competition provisions themselves establish that Congress understood that the FCC has the authority to issue regulations implementing all the provisions of §§ 251-76. Section 251(d) requires that "[w]ithin six months after [the date of enactment of the Telecommunications Act of 1996], the [FCC] shall complete all actions necessary to establish regulations to implement the requirements of this section."

The only way the Eighth Circuit could reach its different conclusion was by ignoring, or distorting, the plain language of each of the foregoing provisions. For example, the Eighth Circuit held that § 201(b) grants rulemaking authority over only "interstate . . . services" because the substantive standard contained in the first sentence of § 201(b) applies only to interstate services. Pet. App. 12a. But § 201(b)'s last sentence grants the FCC rulemaking authority over all "the provisions of this Act," not merely over the substantive "provisions of this Section." Indeed, the Eighth Circuit's attempt to limit this grant to the prohibition contained in the first sentence of § 201(b) is particularly spurious, for the remaining four sentences of this

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[13] *National Broad. Co.* v. *FCC*, 319 U.S. 190, 216-220 (1943); *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 172-78 (1968); *FCC* v. *National Citizens Comm. For Broad.*, 436 U.S. 775, 793-94 (1978).

subsection all contain rules and prescriptions that, by their express terms, apply to the entire "Act." Further, there is even less substance to the Eighth Circuit's attempt to avoid § 303(r)'s independent and equally explicit grant of rulemaking authority.[14]

Similarly, the Eighth Circuit also had no grounds for dismissing § 251(d)'s requirement that the FCC adopt regulations implementing "the requirements of this section [251]" by August of 1996. Indeed, all the Eighth Circuit was able to say is that § 251(d)(1) "operates primarily as a time constraint" (Pet. App. 12a), which is an acknowledgment that it is at least "secondarily" a command that the FCC adopt rules implementing all § 251's requirements. That Congress *required* the FCC to adopt these rules is vivid confirmation that Congress understood and intended that the FCC would be *authorized* to adopt rules implementing all the Act's provisions.

Correlatively, there is no basis for the Eighth Circuit's conclusion that the FCC's rulemaking authority is limited to the six subsections of § 251 that mention the FCC: §§ 251(b)(2), (c)(4), (d)(2), (e), (h)(2) & (g). Four of these provisions mention the FCC to establish that its jurisdiction over a subject is exclusive and that States could not adopt supplemental "access and interconnection" regulations even if they were otherwise "consistent" with federal standards and did not

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[14] Section 303(r) states that the FCC may "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act." Yet the Eighth Circuit held that § 303(r) "merely suppl[ied] the FCC with ancillary authority to issue regulations that may be necessary to fulfill its primary directives contained elsewhere in the statute." 120 F.3d at 795. Moreover, while the FCC rules at issue here implement explicit statutory requirements, this Court has elsewhere rejected the Eighth Circuit's conclusion by holding that the rulemaking authority conferred by § 303(r) is not limited "to those activities and forms of communication that are specifically described by the Act's other provisions." *Southwestern Cable*, 392 U.S. at 172, 181.

"substantially prevent implementation of . . . the purposes of [§§ 251-61]." § 251(d)(3); *compare* §§ 251(b)(2), (c)(4), (e), & (h)(2). The fifth of these provisions, § 251(d)(2), merely imposes conditions on the FCC's rulemaking authority by requiring the FCC to consider certain factors in defining network elements. Indeed, the fallacy of the Eighth Circuit's jurisdictional holding is demonstrated by the fact that it treated § 251(d)(2) as a "grant" of authority, when all it is is a statutory provision that imposes conditions on rulemaking authority granted by the Act's other provisions.

The remaining provision that mentions the FCC -- § 251(g) -- confirms the FCC's jurisdiction over all the pricing and non-pricing requirements. Section 251(g) gives the FCC jurisdiction over the MFJ and GTE antitrust decrees' "equal access" requirements that fully applied to all authorized intrastate services (see pp. 9-12, *supra*) -- including expressly those relating to "receipt of compensation." Because § 251(g) further requires that the FCC enforce these requirements as FCC regulations "until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission," it confirms that the FCC's authority to adopt "supersed[ing]" regulations under § 251 encompasses its pricing as well as its non-pricing requirements.

Indeed, the Eighth Circuit could not follow its own jurisdictional holding. It reviewed on the merits or upheld a number of rules that were outside the FCC's jurisdiction under the terms of its own decision: *e.g.*, the FCC's rules implementing the requirements of § 252(i) and the provisions of § 251 governing negotiation (§ 251(c)(1)), interconnection (§ 251(c)(2)), the terms and conditions under which network elements must be made available (§ 251(c)(3)), and co-location (§ 251(c)(6)). Quite plainly, the foregoing rules did not interpret §§ 251(b)(2), (c)(4), (d)(2), (e), (h)(2) or (g).

Finally, the Eighth Circuit believed that there is an additional textual basis for its holding that the FCC has no authority to adopt pricing rules: that is, the fact that § 252(c)(2) of the Act directs the States to establish prices in accord with the standards of § 252(d) and that neither provision refers to FCC regulations. Pet. App. 10a-14a. The short answer to this claim is that §§ 151, 154, 201, and 303 give the FCC authority to adopt rules to execute, enforce, and carry out all the provisions of the Act, including the provisions of §§ 252(c)(2) and 252(d) that direct States to "establish" specific rates that satisfy particular federal standards: *e.g.*, that network element rates be "based on the cost" of "providing" them "determined without reference to a rate-of-return or other rate-based proceeding."

In this regard, this Court has elsewhere held that a statutory provision that is far less explicit than those in the Communications Act had authorized another federal agency (there HHS) to adopt rules that bind States in setting rates under a federal statute even when, as is not the case here, the state bodies were directed to establish rates "determined in accordance with methods and standards *developed by the State[s].*" *Wilder* v. *Virginia Hosp. Ass'n*, 496 U.S. 498, 502-03, 515-17 (1990) (quoting statutory provision) (emphasis added). That reflects the breadth of the federal authority to "ensure compliance with the provision" of a federal statute even when the federal agency lacked the explicit rulemaking authority that the FCC has under § 201 and the other provisions of the Communications Act. *Id.* at 516.

In all events, the FCC would have explicit authority to adopt pricing rules even if its rulemaking authority were limited to implementing the requirements of § 251. For § 251(c) requires LECs to provide "wholesale rates for resale" and to provide "network elements" and "interconnections" at "rates" that are "just, reasonable, and nondiscriminatory" and "in accordance with . . the agreement and the requirements of this section and

section 252[(d)]." In addition, § 252(c)(1) requires States to adhere to FCC regulations that implement § 251's requirements when they resolve any "open issue" in an arbitration, and § 252(a)(1) requires parties to attempt to negotiate agreements containing "a detailed schedule of itemized charges" and to arbitrate the rates if there is no agreement. Finally, because the FCC has exclusive jurisdiction over some of the costs that can be included in the rates established under § 252(c) (see, *e.g.*, §§ 251(b)(2) & (e)), Congress necessarily intended that States establish rates by following FCC regulations as well as the requirements of § 252(d).

B. The Requirements Of §§ 251 And 252 Are Within The FCC's Jurisdiction Over Interstate Services.

The Eighth Circuit's jurisdictional holdings also rested on a second ground: that the requirements of §§ 251 and 252 are intrastate matters and are outside the FCC's jurisdiction over interstate services. However, as explained in the Statement of the Case, these provisions were enacted against the background of the uniform holdings that the FCC's authority over interstate services encompasses any subject that cannot feasibly be divided into interstate and intrastate components and separately regulated by state and federal authorities.

That is the ground on which the FCC had exclusive jurisdiction over private line networks and customer premises equipment and its interconnections to local networks prior to the 1996 Act. See pp. 5-9, *supra*. That ground fully applies to the new interconnection arrangements that are required by §§ 251 and 252. They permit new entrants to acquire interconnections and network elements (*e.g.*, the same leased local loop from a private line network) and use the elements to provide not only intrastate "exchange service" but also interstate "exchange access services" and other interstate services. While the rates for the services that the new entrants offer to the

public will be separately regulated by the States (for purely intrastate services) and by the FCC (for other services), the rates, terms, and conditions for the "wholesale" capacity that new entrants acquire from LECs and use to provide competing services are determined on a jurisdictionally unseparated basis. In particular, § 252 provides that a single body (either a state commission or the FCC) will, for example, establish a single rate, and single set of terms and conditions, governing a new entrant's lease of a local loop in Arlington, Virginia.

Contrary to the Eighth Circuit's apparent belief (Pet. App. 20a), it is irrelevant that the Act establishes a separations process for circumstances in which the FCC and the States establish separate rates for the interstate and intrastate calls placed over a local loop and other facilities in LEC networks. Where a single rate is established that governs both interstate and intrastate uses of a facility, there is no occasion for separations of investment and expenses, as settled law prior to 1996 established. *See* pp. 5-8, *supra*. Accordingly, in the local competition rulemaking proceedings before the FCC, not a single commentator argued that there was any basis for separating the interconnection arrangements into interstate and intrastate components, and there is no basis for upsetting the FCC's reasonable and well-supported determination that the matters are not severable. Pet. App. 194a-195a (¶ 92).

C. The Other Terms And Structure Of The Act Confirm That The FCC Has The Authority Both To Adopt Rules Defining The Pricing And Other Requirements Of Sections 251 And 252 And To Enforce Those Rules In Other Proceedings.

Finally, the Eighth Circuit also erroneously held that it could prevent "evasion" of the States' alleged jurisdiction over pricing and other matters by construing §§ 10, 208, 271 or other terms of the Act to deny the FCC authority to determine the legal

sufficiency of LEC prices and other conduct. The reality is that all the Act's other terms and structure independently establish that the Eighth Circuit's jurisdictional holding is wrong. They confirm that Congress intended that the FCC would adopt pricing and other rules to implement all the requirements of §§ 251 and 252 and that these rules would first be applied by States (or the FCC) in arbitrating interconnection arrangements and then would be applied in the §§ 10, 208, 271, and other proceedings that are within the FCC's exclusive jurisdiction.

First, the other provisions of the Act establish both that no legitimate state interest is served by requiring state commissions to follow the FCC rules governing only some of §§ 251 and 252's requirements and that the Eighth Circuit's jurisdictional holding is antithetical to the other terms and structure of the Act. Foremost, rather than incorporate provisions of state law on which state commissions would be entitled to deference, the Act explicitly adopts minimum federal standards to govern pricing and all other terms of interconnection arrangements and makes each state arbitration decision reviewable in federal district courts who cannot defer to a State's legal determinations. In this regard, even under the Eighth Circuit's holding, any state commission that fails to follow the interpretation of the federal requirements that best effectuates their terms and purposes will be reversed by a federal district court, a court of appeals, or this Court. Accordingly, the other provisions of the Act establish that a State's only possible legitimate interest is to be supplied with that interpretation in advance -- through FCC rules and a single judicial review proceeding -- not through *post hoc* litigation that can require a State to redo the arbitration.

Moreover, the inevitable effect of the Eighth Circuit's jurisdictional holding will be both to delay the Act's implementation in States that fail to adopt the correct interpretation of its provisions and to impose extraordinary

burdens on the federal courts that are now reviewing States' decisions in over 60 pending cases. However, each of these consequences is inconsistent with the Act's other terms and structure. The highly compressed time deadlines that § 252 establishes for the negotiation, arbitration, and approval of interconnection agreements -- and the requirement that the FCC issue implementing rules within six months -- forecloses any notion that Congress could have intended such delays and burdens, and the increased costs to new entrants that result.

In addition, still other provisions of the Act presume that the FCC has the enforcement and rulemaking authority that the Eighth Circuit denied it. For example, § 10 of the Act (47 U.S.C. § 160) generally authorizes the FCC to "forbear" from applying any provision of the Act to any carrier or service if it finds, among other things, that enforcement of the provision is not necessary to ensure that the charges are "just and reasonable and . . . [non]discriminatory." *Id.* § 160(a). Further, § 10(d) expressly provides that "the Commission may not forbear from applying the requirements of section 251(c) . . . under subsection (a) of this section, until it determines that those requirements have been fully implemented." §160(d). Congress could not have authorized the FCC to forbear from "applying" the requirements of § 251(c) unless the FCC had the authority to interpret and enforce § 251(c)'s pricing and other standards in the first place. The Eighth Circuit's attempt to argue otherwise ignores the text of § 10. See Pet. App. 86a-87a.

Moreover, other provisions of the Act expressly authorize the FCC to make the same determinations that the Eighth Circuit has held to be outside the FCC's jurisdiction, and the Eighth Circuit has responded to each by contorting the statutory language to limit the FCC's authority in order to prevent "evasion" of state jurisdiction. For example, § 208 expressly allows any party to file a complaint with the FCC that claims that a common carrier has violated any requirement of the Act,

including both the duty to provide the access arrangements required by § 251(c) and the duty to comply with any approved interconnection agreement under § 251(c)(2) & (3).

Because it feared that § 208 could allow the FCC directly to review the lawfulness of the LECs' charges and to enforce a state-approved interconnection agreement, the Eighth Circuit essentially rewrote the statute to protect the States' alleged exclusive jurisdiction. The Eighth Circuit "interpreted" the § 252(e)(6) remedy that entrants have against States as precluding § 208 and other enforcement actions against LECs. Further, the Eighth Circuit not only "construed" § 252 to give the States and the federal district courts the jurisdiction over the enforcement of interconnection agreements that the Act does not confer, but also held that this jurisdiction is exclusive. Finally, it also held that § 208 complaints can be filed only for claimed violations of requirements involving interstate services. Pet. App. 30a-34a. Each holding is contrary to the Act's text.

Similarly, § 271 of the Act provides that the FCC cannot authorize a BOC to provide long distance services to customers in a State unless the FCC "finds" that the BOC is, among other things, providing "access to network elements in accordance with the requirements of sections 251(c) and 252(d)(1)" (§ 271(c)(2)(B)(ii)) -- which is the same standard a federal district court must apply when it directly reviews a State's pricing determinations. § 252(e)(6). As the D.C. Circuit has held, § 271 provides that the FCC must conclude "to its own satisfaction" that the BOC has satisfied all "statutory requirements" for long-distance authority, and the FCC is not required "to give the State commissions' views any particular weight" in making that determination. *SBC Communications, Inc.* v. *FCC*, No. 97-1425, slip op. at 12-13 (D.C. Cir. March 20, 1998) (Silberman, J.). Although federal authorities had to assess the sufficiency of state approved arrangements under the MFJ in precisely these ways, the Eighth Circuit has (in a

subsequent order that is the subject of a separate petition for certiorari) required the FCC here to defer to state pricing determinations in order to assure that the "effect" of its § 271 jurisdiction is not to cause any State to follow the FCC's view of how the federal pricing requirements should be interpreted and implemented. *Supra*, pp. 8-9, 17.

Finally, while not discussed by the Eighth Circuit, § 253(d) authorizes the FCC to preempt any state order that "may" have the "effect" of prohibiting any entity from providing "any interstate or intrastate telecommunications service." By its terms, this provision gives the FCC authority over any state-authorized aspect of an interconnection arrangement. Indeed, while the FCC did not expressly invoke § 253 when it adopted its pricing rules, the FCC then found that the different pricing rules that some states have now adopted constitute such entry barriers. J.A. 147-162 (¶¶ 704-723).

In short, the other provisions of the Act vividly confirm what §§ 151, 154, 201, 251(d), and 303 make explicit. Congress intended that the FCC would adopt regulations defining all the requirements of §§ 251 and 252. Congress further intended that these regulations would be first applied by the States (or the FCC) in conducting arbitrations and then applied by the FCC in conducting proceedings under §§ 208, 253, 271, and other provisions of the Act.

D. Because Of Its Erroneous Jurisdictional Holding, The Eighth Circuit Applied The Wrong Standard in Reviewing Other Rules.

The Eighth Circuit's jurisdictional holding also caused it to apply an incorrect legal standard in reviewing those FCC rules that the Eighth Circuit found were within the FCC's jurisdiction. In particular, as this Court has repeatedly held, §§ 151, 154, 201, 251(d), and 303 authorize the FCC to adopt any rules that

are not inconsistent with the requirements of the Act and that reasonably implement its objectives. See pp. 23-24 & nn. 13-14, *supra*. But the Eighth Circuit did not apply this standard in reviewing the FCC's other rules, for the Eighth Circuit erroneously held that these statutory provisions were all inapplicable. Instead, the Eighth Circuit erroneously invalidated three separate sets of FCC rules on the ground that they did not rest on interpretations of the terms of the six subsections of § 251 that mention the FCC.

First, the Eighth Circuit vacated 47 C.F.R. § 51.317 which governs determinations of whether additional network elements must be made available by establishing a rebuttable presumption that if "it is technically feasible to unbundle a particular element," then "the element must be unbundled." Pet. App. 46. No claim was made that this rule frustrated the purposes of the Act or was inconsistent with any of its provisions. Instead, the Eighth Circuit vacated the rule (Pet. App. 46a) simply because there is "no reference to technical feasibility" in § 251(d)(2), which establishes some factors that the FCC must "at a minimum" consider "[i]n determining what network elements should be made available." That was plain error. The absence of any reference to technical feasibility in § 251(d)(2) does not prohibit the FCC from taking issues of technical feasibility into account in identifying network elements. Indeed, the Eighth Circuit's holding would produce the absurdity that the Act could permit or require the unbundling of a particular network capability even when that is technically infeasible.

Second, the Eighth Circuit vacated FCC rules that required incumbents to provide requesting carriers, for an additional charge, with "superior quality interconnection" or "access." Pet. App. 50a-52a (vacating Rules 51.305(a)(4) and 51.311(c)). The Eighth Circuit vacated these rules because the statute stated that access and interconnection must be "at least equal in quality" and could not be construed to *require* superior access.

Pet. App. 100a. Again, no claim was made that the rules were inconsistent with the Act's terms or purposes.

Third, the Eighth Circuit vacated Rules 51.315(c)-(f), which required LECs, upon request and again for additional compensation, to combine network elements with elements possessed by the new entrant or to combine their own network elements in a manner in which they are "not ordinarily combined" in the LECs' network. See Pet. App. 294a. The Eighth Circuit concluded that these rules were not authorized by the second sentence of § 251(c)(3) -- which requires LECs to provide network elements "in a manner that allows requesting carriers to combine" them -- because that sentence "indicates" that the new entrants "will combine the [] elements themselves." See Pet. App. 53a. But here, too, no claim was made that it was inconsistent with the Act's terms or purposes for the FCC to require LECs -- with their superior knowledge of and access to their networks -- to assume that task when requested and fully compensated.

In short, because of the Eighth Circuit's erroneous jurisdictional holding, it vacated pricing and certain non-pricing rules on the ground that they were outside the FCC's jurisdiction and vacated three sets of other rules by applying an incorrect legal standard. These aspects of the Eighth Circuit's judgment should be reversed, and the Eighth Circuit directed to review all these rules under the correct standard.

II. RULE 51.315(b) IMPLEMENTS § 251(c)(3)'s NONDISCRIMINATION REQUIREMENT AND IS CONSISTENT WITH THE UNIFORM DICTIONARY, JUDICIAL, AND REGULATORY DEFINITIONS OF "UNBUNDLED."

FCC Rule 51.315(b) provides that "[e]xcept upon request, an incumbent LEC shall not separate requested network elements

that the incumbent LEC currently combines." 47 C.F.R. § 51.315(b). That rule implements the requirement of § 251(c)(3) that new entrants receive "*nondiscriminatory* access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and *nondiscriminatory*" (emphasis added). As the FCC has held, and as no party has challenged, "nondiscrimination" requires that LECs provide to new entrants the same quality of access to their facilities that the LECs receive themselves. *See* 47 C.F.R. § 51.313(b). Rule 51.315(b) implements that requirement by providing that an incumbent LEC must enable the new entrant to access network elements in combined form to serve a customer when (but only when) the LEC would access those elements in combined form if it were establishing the customer's service. Correlatively, it provides that, absent a request for greater separation, the LEC may separate elements provided to new entrants only to the extent that the elements are separated when the LEC accesses them to establish a customer's service.

This straightforward application of the nondiscrimination requirement is necessary to prevent conduct that would otherwise devastate the ability of new entrants to use network elements to compete with the LECs. Each of the seven network elements the FCC requires LECs to make available is always at least physically connected to, and accessed by the LEC in combination with, one or more of the other six elements. For example, the "loop," the wires that connect the customer's premises to the network, is connected at both ends to other network elements -- at one end to the switch, and at the other end to the "network interface device," a small box at the customer's home or business. If a LEC were permitted physically to disconnect these and other elements from each other before providing them to new entrants, it could render competition through network elements completely infeasible.

That is so for at least three reasons. First, a new entrant that signed up a new customer would incur the cost and delay of somehow obtaining access to the LEC's network and physically reconnecting the elements before it could actually provide service. This would be a powerful entry barrier that would destroy the economics of using network elements to provide competitive service, for, as the FCC found, the new entrant would then bear costs to provide service "that incumbent LECs would not incur" to provide the same service.[15] Second, such disassembly would create a powerful disincentive for any customer to switch service to the new entrant, for any that did so would suffer service outages of indefinite duration as the new entrant sought to reestablish up to six separate physical connections between the elements. Third, the costs and delay would also mean that a competitive carrier would be able as a logistical matter to fill orders from only a competitively trivial number of customers in a given year, thus foreclosing any prospect of widespread competition through network elements.[16] In each respect, the fundamental problem is the same: the new entrant would be forced to provide service at degraded quality and at higher cost than the LEC, and would therefore be denied the nondiscriminatory access that is essential to competition and required by § 251(c)(3).

That has been the precise result of the Eighth Circuit's

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[15] *Local Competition*, Third Order on Reconsideration, 12 F.C.C.R. 12460, 12486, ¶ 44 (1997) (*pet. for rev. on other grounds pending*, No. 97-3389 (8th Cir.)) (J.A. 247-48).

[16] By contrast, when customers switch their long-distance service from one carrier to another, no such disconnection and reconnection of facilities is undertaken. The switchover is therefore quick and seamless, and customers switched long-distance carriers 53 million times in 1996. No such competitive outcome would be possible in local markets if LECs could require discriminatory physical recombinations of elements every time a customer attempted to switch away from the incumbent.

decision invalidating Rule 51.315(b). In the wake of that decision, the LECs announced that they would thereafter physically disconnect certain network element combinations before providing them to new entrants even when the LECs access those elements themselves in combined form. The LECs did so because combinations of network elements constitute the only entry vehicle that can permit the immediate, nationwide establishment of alternatives to the LECs' exchange and exchange access services, and they are particularly critical for providing competition for residential service.[17] Investment analysts have thus concluded that the Eighth Circuit's decision on rehearing "effectively has killed off local competition" in much of the local market.[18]

The Eighth Circuit's rehearing decision invalidated Rule 51.315(b) on three related grounds. First, it held that the term "unbundled" in § 251(c)(3)'s first sentence means "separated" or "uncombined." Pet. App. 71a. Second, the Eighth Circuit seemingly also relied on its previous holding that § 251(c)(3)'s second sentence -- "[a]n incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine" them -- "indicates that requesting carriers will combine the unbundled elements themselves." Pet. App. 53a. It concluded that this sentence must also authorize the incumbent LEC to separate network elements before providing the requesting carrier with access to them so that the requesting carrier can then "rebundle" them. *Id.* Finally, the Eighth Circuit stated that the FCC's rule would

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[17] *See, e.g.*, Aff. of Joseph Gillan on Behalf of the Competitive Telecommunications Association, Ex. 1, *Petition of New York Tel for Approval of Statement of Generally Available Terms and Conditions*, 97-C-0271 (NY PSC) (90% of orders for unbundled network element combinations are to serve residential as opposed to business customers).

[18] *Court Ruling May Close Door on Leasing of Network Elements by CLECs*, Communications Today (Oct. 16, 1997).

destroy the Act's "careful distinctions" between unbundled network elements and resale. Pet. App. 71a.

Each holding is erroneous. Indeed, the FCC's interpretation of § 251(c)(3) is the only plausible construction of that section's terms. In any event, it is patently a permissible and reasonable interpretation to which the Eighth Circuit was required to defer. See, e.g., *Chevron USA, Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

A. "Unbundled" Does Not Mean "Disconnected."

The Eighth Circuit defined the term "unbundled," which appears in § 251(c)(3)'s first sentence, as the opposite of "combined," which appears in its second sentence. See Pet. App. 71a. The term "combine" in the second sentence means to "connect[]" two or more network elements so that they can be used to provide service. See *First Report*, Pet. App. 232a (¶ 294 n.620). Accordingly, the Eighth Circuit's holding was that LECs may "unbundle" network elements by disconnecting them.

1. That interpretation flies in the face of the plain statutory language, which clearly contemplates that new entrants will often obtain access to network elements in combinations. Section 251(c)(3) provides that LECs must provide access to "network *elements*" (in the plural) at any "technically feasible *point*" (in the singular). The only way a new entrant can access multiple elements at a single point is if those elements are provided in combination.

2. The Eighth Circuit's interpretation of "unbundled" is also foreclosed by the uniform dictionary, regulatory, and judicial definitions of the term -- none of which the Eighth Circuit even acknowledged. To provide something on an unbundled basis is not to disconnect it, but simply to state a separate price for it and to give users the option of declining to purchase it as part

of a package.

First, that is the dictionary definition. "Unbundle" is uniformly defined by dictionaries as "to separate the charges for related products or services usually offered as a package," with telephone service listed as an example.[19] That multiple dictionaries support the FCC's interpretation is itself conclusive of its reasonableness. See *National R.R. Passenger Corp.* v. *Boston & Me. Corp.*, 503 U.S. 407, 418-19 (1992).

Second, that was the meaning of the term "unbundled" in the 15 years of prior regulatory decisions that had directed LECs to provide other components of telephone service on an unbundled basis. In these decisions, the LECs' duty was to state a separate price for these components and to give customers the option of declining to obtain the unbundled component in combination with other LEC facilities or services. For example, in 1980, the LECs were required to "unbundle" telephone sets from the provision of local telephone service. That meant that LECs were required to price the two separately and give customers the option of replacing LEC telephones with those obtained from other sources. It did not mean that LECs visited the homes of customers who chose to continue leasing LEC telephones, disconnected them, and made the customers incur inconvenience and expense to reconnect them. See p. 8, *supra*.

The same rule applied when the FCC ordered the "unbundling"

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[19] *Random House Dictionary Of The English Language* at 2055 (2d Ed. Unab. 1987); *accord*, *Webster's New Collegiate Dictionary* (Merriam, 1981), at 1263 ("unbundle" is "to give separate *prices* for equipment and supporting services; to *price* separately") (emphases added); *American Heritage Dictionary*, at 1315 (2d Col. Ed. 1991) ("unbundling" is "[t]he separate pricing of goods and services").

of inside wire,[20] of features used to provide enhanced services,[21] and of dedicated transport, switched transport, and tandem switching.[22] And that is also how courts have uniformly used the term in other industries.[23] In all these contexts, to unbundle is to provide separate rates and choices for users, not to create inefficiencies for purchasers who order existing combinations.[24] Indeed, this Court has held that it violates the Sherman Act if a firm with market power acts with no "normal business purpose" and no "efficiency justification" to harm consumers and competitors. See *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605-611 (1985).

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[20] *Inside Wiring*, 59 Rad. Reg.2d 1143, 1151-56 (1986), *aff'd in relevant part, NARUC* v. *FCC*, 880 F.2d 422 (D.C. Cir. 1989).

[21] *Third Computer Inquiry*, 104 F.C.C.2d 958, 1064-66 (1986) ("unbundling" means that "competitors will pay only for Basic Service Elements that they use").

[22] *Expanded Interconnection*, 7 F.C.C.R. 7369 (1992) (dedicated transport); 8 F.C.C.R. 7374 (1993) (switched transport and tandem switching).

[23] *See, e.g., Northwest Pipeline Co.* v. *FERC*, 61 F.3d 1479, 1482 (10th Cir. 1995) (distinguishing "'bundled customers,' who are charged a unitary rate," and "'unbundled customers,'. . . who are charged separately for each component of service"); *Stinnett* v. *BellSouth*, 1993 U.S. Dist. LEXIS 21056, *6 (E.D. Tenn. March 3, 1993) ("unbundling". . . means that "charges [are] listed separately on a customer's bill"); *In re Data General Corp. Antitrust Lit.*, 490 F. Supp. 1089, 1105 (N.D. Cal. 1980) ("companies that market both software and CPUs make their software available on an 'unbundled' basis -- i.e., without also requiring the purchase of their own CPUs").

[24] Further, if Congress had regarded "unbundled" as the antonym of "combined," it presumably would have written the two sentences of § 251(c)(3) in parallel fashion -- either by requiring LECs to offer access to "*uncombined* network elements" or by requiring LECs to make unbundled network elements available "in a manner that enables requesting carriers to *bundle* them." Instead, Congress used different words because it was addressing different concepts.

Third, that was thus also the meaning of "unbundled" in the equal access requirements of the MFJ and GTE antitrust consent decrees that § 251(g) of the Act requires the FCC to enforce until it adopts "supersed[ing]" "regulations" under § 251. These provisions required the BOCs and GTE to provide all exchange access on an "unbundled . . . basis" at cost-based rates, which requires not that they pull apart network elements but that they file an "unbundled schedule [] of charges" and give carriers the option of using some elements but not others. See *United States* v. *AT&T*, 552 F. Supp. at 233; *United States* v. *GTE*, 603 F. Supp. at 743-46.

Indeed, this definition of "unbundled" is so widely understood that LECs themselves had urged its adoption at the FCC. In particular, in the Notice of Proposed Rulemaking that initiated this proceeding, the FCC provisionally defined "unbundling" as stating separate charges and providing the "ability" to obtain the component separately,[25] and the trade association of incumbent LECs endorsed this definition.[26] The FCC then incorporated that definition in a rule (§ 51.307(d)) and also adopted other rules reflecting the same understanding of unbundling.[27] These aspects of those other rules were not challenged before the Eighth Circuit. Indeed, it was only after the Eighth Circuit's first opinion revealed that the court had erroneously assumed that "unbundled" was the opposite of "combined" (Pet. App. 56a-57a) that the LECs seized on that notion, sought rehearing

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[25] *Local Competition*, 11 F.C.C.R. 14171, 14200 ¶ 86 & n. 116 (1996) (quoting *Random House College Dictionary*, at 1428 (revised ed. 1980)).

[26] *See* Comments of United States Telephone Association, at 26 (May 16, 1996).

[27] For example, the FCC also adopted 47 C.F.R. 51.307(b) to make it explicit that new entrants can never be "prohibited from requesting two network elements that are connected to each other." *First Report*, ¶ 329 (Pet. App. 243a); *accord* §§ 51.319(e)(1); 51.319(e)(2)(iii) (Pet. App. 298-301).

to invalidate Rule 51.315(b), and converted the error into a holding.

3. Finally, the Eighth Circuit's definition is also at odds with other aspects of its own decision. For example, as the Eighth Circuit correctly noted, the Act "definitively declares" that signaling systems are network elements. Pet. App. 44a (citing 47 U.S.C. § 3(29)); see also 47 C.F.R. § 51.319(e). But signaling systems, like most network elements, are "shared" facilities. This means that new entrants and the incumbent LECs both use the same signaling facilities at the same time for all their customers, much as multiple employees in a single company often access and share the same central office computer. That further means that any act to disconnect those facilities from other network elements risks causing outages for all local exchange customers, both the LECs' customers and new entrants' customers.[28]

The engineering realities of telecommunications networks are thus wholly at odds with the Eighth Circuit's understanding of unbundling. Telecommunications networks consist of highly interdependent facilities and functionalities. As one FCC Commissioner explained, network elements cannot simply be "unplugged" from one another and then put "back together [by the new entrant] like pieces in a Lego play set."[29] The Eighth

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[28] The LECs have therefore confined their separating to those elements that are not shared facilities, like the loop, so that they will impose outages only on the new entrants' customers.

[29] *See BellSouth Corp.*, 13 F.C.C.R. 539 (1997) (separate statement of Commissioner Powell). Indeed, this reality led that Commissioner to recommend complying with the Eighth Circuit's decision by having new entrants pay a "glue charge" to LECs in exchange for the LECs' merely leaving their network element combinations intact and thus "*simulat[ing]* the fiction of unbundling and rebundling." *Id.* (emphasis added). The suggestion that the only practical way to deal with the Eighth Circuit's decision is to require new

(continued...)

Circuit's erroneous interpretation of "unbundled" simply underscores the importance of respecting the "practical agency expertise [that] is one of the principal justifications behind *Chevron* deference." *Pension Benefit Guaranty Corp.* v. *LTV Corp.*, 496 U.S. 633, 651-52 (1990).

B. The Statutory Requirement That Incumbent LECs "Allow" New Entrants To Combine Elements Does Not Authorize LECs To Disconnect Elements.

The Eighth Circuit also adopted a related misconstruction of the second sentence of § 251(c)(3). That sentence provides: "An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service." In its initial decision, the Eighth Circuit had held that this sentence "could not be read to levy a duty on the incumbent LECs to do the actual combining of elements," but rather "indicates that requesting carriers will combine the unbundled elements themselves." Pet. App. 53a; *id.* ("the Act does not require incumbent LECs to do *all* of the work"). On that basis, the Eighth Circuit had invalidated Rules 51.315(c)-(f), which had required LECs, upon request by a new entrant and for compensation, to combine network elements that were *not* already combined -- *e.g.*, to combine LEC network elements with the new entrant's facilities, or to combine LEC network elements with other LEC network elements in ways in which they are not "ordinarily combined in the incumbent LEC's network." Pet. App. 53a, 294a.

On rehearing, the Eighth Circuit extended that holding by also

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[29] (...continued)
entrants to pay protection money for a completely non-existent "rebundling" service underscores how far the Eighth Circuit's holding departed from any rational understanding of the Act.

invalidating Rule 51.315(b), even though it, in contrast to Rules 51.315(c)-(f), did not remotely "levy a duty" on LECs "to do the actual combining of elements." To the contrary, Rule 51.315(b) applied only to elements that are already combined, so LECs did not have to do any "work" to comply with it, but merely to refrain from affirmative acts of sabotage.

However, by vacating Rule 51.315(b), the Eighth Circuit effectively read the second sentence's command that LECs "allow" new entrants to combine elements as (a) applying to elements that were already combined, and (b) providing that new entrants would not only be "allow[ed]", but also that they could be required, to establish connections between all elements they purchase. It therefore held that LECs could disconnect elements before providing them to new entrants even when the LECs access those elements for themselves in combined form.

The Eighth Circuit fundamentally misread the Act. The second sentence of § 251(c)(3) imposes a requirement not on new entrants, but on LECs, and that requirement is in addition to the LECs' duties under the first sentence. Thus, the first sentence requires, *inter alia*, that LECs provide nondiscriminatory access to network elements (*i.e.*, in the same form as the LECs access them), and that such access be provided at "any technically feasible point." In addition, even after they comply with those obligations, the LECs still have the duty under the second sentence to provide access at that "technically feasible point" in a manner that allows new entrants to combine the elements.

This obligation of the second sentence is part of the statutory scheme because LECs may lawfully separate elements in at least two circumstances. First, Rule 51.315(b) permits LECs to separate elements for new entrants "upon request." Thus, for example, a new entrant may seek to use a facility of its own (such as a switch) in combination with a LEC's facilities, and

will then exercise its statutory right to obtain access "at any technically feasible point" by interconnecting its switch with the LEC's loop. In order for the new entrant to establish that interconnection, the LEC must first physically separate the LEC's loop from the LEC's switch. Similar physical separation can be necessary when other facilities are substituted by the new entrant for the LEC's facilities. The second sentence requires that, in such situations, the LECs provide their network elements in a manner that enables the new entrant to accomplish the combining. Indeed, the LECs argued, and the Eighth Circuit held, that the second sentence of § 251(c)(3) directly addresses this situation among others. Pet. App. 52a-53a.

Second, the obligation imposed by the second sentence is also important because, even when the new entrant has not requested separation, the first sentence of § 251(c)(3) permits the LECs to provide elements to new entrants in separated form to whatever extent the LECs separate those network elements when they access the elements. When they do so, § 251(c)(3) again requires that the LECs provide new entrants with access "at any technically feasible point" and "in a manner that allows" the new entrants to "combine" the elements.

In that regard, while LECs do not physically disconnect network elements when they access those elements themselves, they do sometimes disconnect elements "logically" through their "operations support systems" ("OSS"). OSS are the computer systems that the LECs use, among other purposes, to send software instructions through the network directing how their facilities are to be used to provide service, and those systems constitute one "technically feasible point" at which new entrants can access network elements. When LECs disconnect network elements in the course of their own use, they do so logically by making software changes through their OSS, rather than by

physically pulling the pieces of equipment apart.[30] The FCC held that § 251(c)(3)'s nondiscrimination requirement applies to both "physical and logical connections" to adjacent elements (*First Report*, ¶ 312 (J.A. 56-57)), and to the extent that the LECs logically separate network elements for themselves, the LECs may likewise logically separate those elements for new entrants. However, under the second sentence of § 251(c)(3) the LECs must also then enable the new entrant to access the OSS to recombine those elements in the same way LECs do.

By contrast, if the Eighth Circuit read the second sentence to mandate disconnection in all instances, that construction is insupportable in at least three respects. First, as with the Eighth Circuit's related interpretation of "unbundled," it interprets one portion of § 251(c)(3) to authorize the discrimination that § 251(c)(3) elsewhere prohibits. Second, it ignores that the second sentence is framed exclusively as a duty of incumbent LECs to "allow" new entrants to combine elements, rather than a grant to LECs of a right to force new entrants to do such combining. Third, the Eighth Circuit's construction defeats the procompetitive purposes of the Act, for it authorizes incumbent LECs to separate elements solely to raise their rivals' costs.

C. The Eighth Circuit's Assertion That Rule 51.315(b) Should Be Invalidated To "Preserve" Resale As An "Attractive" Entry Vehicle Is Baseless.

Finally, the Eighth Circuit also justified its definition of

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[30] For example, when a LEC customer moves out of his or her home and terminates his or her local phone service, the LEC does not physically pull that customer's loop off the switch. Instead, it uses its OSS to send a message to a database associated with the former customer's switch instructing it to terminate service for that loop. Although the loop and the switch remain physically connected, they are then logically disconnected and that loop-switch combination will be inoperable, and the customer unable to make or receive phone calls, unless and until a different software instruction is sent.

"unbundled" by asserting that the FCC's contrary definition would "obliterate" the Act's "careful distinctions" between unbundled network elements and resale. Pet. App. 71a. The Eighth Circuit appeared to believe that unless it substantially and artificially increased the costs of obtaining unbundled network element combinations by permitting LECs to separate them, "all requesting carriers [would] select unbundled access over resale as their preferred route to enter the local telecommunications market," and that construing "unbundled" as "uncombined" was therefore necessary to "preserve resale" as an "attractive option." Pet. App. 56a-57a. This analysis was fundamentally misguided, both legally and factually.

First, there was no legal basis for the Eighth Circuit's effort to ensure that resale remained comparatively attractive to new entrants by making unbundled elements difficult to use. As the FCC found, Congress' purpose in establishing three different entry vehicles was to create alternative paths that new entrants with different business plans could employ "as market conditions and access to capital permit." Pet. App. 137a-138a (¶ 12). Congress could not at that time know, and did not presume to know, which entry vehicles would ultimately prove most successful or be used most often, and certainly did not instruct courts to create artificial obstacles to one vehicle in order to enhance the appeal of another.

Second and in any event, even if the issue were relevant there was never any prospect that Rule 51.315(b) would lead all new entrants to purchase network elements and that the resale option would thereby be nullified. The FCC made detailed findings on this very point in the same order in which it adopted Rule 51.315(b). It explained that these entry vehicles present different costs, different risks, and different opportunities; that new entrants select one or the other based on a range of factors, including the markets they seek to enter, the particular services they seek to provide, and their willingness to assume risk; and

that there is no prospect that the availability of network element combinations will mean that no carrier engages in resale. Pet. App. 244a-246a. These findings were eminently reasonable, supported by a voluminous record, and well within the FCC's expertise, and the Eighth Circuit had no legitimate basis for concluding that it needed to impose additional burdens on purchasers of network elements to make resale more attractive.

Finally, even if Congress had thought it important to ensure that resale be a comparatively attractive entry option and the FCC's factual findings had been found erroneous, the most the Eighth Circuit could have concluded was that §§ 251(c)(3) and 251(c)(4) embodied partially conflicting policies. However, the "principle of deference to administrative interpretations" is highest "'whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies.'" *Chevron*, 467 U.S. at 844 (citation omitted). In short, the Eighth Circuit fundamentally misperceived its role as a reviewing court when it invalidated Rule 51.315(b). It improperly rested its decision on an unprecedented definition of an established term and on uninformed and inaccurate economic and factual speculations that are contrary to well-reasoned conclusions of the federal agency responsible for the Act's implementation.

III. THE FCC's CONSTRUCTION OF § 252(i) IS CORRECT, AND IN ALL EVENTS REASONABLE UNDER *CHEVRON*.

Section 252(i) requires an incumbent LEC to "make available *any* interconnection, service or network element provided *under* an agreement . . . to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement." 47 U.S.C. § 252(i) (emphasis added). The FCC interpreted this "most favored nation" provision in light of its language and evident purpose, and concluded that it required incumbents to make available

"any individual interconnection, service, or network element arrangement contained in an agreement" under all of the "terms and conditions [that] legitimately relate[] to the purchase of the individual element being sought." Pet. App. 261a, 264a, 336a.

The Eighth Circuit vacated this rule, holding that § 252(i) requires incumbents to make available only agreements in their totality, rather than individual elements provided under an agreement. Pet. App. 27a. That holding conflicts with § 252(i)'s language, history and purposes and is based on a misapprehension of the rule's operation.

The FCC correctly concluded that § 252's terms draw a clear "distinction between 'any interconnection, service, or network elements provided under an agreement,' which the statute lists individually, and agreements in their totality." Pet. App. 261a-262a. Section 252(i) was thus designed to "prevent discrimination . . . by making available to other carriers *the individual elements* of agreements that have been previously negotiated." S. Rep. No. 104-23, at 22 (1995) (emphasis added).

Indeed, the terms of the FCC's rule are virtually identical to the language of § 252(i). The Eighth Circuit thus agreed that § 252(i)'s terms "could indicate that the FCC's approach was intended by Congress." Pet. App. 25a n.22. Under *Chevron*, that should have ended the matter. However, the Eighth Circuit vacated the rule because it believed that the Act "reveal[ed]" a "preference" for negotiation over arbitration and that the FCC's rule would "thwart the negotiation process" by permitting requesting carriers to "receive [a] concession without having to grant . . . the corresponding benefit." Pet. App. 26.

But these conclusions were baseless. First, the Act does not embody any overriding preference for negotiations. It establishes a short, four-month period in which LECs and their

potential competitors can attempt to negotiate agreements, and then provides for binding agency arbitrations whenever those negotiations fail to reach agreement. See § 252(b).

Second, in any event, the FCC's rule would not thwart any legitimate "give-and-take process" of negotiation. Pet. App. 26a. Under that rule, a requesting carrier must purchase a service or element under *all* the terms of the agreement that "legitimately relate" to that service or element. Thus, for example, where there has been legitimate give and take with the first carrier -- such as where an incumbent makes the terms of one element expressly conditional on the requesting carrier's agreement to purchase a defined amount of another element at that element's terms -- then a subsequent carrier would have to accept both the "benefit" as well as the "concession."

By contrast, the Eighth Circuit's reading of § 252(i) would require the subsequent carrier to take not only the terms that are tied to an individual service or element, but the entire agreement. That holding would thus permit an incumbent LEC to discriminate among new entrants, and to prevent any carrier from invoking its § 252(i) rights, merely by "insert[ing] into its agreement onerous terms for a service or element that the original carrier does not need," and therefore would not actually purchase, "in order to discourage subsequent carriers [that do need that service or element] from making a request under that agreement." Pet. App. 262a.

CONCLUSION

For the reasons stated, the Eighth Circuit's decisions should be reversed insofar as they vacate FCC rules.

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APPENDIX

RELEVANT STATUTORY PROVISION

47 U.S.C. § 271

§ 271. Bell operating company entry into interLATA services

(a) General limitation

Neither a Bell operating company, nor any affiliate of a Bell operating company, may provide interLATA services except as provided in this section.

(b) InterLATA services to which this section applies

(1) In-region services

Bell operating company, or any affiliate of that Bell operating company, may provide interLATA services originating in any of its in-region States (as defined in subsection (i) of this section) if the Commission approves the application of such company for such State under subsection (d)(3) of this section.

(2) Out-of-region services

A Bell operating company, or any affiliate of that Bell operating company, may provide interLATA services originating outside its in-region States after February 8, 1996, subject to subsection (j) of this section.

(3) Incidental interLATA services

A Bell operating company, or any affiliate of a Bell operating company, may provide incidental interLATA services (as defined in subsection (g) of this section) originating in any State after February 8, 1996.

(4) Termination

Nothing in this section prohibits a Bell operating company or any of its affiliates from providing termination for interLATA services, subject to subsection (j) of this section.

(c) Requirements for providing certain in-region interLATA services

(1) Agreement or statement

A Bell operating company meets the requirements of this paragraph if it meets the requirements of subparagraph (A) or subparagraph (B) of this paragraph for each State for which the authorization is sought.

(A) Presence of a facilities-based competitor

A Bell operating company meets the requirements of this subparagraph if it has entered into one or more binding agreements that have been approved under section 252 of this title specifying the terms and conditions under which the Bell operating company is providing access and interconnection to its network facilities for the network facilities of one or more unaffiliated competing providers of telephone exchange service (as defined in section 153(47)(A) of this title, but excluding exchange access) to residential and business subscribers. For the purpose of this subparagraph, such telephone exchange service may be offered by such competing

providers either exclusively over their own telephone exchange service facilities or predominantly over their own telephone exchange service facilities in combination with the resale of the telecommunications services of another carrier. For the purpose of this subparagraph, services provided pursuant to subpart K of part 22 of the Commission's regulations (47 C.F.R. 22.901 et seq.) shall not be considered to be telephone exchange services.

(B) Failure to request access

A Bell operating company meets the requirements of this subparagraph if, after 10 months after February 8, 1996, no such provider has requested the access and interconnection described in subparagraph (A) before the date which is 3 months before the date the company makes its application under subsection (d)(1) of this section, and a statement of the terms and conditions that the company generally offers to provide such access and interconnection has been approved or permitted to take effect by the State commission under section 252(f) of this title. For purposes of this subparagraph, a Bell operating company shall be considered not to have received any request for access and interconnection if the State commission of such State certifies that the only provider or providers making such a request have (i) failed to negotiate in good faith as required by section 252 of this title, or (ii) violated the terms of an agreement approved under section 252 of this title by the provider's failure to comply, within a reasonable period of time, with the implementation schedule contained in such agreement.

(2) Specific interconnection requirements

(A) Agreement required

A Bell operating company meets the requirements of this paragraph if, within the State for which the authorization is sought–

(i)(I) such company is providing access and interconnection pursuant to one or more agreements described in paragraph (1)(A), or

(II) such company is generally offering access and interconnection pursuant to a statement described in paragraph (1)(B), and

(ii) such access and interconnection meets the requirements of subparagraph (B) of this paragraph.

(B) Competitive checklist

Access or interconnection provided or generally offered by a Bell operating company to other telecommunications carriers meets the requirements of this subparagraph if such access and interconnection includes each of the following:

(i) Interconnection in accordance with the requirements of sections 251(c)(2) and 252(d)(1) of this title.

(ii) Nondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1) of this title.

(iii) Nondiscriminatory access to the poles, ducts, condu-

its, and rights-of-way owned or controlled by the Bell operating company at just and reasonable rates in accordance with the requirements of section 224 of this title.

(iv) Local loop transmission from the central office to the customer's premises, unbundled from local switching or other services.

(v) Local transport from the trunk side of a wireline local exchange carrier switch unbundled from switching or other services.

(vi) Local switching unbundled from transport, local loop transmission, or other services.

(vii) Nondiscriminatory access to--

(I) 911 and E911 services;

(II) directory assistance services to allow the other carrier's customers to obtain telephone numbers; and

(III) operator call completion services.

(viii) White pages directory listings for customers of the other carrier's telephone exchange service.

(ix) Until the date by which telecommunications numbering administration guidelines, plan, or rules are established, nondiscriminatory access to telephone numbers for assignment to the other carrier's telephone exchange service customers. After that date, compliance with such guidelines, plan, or rules.

(x) Nondiscriminatory access to databases and associated signaling necessary for call routing and completion.

(xi) Until the date by which the Commission issues regulations pursuant to section 251 of this title to require number portability, interim telecommunications number portability through remote call forwarding, direct inward dialing trunks, or other comparable arrangements, with as little impairment of functioning, quality, reliability, and convenience as possible. After that date, full compliance with such regulations.

(xii) Nondiscriminatory access to such services or information as are necessary to allow the requesting carrier to implement local dialing parity in accordance with the requirements of section 251(b)(3) of this title.

(xiii) Reciprocal compensation arrangements in accordance with the requirements of section 252(d)(2) of this title.

(xiv) Telecommunications services are available for resale in accordance with the requirements of sections 251(c)(4) and 252(d)(3) of this title.

(d) Administrative provisions

(1) Application to Commission

On and after February 8, 1996, a Bell operating company or its affiliate may apply to the Commission for authorization to provide interLATA services originating in any in-region State. The application shall identify each State for which the authorization is sought.

(2) Consultation

(A) Consultation with the Attorney General

The Commission shall notify the Attorney General promptly of any application under paragraph (1). Before making any determination under this subsection, the Commission shall consult with the Attorney General, and if the Attorney General submits any comments in writing, such comments shall be included in the record of the Commission's decision. In consulting with and submitting comments to the Commission under this paragraph, the Attorney General shall provide to the Commission an evaluation of the application using any standard the Attorney General considers appropriate. The Commission shall give substantial weight to the Attorney General's evaluation, but such evaluation shall not have any preclusive effect on any Commission decision under paragraph (3).

(B) Consultation with State commissions

Before making any determination under this subsection, the Commission shall consult with the State commission of any State that is the subject of the application in order to verify the compliance of the Bell operating company with the requirements of subsection (c) of this section.

(3) Determination

Not later than 90 days after receiving an application under paragraph (1), the Commission shall issue a written determination approving or denying the authorization requested in the application for each State. The Commission shall not approve the authorization requested in an application

submitted under paragraph (1) unless it finds that—

(A) the petitioning Bell operating company has met the requirements of subsection (c)(1) of this section and—

(i) with respect to access and interconnection provided pursuant to subsection (c)(1)(A) of this section, has fully implemented the competitive checklist in subsection (c)(2)(B) of this section; or

(ii) with respect to access and interconnection generally offered pursuant to a statement under subsection (c)(1)(B) of this section, such statement offers all of the items included in the competitive checklist in subsection (c)(2)(B) of this section;

(B) the requested authorization will be carried out in accordance with the requirements of section 272 of this title; and

(C) the requested authorization is consistent with the public interest, convenience, and necessity.

The Commission shall state the basis for its approval or denial of the application.

(4) Limitation on Commission

The Commission may not, by rule or otherwise, limit or extend the terms used in the competitive checklist set forth in subsection (c)(2)(B) of this section.

(5) Publication

Not later than 10 days after issuing a determination under paragraph (3), the Commission shall publish in the Federal Register a brief description of the determination.

(6) Enforcement of conditions

(A) Commission authority

If at any time after the approval of an application under paragraph (3), the Commission determines that a Bell operating company has ceased to meet any of the conditions required for such approval, the Commission may, after notice and opportunity for a hearing—

(i) issue an order to such company to correct the deficiency;

(ii) impose a penalty on such company pursuant to title V; or

(iii) suspend or revoke such approval.

(B) Receipt and review of complaints

The Commission shall establish procedures for the review of complaints concerning failures by Bell operating companies to meet conditions required for approval under paragraph (3). Unless the parties otherwise agree, the Commission shall act on such complaint within 90 days.

(e) Limitations

(1) Joint marketing of local and long distance services

Until a Bell operating company is authorized pursuant to subsection (d) of this section to provide interLATA services in an in-region State, or until 36 months have passed since February 8, 1996, whichever is earlier, a telecommunications carrier that serves greater than 5 percent of the Nation's presubscribed access lines may not jointly market in such State telephone exchange service obtained from such company pursuant to section 251(c)(4) of this title with interLATA services offered by that telecommunications carrier.

(2) IntraLATA toll dialing parity

(A) Provision required

A Bell operating company granted authority to provide interLATA services under subsection (d) of this section shall provide intraLATA toll dialing parity throughout that State coincident with its exercise of that authority.

(B) Limitation

Except for single-LATA States and States that have issued an order by December 19, 1995, requiring a Bell operating company to implement intraLATA toll dialing parity, a State may not require a Bell operating company to implement intraLATA toll dialing parity in that State before a Bell operating company has been granted authority under this section to provide interLATA services originating in that State or before 3 years after February 8, 1996, whichever is

earlier. Nothing in this subparagraph precludes a State from issuing an order requiring intraLATA toll dialing parity in that State prior to either such date so long as such order does not take effect until after the earlier of either such dates.

(f) Exception for previously authorized activities

Neither subsection (a) of this section nor section 273 of this title shall prohibit a Bell operating company or affiliate from engaging, at any time after February 8, 1996, in any activity to the extent authorized by, and subject to the terms and conditions contained in, an order entered by the United States District Court for the District of Columbia pursuant to section VII or VIII(C) of the AT&T Consent Decree if such order was entered on or before February 8, 1996, to the extent such order is not reversed or vacated on appeal. Nothing in this subsection shall be construed to limit, or to impose terms or conditions on, an activity in which a Bell operating company is otherwise authorized to engage under any other provision of this section.

(g) Definition of incidental interLATA services

For purposes of this section, the term "incidental interLATA services" means the interLATA provision by a Bell operating company or its affiliate—

(1)(A) of audio programming, video programming, or other programming services to subscribers to such services of such company or affiliate;

(B) of the capability for interaction by such subscribers to select or respond to such audio programming, video programming, or other programming services;

(C) to distributors of audio programming or video programming that such company or affiliate owns or controls, or is licensed by the copyright owner of such programming (or by an assignee of such owner) to distribute; or

(D) of alarm monitoring services;

(2) of two-way interactive video services or Internet services over dedicated facilities to or for elementary and secondary schools as defined in section 254(h)(5) of this title;

(3) of commercial mobile services in accordance with section 332(c) of this title and with the regulations prescribed by the Commission pursuant to paragraph (8) of such section;

(4) of a service that permits a customer that is located in one LATA to retrieve stored information from, or file information for storage in, information storage facilities of such company that are located in another LATA;

(5) of signaling information used in connection with the provision of telephone exchange services or exchange access by a local exchange carrier; or

(6) of network control signaling information to, and receipt of such signaling information from, common carriers offering interLATA services at any location within the area in which such Bell operating company provides telephone exchange services or exchange access.

(h) Limitations

The provisions of subsection (g) of this section are intended to be narrowly construed. The interLATA services provided

under subparagraph (A), (B), or (C) of subsection (g)(1) of this section are limited to those interLATA transmissions incidental to the provision by a Bell operating company or its affiliate of video, audio, and other programming services that the company or its affiliate is engaged in providing to the public. The Commission shall ensure that the provision of services authorized under subsection (g) of this section by a Bell operating company or its affiliate will not adversely affect telephone exchange service ratepayers or competition in any telecommunications market.

(i) Additional definitions

As used in this section—

(1) In-region State

The term "in-region State" means a State in which a Bell operating company or any of its affiliates was authorized to provide wireline telephone exchange service pursuant to the reorganization plan approved under the AT&T Consent Decree, as in effect on the day before February 8, 1996.

(2) Audio programming services

The term "audio programming services" means programming provided by, or generally considered to be comparable to programming provided by, a radio broadcast station.

(3) Video programming services; other programming services

The terms "video programming service" and "other programming services" have the same meanings as such terms

have under section 522 of this title.

(j) Certain service applications treated as in-region service applications

For purposes of this section, a Bell operating company application to provide 800 service, private line service, or their equivalents that—

(1) terminate in an in-region State of that Bell operating company, and

(2) allow the called party to determine the interLATA carrier,

shall be considered an in-region service subject to the requirements of subsection (b)(1) of this section.

(14) (14) (15) (15)

Nos. 97-826, 97-829, 97-830 & 97-831

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

FEDERAL COMMUNICATIONS COMMISSION
and the UNITED STATES OF AMERICA,
Petitioners,

v.

IOWA UTILITIES BOARD, *et al.*,
Respondents.

AND RELATED PETITIONS

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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CONSOLIDATED BRIEF FOR RESPONDENTS UNITED STATES TELEPHONE ASSOCIATION AND THE RURAL TELEPHONE COALITION

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The parties to the proceedings in the Eighth Circuit are listed in Pet. App. at 1a-4a, 73a-79a and 92a.

Pursuant to Rule 29.6 of the Supreme Court Rules, the Rural Telephone Coalition ("RTC") and United States Telephone Association ("USTA") respectfully submit these disclosure statements.

RTC is comprised of the National Rural Telecom Association ("NRTA"), the National Telephone Cooperative Association ("NTCA"), and the Organization for the Promotion and Advancement of Small Telecommunications Companies ("OPASTCO"). Each of the associations in the RTC is a non-profit trade association representing the interest of facilities-based local exchange and exchange access providers. These companies are full members of the associations. Some of the associations also have international members who provide local exchange services in other jurisdictions, and associate members consisting of consultants, manufacturers, and other parties with interests in the local exchange carrier industry. Neither the RTC nor any of the associations have any parent companies, subsidiaries, or affiliates for whom disclosure is required by Rule 29.6.

USTA is a non-profit trade association representing the interest of facilities-based local exchange and exchange access providers. These companies are its full members. USTA also has international members who provide local exchange services in other jurisdictions, and associate members including consultants, manufacturers, banks and investors, and other parties with interests in the local exchange carrier industry. USTA has no parent companies, subsidiaries, or affiliates for whom disclosure is required by Rule 29.6.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

Nos. 97-826, 97-829, 97-830 & 97-831

FEDERAL COMMUNICATIONS COMMISSION
and the UNITED STATES OF AMERICA,
Petitioners,

v.

IOWA UTILITIES BOARD, *et al.*,
Respondents.

AND RELATED PETITIONS

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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CONSOLIDATED BRIEF FOR RESPONDENTS UNITED STATES TELEPHONE ASSOCIATION AND THE RURAL TELEPHONE COALITION

STATEMENT OF THE CASE

Respondent United States Telephone Association ("USTA") is a non-profit trade association that represents the interests of more than 1,000 facilities-based local exchange and exchange access providers, most of which are small and mid-sized local exchange carriers ("LECs"). Respondent Rural Telephone Coalition ("RTC") is an alliance composed of three national trade associations, the National Rural Telecom Association ("NRTA"), the National Telephone Cooperative Association ("NTCA") and the Organization for the Promotion and Advancement

of Small Telecommunications Companies ("OPASTCO"), which together represent the interests of more than 850 small and rural incumbent LECs.

In the Court of Appeals, USTA and RTC joined with other parties to challenge the validity of Federal Communications Commission ("FCC" or "Commission") rules governing the price and other central terms of interconnection agreements that must be reviewed and approved by State commissions. USTA and the RTC also separately challenged the validity of two FCC rules of special significance to small and rural carriers: (1) 47 C.F.R. § 51.405, which required State commissions to apply restrictive standards of proof when determining whether small and rural carriers should be relieved of undue burdens imposed by the Act; and (2) 47 C.F.R. § 51.303, which required State commissions to review and approve all interconnection agreements adopted by carriers prior to the effective date of the 1996 Act.

The Eighth Circuit vacated both of these regulations based upon its conclusion that the text of 47 U.S.C. § 251(f) and 47 U.S.C. § 252(a)—which assign States the responsibility for making exemption determinations and reviewing interconnection agreements—also vest States with exclusive jurisdiction to establish the rules governing these State proceedings. The Commission and the other Petitioners have now sought review of these rulings as part of their broad-based challenge to the decision of the Eighth Circuit. *See* FCC Br. at (I) (question 1); AT&T Br. at (i) (question 1); MCI Br. at (i) (question 2); ALTS Br. at (i) (question 2); *see also* FCC Br. at 19, 26 n.9. Petitioners nevertheless fail to provide this Court with any background concerning these regulations or the statutory provisions they implement. That background is presented here.[1]

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[1] This brief only addresses the Eighth Circuit's decision with respect to the two referenced rules of special concern to small

A. The Statutory Framework

Throughout much of this century, States have adopted specially tailored policies designed to maintain the investment incentives of the small and rural carriers that provide service to remote areas.[2] Providing service to rural areas has presented challenging policy issues for many decades because the high cost associated with the delivery of rural service makes it difficult for telephone companies to offer customers affordable rates or to provide investors with attractive rates of return. Small carriers that have made the substantial investment in rural markets are obligated to serve their entire local exchange service areas as "carriers of last resort." As a consequence, these small businesses are particularly vulnerable to "cream skimming" by new entrants that target only high-volume business users in the rural territories. *See, e.g.*, H.R. Rep. No. 81-246, at 8 (1949) (observing that telephone companies were "running their lines down the highways into the most profitable areas and relegating farmers in the less profitable service areas perpetually to a nontelephone hinterland"). Left unchecked, the loss of even one or two high-volume customers in a rural market will drive up the costs of serving the rural LECs remaining residential

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LECs. USTA and RTC join the arguments set forth in the briefs of the Regional Bell Companies and GTE (the "Large LECs") and the Mid-Sized Local Exchange Carriers (the "Mid-Sized LECs") with respect to the other rules at issue in this case.

[2] *See, e.g., AT&T Communications of the Mountain States*, 61 Pub. Util. Rep. 4th 102, 113 (Wy. 1984) (noting that universality of basic service has been "accomplished in Wyoming through years of concerted effort by utilities and this commission"); *Northwestern Bell Tel. Co.*, 71 Pub. Util. Rep. 1, 11 (S.D. P.U.C. 1947) (stating that "it has been the general policy of this Commission to encourage the extension of exchange service into every community and household of the state"); *In re Mountain States Tel. & Tel. Co.*, Pub. Util. Rep. 1916B, 169, 171 (Co. P.U.C. 1915) (requiring defendant telephone company to "make every effort to serve all communities within the State").

customers and/or diminish the economic viability of the rural service providers.[3] State commissions, the FCC, Congress, and economists have long recognized that the efficiency and public policy justifications for introducing competition have been far less apparent in rural markets than in densely populated urban areas where vast economies of scale and lower cost service are possible.[4]

1. In enacting the Telecommunications Act of 1996, Congress fundamentally changed the nature of competition in the markets for local telecommunications services by removing many competitive barriers to entry. But Congress did not renounce decades of special policies designed to enable small companies to provide service and update their networks in rural areas, or the significance of the States' role in fostering the success of these rural ventures. Congress's decision to rely upon the States to develop competition policies tailored to the rural markets is reflected throughout the 1996 Act. *See* 47 U.S.C. § 253(a), (f) (adopting general rule that States may not bar the entry of any telecommunications competitor, except that States may limit competitive entry "in a service area served by a rural telephone company" in certain

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[3] *Cf. Public Service Commission v. Mountain States Tel. & Tel. Co.*, Pub. Util. Rep. 1924C, 545, 560-61 (Mont. P.S.C. 1924) (noting that without following policy of averaging rates over customers of high- and low-cost areas "[i]t is entirely conceivable that . . . a great many of the smaller communities of the state, and possibly all of the rural districts, would be cut off entirely from telephone service by prohibitive rates") (citing *New Castle v. Bell Tel. Co.*, Pub. Util. Rep. 1921B, 378, 380 (Pa. P.U.C. 1921) (same).

[4] *See, e.g.*, John C. Panzar and Steven S. Wildman, "Competition in the Local Exchange: Appropriate Policies to Maintain Universal Service in Rural Areas," at 4-8 (Northwestern Univ. 1993) ("Panzar"), attached to National Comms. Infrastructure (Part 3), Hearings Before the Subcomm. on Telecomms. and Finance of the House Comm. on Energy and Commerce, 103d Cong. (Feb. 8-10, 1994) (testimony of Lawrence C. Ware, Rural Tel. Coalition).

circumstances); 47 U.S.C. § 214(e)(2) (permitting the States to determine whether it would promote the "public interest" to provide universal service funding to more than one telecommunications carrier in a rural market); 47 U.S.C. § 251(f) (authorizing State commissions to terminate exemptions and grant suspensions and modifications of the competition provisions of the Act for small and rural carriers).[5]

Section 251(f) provides the States with two central mechanisms to relieve small and rural telephone companies of undue competitive burdens. Section 251(f)(1) first exempts "rural telephone compan[ies]"[6] from the obligations imposed by Section 251(c) on incumbent carriers to offer competitors interconnection with their facilities and unbundled network elements.[7] States are given express authority to administer this exemption. Section 251(f) directs a carrier seeking interconnection with a rural LEC to "submit . . . its request to the State

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[5] *See also Implementation of the Telecommunications Act of 1996*, 168 Pub. Util. Rep. 4th 89, 96 n.12 (Pa. P.U.C. 1996) (observing that "the interrelationship of [Sections 253(f), 214(e)(2) and 251(f)] is designed to protect rural telephone companies from 'cream skimming' practices by competing carriers," and that "[b]ecause of their small size and limited number of commercial customers, potential 'cream skimming' practices create greater exposure for rural telephone companies").

[6] The definition of a "rural telephone company" is established in 47 U.S.C. § 153(37).

[7] Congress adopted this exemption provision in order to create a "level playing field, particularly when a company or a carrier to which this subsection applies faces competition from a telecommunications carrier that is a large global or nationwide entity that has financial or technological resources that are significantly greater than the resources of the company or carrier." S. Rep. No. 104-23, at 22 (1995) ("Senate Report"); *see also* H.R. Rep. No. 104-204, pt. 1, at 74 (1995), *reprinted in* 1996 U.S.C.C.A.N. 10, 40 (rural exemption necessary to avoid "significant costs associated with seeking a modification or waiver before the Commission").

commission," and the State commission is authorized to terminate the exemption if it "determin[es]" that the "request [for interconnection] is not unduly economically burdensome," is "technically feasible," and is otherwise "consistent" with certain universal service provisions of Section 254. 47 U.S.C. § 251(f)(1)(A). The Act does not authorize the FCC to conduct *any* proceedings relating to the rural exemption. *See* 47 U.S.C. § 251(f).

Section 251(f)(2) also vests States with authority to grant discretionary relief to any LEC (including a rural telephone company) that has "fewer than 2 percent of the Nation's subscriber lines installed in the aggregate nationwide" (referred to herein as "small companies"). These companies "may petition a State commission" for a suspension or modification of any requirement imposed by Sections 251(b) or (c). 47 U.S.C. § 251(f)(2). Congress accordingly afforded the State commission power to exempt (in whole or in part) small carriers from all of the special competitive obligations imposed on incumbent LECs under the 1996 Act. And this section vests the State commission with authority to grant relief if "[it] determines" that such relief "is consistent with the public interest, convenience, and necessity," and that it is necessary to avoid a "significant adverse economic impact on users of telecommunications services generally," an "undue economic[] burden[]," or a "technically infeasible" request made by a carrier. 47 U.S.C. § 251(f)(2)(A), (B). The FCC is not authorized to conduct suspension and modification proceedings under any circumstance. *See* 47 U.S.C. § 251(f)(2).

2. The 1996 Act also preserved State responsibility for regulating rural carriers' agreements with larger, non-competing LECs. For many years, rural telephone carriers have depended upon "co-carrier" relationships with larger companies to provide efficient service to rural subscribers. *See* Panzar at 34. Such joint arrangements between non-

competing LECs have served to reduce modernization costs and preserve revenues for universal service. For example, Extended Area Service ("EAS") arrangements between rural LECs and their neighboring large LECs enable rural and urban subscribers to call each other without incurring long distance charges. The prices of shared service components for rural LECs under such agreements are generally lower than prices made available to requesting carriers in a competitive marketplace. *See id.* at 41.

Rural carriers entered into hundreds of agreements of this type prior to the effective date of the 1996 Act, and one of the questions at issue in this case is how these agreements are affected by the terms of the Act. As described in the briefs of the large and mid-sized LECs, Sections 251 and 252 of the Act seek to introduce competition through reliance on private party negotiations and State commission review and approval of interconnection agreements. Section 252(a)(1) provides that an incumbent local exchange carrier "may negotiate and enter into a binding agreement with the requesting telecommunications carrier" upon receipt of a "request for interconnection, services, or network elements pursuant to section 251." 47 U.S.C. § 252(a)(1). Section 252(e) in turn provides that "[a]ny interconnection agreement adopted by negotiation or arbitration" under Sections 251 or 252 "shall be submitted for approval to the State commission." 47 U.S.C. § 252(e)(1). The Act does not clearly say whether State commissions must require agreements "negotiate[d] and enter[ed] into" before the effective date of the Act to be submitted to them for review and approval. although it clearly does provide that an agreement which was "negotiated" before the enactment date but executed afterwards must be submitted. 47 U.S.C. § 252(a)(1).

B. The FCC's Implementation of the 1996 Act

There is no dispute that Congress authorized States to adopt implementing regulations to fulfill their obligations to conduct exemption and suspension proceedings under

Section 251(f) and interconnection agreement approval proceedings under Section 252. *See* 47 U.S.C. § 261(b) (stating that "[n]othing in this part shall be construed to prohibit any State commission . . . from prescribing regulations . . . in fulfilling the requirements of this part [including Section 251(f) and Section 252(a)], if such regulations are not inconsistent with the provisions of this part"). The FCC confirmed this reading in its order by acknowledging that "we expect that states will interpret the requirements of section 251(f) through rulemaking and adjudicative proceedings." J.A. at 193. Although the FCC initially acknowledged that "states alone" had authority to make determinations under Section 251(f), J.A. at 11, the FCC nevertheless changed its mind (without explaining why), and decided to prevent States from adopting their own interpretations of central terms of Section 251(f) and Section 252(a) through rulemaking or adjudications. The Commission instead adopted "national rules" and directed States to render exemption and suspension decisions that "conform to our rules." J.A. at 435-36.

The national rule promulgated under Section 251(f) sought to dramatically circumscribe the State commissions' discretion to tailor competitive policies to the special characteristics of their rural markets, and sought to compel State commissions to adhere to an unduly restrictive interpretation of the standards for relief established under Section 251(f). First, Rule 51.405 displaced the three prerequisites for terminating an exemption established under Section 251(f)(1)—technical feasibility, undue economic burden, and consistency with universal service provisions—with a single "embellishe[d]" standard, Pet. App. at 28a, that required termination of any exemption absent proof that the request would impose an "undue economic burden."[8] Second, the FCC determined that an "economic

[8] Although the FCC protested in the Eighth Circuit that it did not really intend to displace the other prerequisites for termination

burden" warranting relief could not include any "economic burden that is typically associated with efficient competitive entry." 47 C.F.R. § 51.405(c), J.A. at 1124. Third, once a bona fide request is made by a requesting carrier, the FCC's rule assigned the burden of proof to the rural telephone company, based on the Commission's unsupported premise that "it is appropriate to place the burden of proof on the party seeking relief from otherwise applicable requirements." J.A. at 196.

The national rule promulgated under Section 252(a) required State commissions to review and approve hundreds of preexisting agreements between non-competing, neighboring LECs, including EAS agreements. The FCC interpreting the language of Sections 252(a) and (e) to require such approval, despite its acknowledgment that such agreements "were negotiated under very different circumstances, and may not provide a reasonable basis for interconnection agreements under the 1996 Act." J.A. at 30.

C. The Decision of the Eighth Circuit

The Eighth Circuit vacated the FCC's pricing regulations because they "exceeded" the FCC's jurisdiction. *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 794 (8th Cir. 1997); Pet. App. at 10a. That determination was based upon an analysis of the text of the provisions governing the States' authority to regulate pricing in local exchange markets. Pet. App. at 9a-24a. The Eighth Circuit also vacated the FCC's nonprice rules where the text of the 1996 Act demonstrated a congressional intent to give the States exclusive jurisdiction to implement those sections of the Act.

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of a rural exemption, the terms of its rule expressly provided otherwise. *See* 47 C.F.R. § 51.405(c), J.A. at 1124 ("In order to justify continued exemption . . . an incumbent LEC must offer evidence . . . . [of] undue economic burden . . . .").

1. The Eighth Circuit vacated the FCC's rules governing State rural exemption, suspension and modification proceedings because the "plain meaning of subsection 251 (f)(1) (governing exemptions) and 251(f)(2) (governing suspensions and modifications) indicates that the state commissions have the exclusive authority to make these determinations." Pet. App. at 28a. The court emphasized that "nothing in either of these provisions, or in the Act generally, provides the FCC with the power to prescribe the governing standards for such determinations." *Id.* In contrast to the "repeated and exclusive" references to State commission determinations in Section 251(f), the Court of Appeals found absolutely "no indication that State commissions must follow FCC standards" in conducting exemption, suspension or modification inquiries. *Id.*

The court found that this conclusion was further confirmed by the fact that Congress had rejected both a Senate bill and a House bill giving the FCC concurrent jurisdiction with State commissions to administer these provisions. *Id.* at 29a. The court held that it would be "unreasonable to infer from subsection 251(d) or the other general rulemaking provisions cited by the FCC that Congress intended to put the Commission—the agency it decided to exclude from the exemption process—in a position to dictate the substantive standards governing the exemption process." *Id.* at 29a-30a.

After resolving the issue based on the language of Section 251(f) alone, the Court of Appeals found that Section 2(b) provided an additional ground for its decision.[9] *Id.* at 30a. The court reasoned that "determinations of

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[9] Section 2(b) of the Act provides that "nothing in this chapter shall be construed to apply or to give the [FCC] jurisdiction with respect to . . . charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service." 47 U.S.C. § 152(b).

whether small or rural LECs should receive exemptions, modifications, or suspensions" of interconnection duties qualify as "practices or regulations" which are made "in connection with intrastate communication service" within the meaning of Section 2(b). *Id.* The court declined to address respondents' substantive challenges to the regulation in light of its jurisdictional holding. *Id.*

2. The Eighth Circuit also vacated the FCC's rule requiring State commissions to review and approve all preexisting interconnection agreements. The Eighth Circuit determined that "[n]othing" in Section 252 "can be read to authorize the FCC to issue regulations regarding which interconnection agreements must be submitted for state approval." Pet. App. at 35a. The court emphasized that Section 252 "establishes the procedures and standards that *state commissions* must follow when approving and arbitrating agreements under the Act." *Id.* (emphasis in original).

Acknowledging the FCC's "grasp for some sort of statutorily-based jurisdiction over these interconnection agreements," *id.* at 36a, the Court of Appeals nevertheless concluded that "section 2(b) forecloses the ability of the Commission to determine which interconnection agreements must be submitted for State commission approval." *Id.* at 35a (citation omitted). The Court of Appeals concluded that this issue must be resolved by State commissions. *Id.*

3. The Eighth Circuit also rejected the FCC's attempt to compel States to conform their decisions to its "national rules" for an additional reason. As the Eighth Circuit explained, the FCC's order "purport[ed] to preempt any State policy that conflicts with an FCC regulation promulgated pursuant to section 251." Pet. App. at 36a. Even if the FCC had some "residual authority to prescribe and enforce regulations to implement the requirements of section 251" beyond "the six areas in [Section 251] where Congress expressly called for the FCC's participation," *id.* at 37a, the court found that the FCC exceeded that au-

thority. The court held that two sections of the Act directly addressing the issue of preemption—Section 251 (d)(3) and Section 261—expressly "constrain[] the FCC's authority" to adopt binding national rules. *Id.* at 37a. The court explained that Section 251(d)(3) provides that the FCC cannot preempt State commission orders establishing interconnection obligations so long as they are "consistent with the requirements of section 251" and do not "substantially prevent the implementation of the requirements of Section 251 and the purposes of Part II." *Id.* The Eighth Circuit found that "[t]his provision does not require all State commission orders to be consistent with all of the FCC's regulations promulgated under section 251," because it is "entirely possible for a State interconnection or access regulation . . . to vary from a specific FCC regulation and yet be consistent with the overarching terms of section 251." *Id.* at 38a. It found further support for that conclusion in Section 261(b), which authorizes States to adopt rules that are "not inconsistent with the provisions of this part" to "fulfill[] the requirements of this part," but which does not provide that such rules must conform to FCC regulations. *Id.* at 39a.

On the basis of these sections of the Act, the court concluded that the FCC could not preempt State authority based solely on the theory that it had concurrent jurisdiction to adopt rules under Sections 251 and 252. The FCC could only adopt rules with preemptive force—the authority it purported to exercise here—based upon legally supportable findings that divergent State rulings would contravene "the requirements of [Section 251]" or would "substantially prevent implementation of the requirements of . . . section [251] and the purposes of [Part II]." 47 U.S.C. § 251(d)(3)(B)-(C); Pet. App. at 37a. The FCC made no such findings in its order, and the court rejected the agency's view that "an inconsistency between a state rule and a Commission regulation under section 251 is

sufficient for the FCC to preempt the state rule" as an "unreasonable interpretation of the Act." Pet. App. at 40a.

SUMMARY OF THE ARGUMENT

The 1996 Act fundamentally changed the telecommunications industry by eliminating many barriers to entry and imposing unprecedented requirements to stimulate competition. Congress nevertheless recognized that it was premature to introduce such sweeping changes into the sparsely populated rural markets served by small telephone companies who, along with their customers, could be unfairly burdened by the entry of virtually unregulated competitors seeking to serve only the more profitable segments of the rural market. Congress addressed this issue by affording small carriers relief from many of the most onerous competitive burdens associated with the new law, and entrusted the responsibility for administering this relief to the agencies in the best position to assess the special issues presented in rural markets—State commissions that have been helping to preserve and promote the mission of small and rural telephone companies for most of this century. The Eighth Circuit properly determined that the rules adopted by the FCC to implement the sections of the Act addressing these small carrier issues represent an impermissible attempt to exercise jurisdiction reserved to the States, and undermine the scheme of cooperative federalism that Congress sought to establish.

I. The FCC originally conceded that Congress expressly delegated authority to the States to "prescrib[e] regulations" to implement Section 251(f), and initially concluded in the NPRM that "the states alone have authority to make [such] determinations." J.A. at 11. The text of Section 251 confirms that the FCC had it right the first time. When Congress wanted the FCC to adopt regulations to govern issues in State commission proceedings, it expressly said so. *See, e.g.*, 47 U.S.C. § 251(f)(1)(B) (when States terminate an exemption, they are required

to enter orders establishing a schedule for compliance "that [are] consistent in time and manners with Commission regulations"). The legislative history further confirms that reading. The bills passed by both the House and Senate gave the FCC a role in conducting proceedings designed to afford relief to small companies. Both versions were rejected in conference, however, and the states were given *sole* authority to conduct exemption, suspension and modification proceedings for all small carriers. *See* 47 U.S.C. § 251(f)(1)-(2).

The FCC similarly lacked statutory authority to adopt a rule requiring States to review and approve (or disapprove) *all* interconnection agreements that predated the passage of the Act—an interpretation that would have required State commissions to review hundreds (and perhaps thousands) of preexisting agreements between small carriers and their neighboring LECs. The language of Section 252, however, establishes that Congress only afforded the FCC authority to oversee the process of approving private agreements in the event a State commission refuses to act. 47 U.S.C. § 252(e)(5). It is therefore manifestly unreasonable to conclude that Congress gave the FCC authority to dictate how State commissions should construe their statutory responsibilities with respect to the review of preexisting agreements that involve "almost exclusively . . . local intrastate telecommunication services." Pet. App. at 35a.

Other provisions of the Act further confirm congressional intent to leave these interpretive issues to the State commissions. Although the FCC claims that "Congress divided responsibility between the FCC and the state commissions along the lines of legislative and adjudicatory *function*," that theory cannot be reconciled with three other sections of the Act that expressly address the allocation of rulemaking authority between the FCC and the States. FCC Br. at 37 (emphasis in original). First, Section 261 of the Act authorizes States to adopt *"regu-*

lations" to fulfill their responsibilities under the Act, and those State regulations do not have to conform to Commission regulations. *Compare* 47 U.S.C. §261(b) (authorizing implementing regulations by States that are not "inconsistent with the provisions of this part") *with* 47 U.S.C. § 261(c) (authorizing "additional" state regulations beyond those adopted to "fulfill" State responsibilities under the Act, but only if they are consistent with "the Commission's regulations"). Second, Section 251 (d)(3) strictly limited the FCC's authority to preempt State regulations or orders concerning the LECs' "interconnection obligations" when "prescribing [its own] regulations." Yet the FCC rules at issue plainly exceed that authority by "prescribing . . . regulations" that would "preclude the enforcement" of State rules and orders that are "consistent with the requirements and . . . purposes" of the Act, and the FCC made no contrary finding. 47 U.S.C. § 251(d)(3). Third, confirmation of the Eighth Circuit's interpretation of the FCC's authority is also found in Section 2(b) of the Communications Act, which forecloses the assertion of FCC jurisdiction over intrastate service issues in the absence of an unambiguous grant of authority. Nothing in the Act can even plausibly be read as an unambiguous grant of authority to the FCC over these intrastate service issues. As the FCC's own order recognizes, Sections 251 and 252 "do not contain an explicit grant of intrastate authority." J.A. at 448.

II. The Eighth Circuit's interpretation does not undermine the policies of the Act. The FCC has offered no evidence—and there is none—that the Eighth Circuit's decision has disrupted the State processes for deciding the small carrier issues (or any other issues for that matter). The federal scheme is working better without the FCC's mandatory directives to State commissions on these small company issues because it has allowed States needed flexibility—that the FCC's rules denied—to interpret the Act

in light of the State commissions' knowledge and expertise regarding the status of local competition in their states.

The FCC places substantial reliance on its claim that the Eighth Circuit's interpretation of the FCC's jurisdiction frustrates congressional intent by preventing "a single court of appeals" from "resolv[ing]" the "most fundamental issues arising" under the 1996 Act. FCC Br. at 40. But there is no reason to conclude that Congress shared the Commission's view that this was a paramount goal of the Act. To the contrary, the terms of the Act make clear that Congress was content to allow these statutory issues to be resolved through State proceedings conducted over time. Nothing in the statute required the FCC to adopt any interpretations of Sections 251(f) or 252(a), and Congress did not even grant federal district courts jurisdiction to conduct direct review of State commission determinations issued under Section 251(f). This Court should accordingly conclude, as the Eighth Circuit did, that Congress adopted a program that permits States to develop reasonable interpretations of the Act in the course of conducting the proceedings Congress assigned to them. It did not authorize the FCC to short circuit that important State role in the new regulatory scheme.

ARGUMENT

The FCC's attempt to command the States to render decisions that "conform to [its] rules" was properly rejected by the Eighth Circuit. J.A. at 435-36. Contrary to the FCC's claims, there is a very "coherent textual basis for attributing to the Commission jurisdiction to implement some, but not all, of the core federal standards of the local competition provisions." FCC Br. at 15. The language of the Act firmly supports the Court of Appeals' conclusion that the FCC had no authority to displace (or severely circumscribe) the States' responsibility to implement the relief afforded to small carriers under Section 251(f), or to compel State commissions to review thousands of pre-

existing carrier agreements under Section 252(a), with no discretion to evaluate whether they warrant submission. Nothing about this reading of the Act "raise[s] immense obstacles to effective implementation" of congressional policies. FCC Br. at 39. To the contrary, it promotes them.

I. THE LANGUAGE AND STRUCTURE OF THE 1996 TELECOMMUNICATIONS ACT ESTABLISH THAT THE FCC IMPERMISSIBLY DISPLACED THE STATES' AUTHORITY TO IMPLEMENT THE STATUTORY PROVISIONS AT ISSUE

The FCC looks far and wide to support its claim that "Congress directed [it] to create a national framework for individual state commissions to apply" when conducting proceedings under Section 251(f) and Section 252. FCC Br. at 15; *id.* at 30 (stating that Section 271—which has nothing whatsoever to do with the rural exemption provision—"is powerful evidence that Congress meant to authorize the Commission to create a national regulatory framework that the state commissions would apply in adjudicating particular carrier-to-carrier disputes under Sections 251 and 252"). Several provisions of the Act explicitly address the respective roles of the FCC and the State commissions in the implementation of Section 251(f) and Section 252. It is those express provisions which plainly establish that Congress withheld authority from the FCC to tell State commissions how to conduct and decide the matters Congress entrusted to them.

A. The Text Of Sections 251(f) And 252 Plainly Establishes That The FCC Has Exceeded Its Authority

1. The FCC contends that Congress required it to adopt rules implementing "core federal standards" for the 1996 Act's local competition provisions, including the "criteria by which rural carriers may claim exemption from"

interconnection requirements under Section 251(f). FCC Br. at 18-19. In fact, few provisions in the 1996 Act more clearly illustrate Congress's plan to grant *the States* primary authority to implement important sections of the 1996 Act governing competition in intrastate markets. The Court of Appeals correctly concluded that the "plain meaning" of subsections 251(f)(1) and (2) "indicates that the state commissions have the exclusive authority to make [rural exemption] determinations." Pet. App. at 28a.

The FCC contends that it is unreasonable to infer that Congress "divest[ed] [the] Commission of any role in implementing [the] 'rural exemption' provision of Section 251(f)" based on the fact that Congress "assigned the state commissions *some* role in implementing" the Act. FCC Br. at 26 n.9 (emphasis in original). A review of Section 251(f), however, hardly supports the view that Congress just gave State commissions "some" role in implementing Section 251(f)—States were given the *sole* role. As the Eighth Circuit found, subsection 251(f)(1)(B) "explictly provides [that], '*The State commission* shall conduct an inquiry for the purpose of determining whether to terminate the exemption under subsection paragraph (A).'" Pet. App. at 28a (emphasis added). The court emphasized that there are "[r]epeated and exclusive references to such state commission determinations . . . contained throughout subsection 251(f)," while "[i]n contrast, there is no indication that state commissions must follow FCC standards in conducting these inquiries." *Id.*

As the Eighth Circuit further found, Congress "is capable of clearly expressing its desire to grant the FCC authority . . . when it wishes to do so," and it did so in a number of instances. Pet. App. at 14a.[10] Yet Congress

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[10] Under the statute, the FCC is specifically authorized to issue regulations under subsections 251(b)(2) (number portability), 251(c)(4)(B) (limitations on resale), 251(d)(2) (unbundled network elements), 251(e) (numbering administration), 251(g) (con-

did not direct State commissions conducting exemption, suspension, and modification proceedings to make those determinations in conformity with Commission regulations. Instead, Congress indicated that States were only required to enter orders establishing "an implementation schedule" for compliance "that is consistent in time and manner with Commission regulations" once they have concluded that the termination of an exemption is warranted. 47 U.S.C. § 251(f)(1)(B); *see* Pet. App. at 29a. The fact that Congress only directed State commissions to adhere to specified Commission regulations "[u]pon termination of [an] exemption" negates any inference that Congress impliedly authorized the FCC to adopt other rules governing a State commission's resolution of requests pertaining to exemptions under Section 251(f). 47 U.S.C. § 251 (f)(1)(B).[11]

The FCC's claim that Congress intended rural exemption determinations to be governed by federal regulations is further undermined by the fact that Congress expressly rejected versions of Section 251(f) which gave the FCC concurrent jurisdiction with State commissions to administer the exemption and waiver provisions for small local

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tinued enforcement of exchange access), and 251(h)(2) (treatment of comparable carriers as incumbents). Pet. App. at 12a n.10, 29a n.23.

[11] Indeed, the interpretation of the 1996 Act that the FCC has advocated would render this language of Section 251(f)(1)(B) superfluous. Under the Commission's reading of the Act, all of the State commission's determinations under Section 251(f) must "comply with the Commission's regulations." J.A. at 455. But if the FCC already possesses broad authority to adopt regulations implementing Section 251(f) as it alleges—regulations which the States would be obligated to apply in resolving requests for relief under that section—it would have been completely unnecessary for Congress to direct the States to adopt an implementation schedule that conformed to Commission regulations. It is apparent, therefore, that Congress simply did not authorize the Commission to adopt any other regulations implementing Section 251(f).

exchange carriers. The Senate bill provided that the Commission *or* a State could provide small companies with relief from the obligations of Section 251. *See* S. 652, 104th Cong. § 251(i) (1995); Senate Report at 22. The House bill gave State commissions authority to administer exemption and waiver provisions for rural telephone companies, but also gave the FCC authority to grant waivers for any local exchange carrier with fewer than 500,000 access lines installed. *See* H.R. 1555, 104th Cong. § 242 (e)-(g) (1995). Both of these bills were rejected in conference, and the States were given *exclusive* authority to conduct exemption, suspension and modification proceedings for all small carriers. *See* 47 U.S.C. § 251(f)(1)-(2). The FCC's effort to claim dual jurisdiction to control the resolution of exemption proceedings in State commissions after Congress deliberately excluded the FCC from the process was correctly rejected by the Court of Appeals. *See* Pet. App. at 29a; *Russello v. United States*, 464 U.S. 16, 23 (1983) (declining to adopt an interpretation at odds with changes in the language of a bill).

The language and history of Section 251(f) makes its intent plain. Congress determined that State agencies are better situated to evaluate the special concerns of rural areas, and to administer provisions designed to shield small companies operating in their jurisdictions from unduly harmful effects of the new obligations. Under these circumstances, it is unreasonable to infer that Congress nevertheless meant to put the FCC—the agency it decided to exclude from the exemption process—in a position to dictate the substantive standards that States should apply in their own agency proceedings (let alone to rewrite the statutory standard).

2. Subsections 252(a) and (e) of the Act require interconnection agreements to be approved by State commissions. In its pursuit of increased competition at any cost, the FCC determined that States must review and

approve (or disapprove) all interconnection agreements that predated the passage of the Act. The FCC reached this conclusion even though the State of Wisconsin, for example, had interpreted Section 252(a) to exclude agreements executed before the effective date, and explained the unwarranted burdens the FCC's interpretation would impose on State commissions. Petition for Reconsideration by Public Service Commission of Wisconsin, *In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98 (Sept. 30, 1996). Under this interpretation, hundreds upon hundreds of contracts negotiated under "very different" competitive circumstances, J.A. at 30, must be reviewed by State commissions. The Eighth Circuit correctly vacated the rule based upon its finding that State commissions—not the FCC—were given authority to interpret the scope of their own obligations under this section.

As set forth in the Eighth Circuit's opinion, the FCC's jurisdiction to adopt regulations implementing the 1996 Act is limited in scope. Section 252 of the 1996 Act establishes the process and standards that *States* must follow when arbitrating and approving interconnection agreements. The FCC's role under this section is extremely circumscribed—indeed, it is limited only to stepping in to oversee the arbitration process in the event that a State commission refuses to act. *See* 47 U.S.C. § 252(e)(5). The text and structure of Section 252 cannot reasonably be read to confer upon the FCC the authority to implement regulations specifying the obligations of interconnectors to submit their agreements for approval under subsections 252(a) and (e). As the court found, these agreements "almost exclusively involve local intrastate telecommunication services," Pet. App. at 35a, where Congress has traditionally relied upon State commissions to regulate competition. The fact that Congress has established limited standards to guide the exercise of the States' discretion does not mean that the FCC is the final arbiter of

how the States should implement those standards. The Eighth Circuit correctly determined that Congress assigned that role to the States.

B. The Eighth Circuit's Rejection Of The FCC's Authority To Adopt Mandatory Rules Implementing Sections 251(f) And 252 Is Firmly Grounded In Other Provisions Of The Act

In an effort to find some justification for its blanket preemption of the States' authority to interpret the sections of the Act they alone must administer, the FCC claims that "Congress divided responsibility between the FCC and the state commissions along lines of legislative and adjudicatory *function*." FCC Br. at 37 (emphasis in original). According to the Commission, Congress wanted it to make the rules, and wanted the State commissions to apply them. That division of responsibility is not, of course, reflected in the language of Section 251(f) or Section 252(a), and it is contradicted by three other sections of the Act that expressly address the allocation of authority between the FCC and the States.

1. The FCC does not even attempt to reconcile its theory concerning Congress's division of responsibility with Section 261 of the Act. That section plainly establishes that Congress did not relegate State commissions to an adjudicatory role. Instead, it authorized States to adopt "regulations" to fulfill their responsibilities under the Act, including Sections 251(f) and 252(a), and provided that the States' implementing regulations need not conform to Commission regulations. Section 261(b) is explicit: "[*n*]*othing in this part* shall be construed to prohibit any State commission . . . from prescribing regulations . . . in fulfilling the requirements of this part [including Section 251(f) and Section 252(a)], if such regulations are not inconsistent with the provisions of this part." 47 U.S.C. § 261(b) (emphasis added). Nor can the FCC reasonably contend that State commission regulations are "incon-

sistent with the provisions of this part" whenever they are inconsistent with regulations adopted by the Commission. Any such construction is foreclosed by the language of the very next subsection, Section 261(c). That section expressly requires States to conform their rules to "the Commission's regulations" if they seek to adopt "additional" regulations beyond those enacted under Section 261(b) to "fulfill[] the requirements of this part." 47 U.S.C. § 261 (b), (c). If Congress truly had intended to conform State implementation of the Telecommunications Act of 1996 to FCC regulations, it would have said so explicitly, as it did in Section 261(c). Instead, Congress clearly granted the States the autonomy to implement the Act in the first instance, and not merely to "apply" a preordained, FCC-defined "framework" as the agency suggests. FCC Br. at 9.

Although the Commission unsuccessfully attempted to distinguish the application of Section 261 before the Eighth Circuit, *see* Pet. App. at 39a, the Commission *does not even mention* the provision here. Nevertheless, Section 261(b) contains an explicit recognition that the States have authority to "prescrib[e] regulations" to "fulfill[] the requirements of this part."[12] The FCC's attempt to impose binding regulations that States must follow in exemption, suspension and modification proceedings, or with respect to Section 252(a) carrier agreement filings, accordingly cannot be reconciled with the Act.

2. Section 251(d)(3) further confirms that State commissions are not obligated to implement Section 251(f) and Section 252(a) in accordance with national regulations adopted by the FCC. Under that section, Congress prohibited the FCC from "prescribing . . . regulations" that would "preclude the enforcement" of any State "regu-

[12] The FCC itself recognized in its order that "we expect that states will interpret the requirements of section 251(f) through rulemaking and adjudicative proceedings." J.A. at 193.

lation, order or policy" establishing "access and interconnection obligations of local exchange carriers" which is "consistent with the requirements and . . . purposes" of the Act. 47 U.S.C. § 251(d)(3). Yet that is exactly what the Commission has sought to do by establishing a uniform national rule governing any "order" issued by the State in Section 251(f) and Section 252 proceedings which "establish[] the . . . obligations of local exchange carriers." *Id.*

The Eighth Circuit correctly observed that Section 251(d)(3)'s requirement of "consisten[cy] with the requirements of section 251" does not necessarily mean "consisten[cy] with all of the FCC's regulations promulgated under section 251." Pet. App. at 37a. The Court of Appeals recognized that, given the specific way the text of the provision is drafted, "[i]t is entirely possible for a state interconnection or access regulation, order or policy to vary from a specific FCC regulation and yet be consistent with the overarching terms of section 251." *Id.* at 38a. The FCC responds in conclusory fashion, claiming that it is "illogical to presume that Congress withheld" a binding "interpretive role"—apparently with respect to every issue that arises in Section 251(f) and Section 252 proceedings —"from the agency to which it gave preemptive authority." FCC Br. at 23 n.7.

That reading makes no sense. Congress clearly knows how to draft a preemption provision. And if Congress had intended to permit the FCC to preempt categorically any "regulation, order, or policy of a State commission" establishing "access and interconnection obligations," it would have simply said so. Instead, Congress dramatically circumscribed whatever rulemaking authority the FCC has by *prohibiting* the FCC from "preclud[ing] the enforcement of any [State commission] regulation, order, or policy" when "prescribing [its own] . . . regulations to implement the requirements of this section," except in

limited circumstances.[13] 47 U.S.C. § 251(d). As the Court of Appeals found, Section 251(d)(3) emphatically "does *not* support the FCC's view" that "state rules must conform to the Commission's regulations." Pet. App. at 39a (emphasis added).

3. Confirmation of the Eighth Circuit's interpretation of the FCC's authority is also found in Section 2(b) of the Communications Act.[14] As the Court of Appeals explained, "determinations of whether small or rural LECs should receive exemptions, modifications, or suspensions of such duties also qualify as practices or regulations 'for or in connection with intrastate telecommunications service' that are outside of the FCC's jurisdiction by the operation of section 2(b)." Pet. App. at 30a (quoting 47 U.S.C. § 152(b)). And the court was also correct in concluding that Section 2(b) "forecloses the ability of the Commission to determine which interconnection agreements" governing intrastate service "must be submitted for state commission approval." *Id.* at 35a. The flaws in the FCC's analytical efforts to avoid the straightforward operation of Section 2(b) are set forth fully in the briefs of the large and midsized LECs. Their arguments apply equally to the small and rural company issues addressed here, and Respondents USTA and RTC accordingly join those briefs. Here we emphasize two points.

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[13] The limited scope of the FCC's preemptive authority is also confirmed by 47 U.S.C. § 253(d). Even under that section, which explicitly provides for FCC preemption of state regulations that function as barriers to entry, the FCC cannot preempt a state regulation erecting barriers to entry in violation of Section 253(a) or (b) without first providing notice and the opportunity for comment.

[14] That provision of the Act provides that "nothing in this chapter shall be construed to apply or to give the [FCC] jurisdiction with respect to . . . charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service." 47 U.S.C. § 152(b).

First, the Commission's contention that Section 2(b) is inapplicable because the Congress has "straightforward-[ly]" subjected competition in local telecommunications markets to federal regulation, FCC Br. at 33-34 (citing *Louisiana Public Serv. Comm'n v. FCC*, 476 U.S. 355, 377 (1986)), is without merit. Nothing in the Act can even plausibly be read as an unambiguous grant of authority to the FCC over intrastate service issues, as the *FCC itself has recognized. See* J.A. at 448 (acknowledging that Sections 251-252 "do not contain an explicit grant of intrastate authority"); J.A. at 7-8 (observing that States historically have regulated competition in local service areas). Instead, Congress has "straightforward[ly]" preserved State authority by giving State commissions—not the FCC—responsibility for implementing small company policies established by the Act.

Second, the FCC's suggestion that the consideration of the conditions that rural carriers face in particular local markets, or the policy merits of filing hundreds of thousands of EAS and other locally-oriented carrier-to-carrier agreements, is "inextricably" both interstate and intrastate in character, FCC Br. at 35, is simply wrong. The exemption, suspension and modification proceedings under Section 251(f), for example, determine the extent to which competitive obligations should be imposed on small and rural carriers to provide "telephone exchange service in [a local] area." *See* 47 U.S.C. § 251(h)(1). The FCC has conceded that "telephone exchange service" is a "local, intrastate service." J.A. at 449. There accordingly can be no question that the rule at issue represented the assertion of FCC "jurisdiction with respect to . . . classifications, practices, . . . or regulations for or in connection with intrastate communication service," within the meaning of Section 2(b). 47 U.S.C. § 152(b); *see Louisiana*, 476 U.S. at 370 (noting that "this provision fences off

from FCC reach or regulation intrastate matters—indeed, including matters 'in connection with' intrastate service").

C. The FCC's Rules Cannot Be Upheld On The Basis Of *Chevron*

The FCC's appeal to *Chevron* deference, *see* FCC Br. at 42 (citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)); *see also* FCC Br. at 17, is unavailing. As a threshold matter, *Chevron* has no role to play when the agency's interpretation does not reflect a reasonable reading of congressional intent, *see Lechmere, Inc. v. NLRB*, 502 U.S. 527, 539 (1992), and the FCC's reading of its authority to interpret Sections 251(f) and 252(a) assuredly was not.

In addition, the application of *Chevron* makes little sense where, as here, the FCC shares responsibility for administration of the statute with other governmental bodies. *See Bowen v. American Hospital Ass'n*, 476 U.S. 610, 642 n.30 (1986) (where administration of a statute is shared among agencies, there "is not the same basis for deference predicated on expertise" as in other contexts); *Rapaport v. United States Dep't of Treasury, Office of the Thrift Supervision*, 59 F.3d 212, 216 (D.C. Cir. 1995) (no *Chevron* deference where Congress delegated statutory responsibility to at least three other agencies), *cert. denied*, 516 U.S. 1073 (1996). The deference afforded under *Chevron* is based upon the premise that Congress would have wanted courts to defer to reasonable interpretations advanced by the agency given responsibility for implementing the statute. *See Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990) (observing that a "precondition" to *Chevron* deference is a congressional delegation of administrative authority); *cf. Crandon v. United States*, 494 U.S. 152, 177 (1990) (Scalia, J. concurring) (rejecting *Chevron* deference where statute "is not administered by any agency but by the courts"). *Chevron* deference is accorded to agencies "because of a presumption that Congress, when it left

ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency." *Smiley v. Citibank (South Dakota), N.D.*, 517 U.S. 735, 740-41 (1996). But Section 261(b) clearly establishes that the *States* have such implementing and interpretive authority under Section 251(f) and 252(a), and Congress unquestionably circumscribed the FCC's authority to displace that power.

Under these circumstances, where the States in fact possess the "historical familiarity and policymaking expertise" with respect to local rural service issues and intrastate carrier-carrier agreements, *Martin v. OSHRC*, 499 U.S. 144, 153 (1991), it would be at least as reasonable—in fact more reasonable—to afford deference to the *States'* interpretations of these provisions.[15] There certainly is no language of delegation anywhere in the 1996 Act that supports the notion that the FCC's views should trump those of the States, or of the courts, on this question. Given the breadth and intrusiveness of the FCC's proposed rules, deference to the Commission is not appropriate. *Cf. Gregory v. Ashcroft*, 501 U.S. 452, 464 (1991) (before interpreting statute to accord "state-displacing weight" to federal law, it "must be absolutely certain that Congress intended such an exercise"); *United States v. Bass*, 404 U.S. 336, 349 (1971) (requiring "clear statement" by Congress in "traditionally sensitive areas, such as legislation affecting the federal balance"); *Amos v. Maryland Dep't of Public Safety & Correctional Servs.*, 126 F.3d 606-07 (4th Cir. 1997) (declining to defer to federal administrative agency's interpretations of ambiguous federal statute, "however reasonable," where there are "enormous" implications for the "balance of power between Federal Government and the States").

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[15] Indeed, as the Large LECs explain, the very presumption written into the text of the Communications Act on these intrastate matters is that they are completely "fence[d] off" from the FCC's reach. *Louisiana*, 476 U.S. at 370; 47 U.S.C. § 152(b).

II. THE EIGHTH CIRCUIT'S INTERPRETATION DOES NOT UNDERMINE THE POLICIES OF THE ACT

The FCC attempts to bolster the weaknesses in its textual arguments with broad assertions that competition in "local telephone markets" is being "impede[d]," FCC Br. at 39, because the FCC has not been granted *carte blanche* to dismantle the framework of cooperative federalism that Congress intended with respect to the implementation of Sections 251-252. Contrary to the FCC's claims, Congress *did* "leave room"—indeed, plainly intended—to give 50 State commissions latitude to define the precise contours of determinations related to rural telephone company exemptions, suspensions, and modifications, and the filing of co-carrier agreements, in the context of competition issues and conditions now arising in their local market. There is no practical reason to revisit the wisdom of Congress's choice.

1. Contrary to the FCC's assertions, the Section 251-252 framework of private party negotiation and State commission arbitration crafted by Congress has been working well since the Act's passage to foster the emergence of local exchange competition. To date, *thousands* of local interconnection agreements have been signed since the Act's passage, with new competitors emerging each day in local telephone markets. *See* Roy Neel, President, United States Telephone Association, *En Banc Presentation on State of Local Competition before the FCC* (Jan. 29, 1998) (observing that by November 1997, incumbent LECs had signed more than 2,400 voluntary agreements with 280 local service competitors). That process would be even more effective if the FCC had not decided, in the most intrusive manner possible, to inject itself into the private party negotiation and State commission arbitration processes. Congress intended private parties first, and then the States, to be the impetus for the development of local

competition. Congress did *not* invite the FCC to introduce more than 700 pages of binding federal guidance into Congress's "pro-competitive, de-regulatory" program.

2. The FCC also has offered no evidence that the Eighth Circuit's decision has disrupted the State processes for deciding the small carrier issues discussed herein. As a practical and policy matter, Congress's deference to the States with respect to local interconnection matters generally, and with respect to rural exemption and interconnection agreement filing issues in particular, makes perfect sense. The State commissions are the agencies with the specific knowledge and expertise regarding the status of local competition in their States, and the particular carriers that are either incumbent, emerging and/or at risk when local competition is introduced.

Two examples illustrate the fact that Congress's scheme is working better without the FCC's mandatory directives to State commissions on these small company issues. The Alabama Public Service Commission recently considered the "financial and technical limitations of [Alabama's] small LECs"; found that the interconnection obligations imposed by subsections 251(b) and (c) would impose undue economic burdens; and temporarily suspended those obligations pending further review of "the effects of competitive entry" on Alabama's rural carriers. *In re All Telephone Cos. Operating in Alabama*, No. 24472 (LEXIS, Pub. Util. Rep. 4th, slip op.) (Oct. 8, 1996). Significantly, that determination was based upon a reasonable interpretation of the Act *without* reference to the FCC's "embellishe[d]" and restrictive standard of proof for rural exemption, suspension and modification proceedings, Pet. App. at 28a, which otherwise could have undermined Alabama's ability to shape competition policy in accordance with the needs of its small carriers and their customers.[16]

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[16] Congress established that State commissions could not terminate an exemption or deny a suspension or modification, when the

Similarly, some State commissions have been assessing what types of agreements should be filed under Section 252(a) pursuant to their own reasonable interpretations of the Act. Minnesota, for example, has commenced a proceeding to determine whether EAS agreements, which are of enormous importance to small and rural carriers, in fact represent the type of agreements that should be subject to Section 252(a) filing and approval requirements. *See In re U.S. West Communications, Inc.*, No. P-421, 1997 WL 634623 (Minn. P.U.C. June 24, 1997). Under the FCC's mandatory rules, that inquiry would have been foreclosed because the FCC determined that all preexisting agreements, including EAS agreements, had to be filed with State commissions. *See* J.A. at 1111 (text of 47 C.F.R. § 51.303).

The actions unfolding in the States illustrate the problem with the FCC's emphasis on the alleged practical and policy need for "nationally consistent interpretations" regarding local competition issues. FCC Br. at 40. Con-

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imposition of certain obligations under Section 251 would be "unduly economically burdensome." *See* 47 U.S.C. § 251(f)(1)(A) and (2)(A)(ii). This was the standard that Alabama applied. Section 51.405(c) and (d) of the FCC's new rules, however, would have required proof of an "undue economic burden" other than an "*economic burden that is typically associated with efficient competitive entry*." 47 C.F.R. § 51.405(c), (d) (emphasis added). Under this new "efficient competitive entry" standard—which appears *nowhere* in the statutory text—State commissions such as Alabama would have been required to disregard losses that would threaten the viability of a rural telephone company if such losses would be attributable to the entry of a more efficient competitor seeking to serve part of a rural market. The FCC's interpretation completely ignores the fact that Congress understood the need to give States substantial latitude to mitigate the impact of the Act on rural telephone companies and their customers. *See, e.g.*, 47 U.S.C. §§ 253(f), 214(e); *see also* 47 U.S.C. § 613(d)(3), (e) (defining an "undue burden" in another section of the Communications Act to include any "significant difficulty or expense"); *Air Line Pilots Ass'n Int'l v. Civil Aeronautics Bd.*, 494 F.2d 1118, 1125 (D.C. Cir. 1974) (interpreting similar phrase in statute creating small carrier exemption from economic regulatory provisions of the Federal Aviation Act to reflect intent to keep small carriers "economically viable").

gress's point in crafting the Section 251-252 regime in fact was (and is) just the opposite: except for certain discrete matters where federal involvement is required by the Act, local competition determinations should be market-specific, not "nationally uniform." [17]

3. The FCC places substantial reliance on the claim that the Eighth Circuit's interpretation of the FCC's jurisdiction frustrates congressional intent by preventing "a single court of appeals" from "resolv[ing]" the "most fundamental issues arising" under the 1996 Act "soon after the Act's enactment." FCC Br. at 40. But there is no reason to conclude that Congress shared the Commission's view that this rulemaking proceeding should culminate in uniform national rules—*even* if Congress had given the Commission concurrent juisdiction to address these issues.

There is no dispute that Congress expected States to adopt interpretive rules when conducting rural exemption and interconnection proceedings, and that Congress did not *require* the FCC to adopt rules on the statutory questions at issue here. Congress was accordingly content to allow these issues to be resolved through State proceedings conducted over time. In addition, as the Eighth Circuit held, Congress did not allow the FCC to establish nationally uniform standards which categorically preempt contrary State rules. The Eighth Circuit rejected the FCC's view that its rules can "preempt any [different] state policy" as "untenable." Pet. App. at 36a. As discussed *supra* at I.B., the FCC's assertion that State decisions implementing Section 251 and 252 must conform to FCC regulations, even where Congress did not say so, is refuted by Sections 261(b) and 251(d)(3). Nor did Congress create a scheme where federal district courts would

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[17] This does not mean, of course, that States cannot follow the FCC's implementation approaches on rural exemption or LEC-LEC agreement filing issues, provided that such approaches are consistent with the Act. Indeed, various States have done so. But Congress clearly intended the States to implement the Act in accordance with their individual assessment of local market conditions, irrespective of whether the FCC might take a divergent position.

"supply nationally consistent interpretations" for all of the provisions construed by the FCC in its rules, as the FCC contends. FCC Br. at 40. Congress did *not* grant federal courts jurisdiction to conduct direct review of State commission determinations issued under Section 251(f) (except insofar as such issues might arise in connection with review of State commission arbitration orders). *Compare* 47 U.S.C. § 252(e)(6) *with* 47 U.S.C. § 251(f).

There is accordingly no reason to presume that Congress thought that all central issues of statutory interpretation arising under Sections 251 and 252 should be adjudicated in a single federal court proceeding. Instead, this Court should find that Congress adopted a program that permits States to develop reasonable interpretations of the Act in the course of conducting the proceedings Congress assigned to them. Short-circuiting that process in the name of litigation expediency undermines the State's role in the statutory scheme without any justification in the text of the statute.

CONCLUSION

For the reasons set forth, respondents respectfully request this Court to affirm the decision of the Court of Appeals.

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Supreme Court of the United States

OCTOBER TERM, 1997

AT&T CORP., *et al.*,
Petitioners,

v.

IOWA UTILITIES BOARD, *et al.*,
Respondents.

AT&T CORP., *et al.*,
Petitioners,

v.

CALIFORNIA, *et al.*,
Respondents.

AND RELATED CASES

On Writs of Certiorari to the United States Court of Appeals for the Eighth Circuit

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QUESTIONS PRESENTED

1. Did the court of appeals correctly decide that the Federal Communications Commission ("FCC") exceeded its statutory authority under the Communications Act of 1934, as amended by the Telecommunications Act of 1996 ("1996 Act"), when issuing orders and rules purporting to implement the provisions in the 1996 Act governing competition in local telephone markets?

2. Did the court of appeals correctly decide to vacate an FCC rule that, as petitioners themselves acknowledge, would allow new entrants to obtain from incumbent local telephone carriers an already combined platform of network elements at cost-based prices, when the Act allows entrants to obtain only *unbundled* network elements at cost-based prices?

3. Did the court of appeals correctly decide to vacate the FCC's rule implementing 47 U.S.C. § 252(i) as improperly subverting the system of private negotiation established by Congress?

4. Did the court of appeals err in upholding the following: (a) the FCC's ruling that entrants into the local telephone markets—without using any of their own facilities—may rely solely on the purchase of network elements, at cost-based prices, to provide local service; and (b) the FCC's expansion of the statutory definition of network elements to include Operations Support Systems, directory assistance, operator services, and vertical services?

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INTRODUCTION

This brief is filed on behalf of eight telecommunications companies that are based in virtually every part of the country, and on behalf of a trade association of telecommunications companies. Each of the companies is an incumbent local exchange carrier ("LEC"), as that term is defined in 47 U.S.C. §§ 153(26) and 251(h)(1), as added by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) ("1996 Act" or "Act").[1] The eight companies actively participated as petitioners and intervenors in the briefing and argument before the United States Court of Appeals for the Eighth Circuit and were collectively referred to as the "Mid-Sized LECs."[2] In contrast to the "large LECs," *i.e.*, the Bell Operating Companies ("BOCs") and GTE Service Corporation ("GTE"), each of the Mid-Sized LECs individually controls less than two percent of the nation's telephone access lines. The Independent Telephone & Telecommunications Alliance is a non-profit trade association representing 15 mid-sized LECs providing local exchange and exchange access telephone service in 41 states.

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[1] The relevant portions of the 1996 Act amended the Communications Act of 1934, 47 U.S.C. § 151 *et seq.* ("Communications Act"). Relevant statutes are in the appendix to the BOC's merits brief. *See also* appendix to the petition in No. 97-826 ("Pet. App."). The Mid-Sized LECs' Rule 29.6 statement is in their opposition to the petition.

[2] The "Mid-Sized LECs," and their principal places of business, are as follows: Aliant Communications Co. (Lincoln, Nebraska); ALLTEL Telephone Services Corp. (Little Rock, Arkansas); Cincinnati Bell Telephone Co. (Cincinnati, Ohio); The Concord Telephone Co. (Concord, North Carolina); North State Telephone Co. (High Point, North Carolina); Rock Hill Telephone Co. (Rock Hill, South Carolina); Roseville Telephone Co. (Roseville, California); and The Southern New England Telephone Co. ("SNET") (New Haven, Connecticut). The Mid-Sized LECs filed briefs and presented oral argument in the Eighth Circuit's review of the FCC's First Report and Order in *Iowa Utilities Bd. v. FCC*, No. 96-3321, but did not participate in the court's separate review of the FCC's Second Report and Order in *California v. FCC*, No. 96-3519. Accordingly, the Mid-Sized LECs do not address the decision in *California*.

The Mid-Sized LECs have endeavored in this brief not to repeat the arguments set forth in the merits briefs filed today by the BOCs, GTE, and the United States Telephone Association/Rural Telephone Coalition. The Mid-Sized LECs fully support those parties' arguments and incorporate them by reference in this brief. Nonetheless, as some of the approximately one thousand smaller local telephone companies throughout the United States, the Mid-Sized LECs have a unique perspective on the issues raised in this case. In their Statement, the Mid-Sized LECs describe the background, language, and structure of the 1996 Act, which underscores the central role that Congress envisioned state utility commissions would play in implementing the Act's broad goals. The Statement further discusses the progress that state regulators have made in opening local telephone markets to competition in the manner prescribed by Congress. Finally, the Mid-Sized LECs focus their Argument on the Eighth Circuit's decision regarding provisions of the Act that have been virtually ignored by petitioners, and that further demonstrate that Congress did not intend the FCC to issue detailed, uniform, national rules that bind state commissions and stifle state regulators' ability to implement the 1996 Act in the manner Congress intended.

STATEMENT

In enacting the Telecommunications Act of 1996, Congress followed the lead of numerous states that had already taken steps to open their local telephone markets to competition. Congress did so by preempting any remaining state laws that prohibited competition with incumbent local exchange carriers and by requiring incumbent LECs to, among other things, permit new entrants to interconnect with their networks and gain unbundled access to discrete elements of those networks. In passing the Act, however, the 104th Congress expressly sought to promote local competition through a deregulatory and decentralized approach. That approach relied first upon voluntary negotiations between potential competitors and, second, upon state commission-run arbitrations of issues that the parties

were unable to resolve among themselves. Congress thus sought to take advantage of the knowledge and experience of state regulators, who had long regulated local exchange service—what the Government in the past has described as the "paradigmatic intrastate market"[3]—and who best understood the regulatory history, needs and conditions of the diverse local markets and the over 1,000 incumbent LECs providing local exchange service throughout the United States. While Congress granted the FCC statutory authority to regulate with respect to certain provisions of the Act, Congress expressly preserved the authority of state utility commissions to implement the broad goals of the Act through their own regulations, applied in state commission-run arbitrations when private negotiations failed. Moreover, Congress carefully limited the power of the FCC to preempt those state regulations. In this way, Congress recognized and preserved the historical authority of state commissions as the primary regulators of local telephone markets, permitting the FCC to step in and regulate only when the states failed to execute their responsibilities under the Act.

As described below, the FCC chose to ignore Congress's deregulatory and decentralized scheme. The FCC placed itself in complete control of every local telecommunications market throughout the country by issuing uniform national rules that inhibited negotiations and preempted any and all state regulatory policies that differed in any way from those rules. The Eighth Circuit properly concluded that in doing so, the FCC had far exceeded its statutory authority under the Act.

A. Regulation of Local Telephony Before the Telecommunications Act of 1996

1. State regulation of local telephone service. Since the invention of the telephone in 1876, most local tele-

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[3] In the unsuccessful Application to Vacate Stay it filed in this Court, the FCC made the following statement: "On its face, Section 251 pervasively regulates many aspects of local exchange services, the paradigmatic intrastate market." Application to Vacate Stay at 22, *FCC v. Iowa Utilities Bd.*, No. A-299 (filed Oct. 24, 1996).

phone service has been provided to business and residential customers within a defined geographic area by a single company. Currently, over 1,000 incumbent LECs of widely varying sizes provide local exchange service in countless markets throughout the country. See H.R. Rep. No. 104-204, at 49-50 (1995), *reprinted in* 1996 U.S.C.C.A.N. 10. The Mid-Sized LECs alone range in size from approximately 90,000 to two million access lines as of December 1, 1995; by comparison, the BOCs and GTE range from approximately 14 to 21 million access lines.[4] The local markets served by the incumbent LECs differ dramatically not only in terms of their geography, but also in their topography, demographics, infrastructures, and population densities. Having regulated the LECs throughout much of that more than a century-long time period, state utility commissions are uniquely attuned to the market- and company-specific particularities that materially affect the needs of consumers of local telephone service and the pricing and even physical configuration of service in the local market.

Until recently, it was generally accepted that the provision of local telephone service was a natural monopoly, *i.e.*, that a single telecommunications provider could supply telephone service at a lower cost than could two or more firms. *See* J. Gregory Sidak & Daniel F. Spulber, *Deregulatory Takings and Breach of the Regulatory Contract*, 71 N.Y.U. L. Rev. 851, 867 (1996). Consistent with this widely-held belief, local telephone service has been a regulated monopoly for most of the century, with states enacting legislation protecting incumbent LECs against competitive entry. The right to operate as the exclusive provider of telephone services within a particular market, however, was not without countervailing costs and obligations to the provider. The states, through their utility commissions, have strictly regulated the price and

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[4] United States Telephone Ass'n, *Phone Facts* 8-9 (1996), *reprinted in* Appendix to Brief of Mid-Sized Local Exchange Carriers at A-213, *Iowa Utilities Bd. v. FCC*, No. 96-3321 (8th Cir., filed Nov. 18, 1996).

service offerings of intrastate telephone service and imposed "universal service" obligations on LECs, requiring carriers to serve their entire service areas—the densely populated as well as the remote—and all of their citizens, business and residential customers alike. As a result, state regulators have built numerous cross-subsidies into the rate structures of each local exchange market. Any pricing methodology now adopted to unravel those subsidies, therefore, must be designed and implemented in a manner best adapted to the particular local market in order both to achieve vigorous competition *and* maintain universal service to all residents of each local market.

Although most LECs have historically functioned as monopolies within their own geographic markets, virtually every state is served by more than one LEC. For example, 150 incumbent LECs serve Iowa alone.[5] Consequently, state commissions have decades of experience regulating not just the retail prices that LECs charge their customers, but *interconnection* between and among the various LECs under their jurisdictions as well. Without interconnection, a family served by one LEC in a particular town would be unable to place a *local* telephone call to another family served by a different LEC in a neighboring town. Most state commissions have thus developed considerable familiarity with the technical and economic issues that arise when more than one telephone company provides service (although not overlapping service) in the same local telephone market.

As far back as 1934, when Congress passed the Communications Act and created the FCC, Congress recognized and respected the important historical role that state utility commissions had long played as the regulators of intrastate telephone service. Section 2(b) of the Communications Act, which the 1996 Act did not amend, provides that "nothing in this [Act] shall be construed to

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[5] United States Telephone Ass'n, *Phone Facts* 7 (1996), *reprinted in* Appendix to Brief of Mid-Sized Local Exchange Carriers at A-212, *Iowa Utilities Bd. v. FCC*, No. 96-3321 (8th Cir., filed Nov. 18, 1996).

apply or to give the [FCC] jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier . . . ." 47 U.S.C. § 152(b). Although the plain language of this section hardly needed any clarification, the Court, in *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355 (1986) [hereinafter *Louisiana PSC*], confirmed that section 2(b) is a "sweeping" limitation on the FCC's statutory authority that "fences off from FCC reach or regulation intrastate matters—indeed, including matters 'in connection with' intrastate service." *Id.* at 370.

In short, the Communications Act created a dual regulatory regime for telecommunications services, with the FCC given statutory authority to regulate only the interstate aspects of such services. Congress chose to allow the states to retain their historical authority as the sole regulators of intrastate telecommunications services.

2. The development of competition in local telephone markets. Competition in the telecommunications industry began developing in the 1970s in the markets for telephone equipment, information services and long-distance services. S. Rep. No. 104-23, at 2 (1995). Accelerated by the 1984 breakup of AT&T, competition for long-distance services developed and grew. In view of the increasing success of competition in the long-distance market, and with cable companies in particular recognizing that they were well positioned to offer local telephone service, many states began to investigate the prospects of bringing competition to the local exchange market. For example, as early as 1994 the Connecticut legislature had acted to open all telecommunications markets in Connecticut to competition. *See* Conn. Gen. Stat. § 16-247a *et seq.* Further, that state's principal local exchange carrier had already signed a comprehensive agreement with governmental agencies and with numerous competitors (including petitioners AT&T and MCI) governing many aspects of interconnection, network unbundling and physical collocation, leading the state utility commission in 1995 to

comment in approving the agreement that it constituted "irrefutable evidence of the ability to achieve reasonable agreement on issues of common concern to the industry and the public." *In re The Southern New England Telephone Company*, Docket No. 94-10-02, 1995 WL 807764 (Conn. D.P.U.C. Sept. 22, 1995).[6]

Connecticut was hardly alone. Beginning in earnest in 1993 and 1994, numerous states acted to bring competition to their local telephone markets. For example, the Alabama state utility commission entered a local competition order after a full-scale hearing on September 20, 1995.[7] The North Carolina commission entered a similar pro-competition order in 1996, establishing rules governing interconnection, requests for unbundled elements, resale of local service, number portability and certification of competitive local exchange carriers.[8] The North Carolina commission has certified 11 competitors, with 11 more applications pending. New York, Illinois and California also took steps in that time period to open their local markets to competition. S. Rep. No. 104-23, at 5 (1995).[9]

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[6] *See also In re The Southern New England Telephone Company's Cost of Providing Service*, Docket No. 94-10-01, 1995 WL 509180 (Conn. D.P.U.C. June 15, 1995) (order of Connecticut commission certifying 15 companies to provide local exchange service).

[7] *Order Adopting a Telecommunications Price Regulation and Local Competition Plan*, 164 P.U.R. 4th 324, 1995 WL 627739 (Ala. P.S.C. Sept. 20, 1995).

[8] *Order Setting Out Regulatory Structure for Competing Local Providers and Promulgating Rules*, Dkt. P-100, Sub 133, 1996 WL 593672 (N.C. U.C. Sept. 18, 1996) (generic docket implementing House Bill 161 on local competition).

[9] *E.g., Interim Order*, 167 P.U.R. 4th 349, 1995 WL 767890 (Cal. P.U.C. Dec. 20, 1995) (order of California Commission certifying 31 carriers to offer facilities-based local exchange services); *Order re: Competition for Local Exchange Service*, 163 P.U.R. 4th 155, 1995 WL 467996 (Cal. P.U.C. July 24, 1995); *Interim Opinion*, 1996 WL 223624 (Cal. P.U.C. Apr. 10, 1996) (California Commission holding that state regulations concerning number portability are consistent with the Act).

B. The Telecommunications Act of 1996

1. Congress ends the legal telephone monopoly. With knowledge of the states' progress toward deregulation of local exchange markets, Congress passed section 101 of the Telecommunications Act of 1996, which amended the Communications Act by adding new sections 251 through 261, codified at 47 U.S.C. §§ 251-261. Pet. App. 98a-130a. Congress intended that this new part of the Communications Act would provide the citizens of all states the benefits of competition in all sectors of the telecommunications industry, including local exchange service.

At the heart of the local telephone service provisions added by the Act is section 253, by which Congress brought an end to state and local laws giving local telephone providers legal monopoly status. Section 253 thus prohibits all state and local legislation or regulation that prohibits, or has the effect of prohibiting, any entity from providing any interstate or intrastate telecommunications service. 47 U.S.C. § 253(a). Congress recognized, however, that new entrants could not duplicate an incumbent's entire local network infrastructure overnight. It therefore imposed upon incumbents the duty to allow new entrants to interconnect their own facilities with the incumbent's network factilities and to obtain unbundled access to elements, or pieces, of the incumbent's network. 47 U.S.C. § 251(c)(2), (3). As a result, new entrants do not have to duplicate the entire local network infrastructure of loops and switches in order to compete for an incumbent LEC's customers. Instead, new entrants with at least some facilities of their own can interconnect those facilities with the incumbent LEC's local network and can purchase selected pieces of the incumbent's network facilities, without having to construct a complete local exchange network. As an alternative, Congress provided that new entrants without any facilities could purchase an incumbent LEC's finished telephone service and resell it under its own name. 47 U.S.C. § 251(c)(4).

Congress understood, of course, that it could not require incumbent LECs to open their private networks to new entrants without complying with the Fifth Amendment. The Act therefore provides that incumbent LECs can charge rates for interconnection and unbundled access that are "just, reasonable, and nondiscriminatory" and can charge wholesale rates to new entrants seeking only to purchase and then resell an incumbent's finished telephone service. 47 U.S.C. § 251(c)(2)-(4).

2. Congress's deregulatory approach to competition. Congress described the twin goals of the 1996 Act as establishing a "pro-competitive, *de-regulatory* national policy." Joint Explanatory Statement of the Committee of Conference, H.R. Conf. Rep. No. 104-458, at 1, 113 (1996) (emphasis added) (also issued as S. Conf. Rep. No. 104-230 (1996)), *reprinted in part in* 1996 U.S.C.C.A.N. 124 [hereinafter, *Joint Explanatory Statement*]. Congress envisioned that the Act would "reduc[e] regulation of the telecommunications industry . . . [to] spur the development of new technologies and increase investment in these industries." S. Rep. No. 104-23, at 9 (1995); *see id.* at 10 ("By reducing regulation and barriers to competition, the bill will help ensure the future growth of these industries"). The Act thus reflected Congress's "belief that more competition, rather than more regulation, will benefit all consumers." H.R. Rep. No. 104-204, at 50 (1995).

Consistent with its deregulatory approach, Congress consciously and explicitly designed a regime for increasing competition in the local telephone market that provides new entrants with access to the incumbent carrier's existing network and then relies principally upon private, freely negotiated agreements between the entrants and incumbents to determine the precise terms and scope of that access. Thus, the Act requires incumbent LECs and their competitors to negotiate in good faith the terms and conditions of local interconnection and access. 47 U.S.C. §§ 251(c)(1), 252(a)(1). Underscoring its preference for a deregulatory, negotiation-based approach to com-

petition, Congress even provided that the parties could enter into agreements "without regard to the [interconnection and access] standards set forth in subsections (b) and (c) of section 251." *Id.* § 252(a)(1).

In the event voluntary negotiations did not resolve all issues between the parties, Congress provided two alternatives. First, it gave the parties the option of asking a state commission "to participate in the negotiation and to mediate any differences arising in the course of the negotiation." *Id.* § 252(a)(2). Second, it provided that either party to a negotiation may "petition a State commission to arbitrate any open issues." *Id.* § 252(b)(1). Even then, Congress emphasized voluntary negotiation by prohibiting a petition to arbitrate until 135 days after the start of negotiations. *Id.*

3. Congress's decentralization of regulatory authority and preservation of state regulation. Consistent with its adoption of a deregulatory policy for bringing competition to local markets, the 104th Congress also chose a decentralized approach to government regulation of the newly opened local markets. Rather than vesting the FCC with primary responsibility to oversee implementation of the 1996 Act in countless local markets, involving over a thousand local carriers, Congress explicitly placed such authority in the state commissions that were most familiar with those markets and carriers.

Thus, Congress expressly preserved the authority of state commissions to issue regulations implementing the broad standards of the Act (47 U.S.C. § 261(b)) and forbade the FCC from preempting state commission regulations and policies governing the interconnection and access obligations of LECs that were consistent with the broad standards of the Act. *Id.* § 251(d)(3). Congress also vested state commissions with sole responsibility for determining and establishing rates for interconnection and access, including the price of unbundled network elements and wholesale rates for resold services. *Id.* § 252(c)(2), (d). In addition, as previously noted, Congress chose state com-

missions to mediate and, if necessary, arbitrate disputes between LECs and new entrants, and left to state commissions the sole responsibility to approve or reject interconnection and access agreements finalized and submitted by the parties. *Id.* § 252(a)(2), (b), (c). Congress further provided that any party aggrieved by the determination of a state commission with respect to an interconnection agreement could seek review of that determination, not with the FCC, but in federal district court. *Id.* § 252 (e)(6). Congress also foresaw that certain obligations of the Act would place small and mid-sized incumbent LECs at a grave disadvantage when suddenly faced with competition from large, sometimes global entities. It thus gave state commissions the sole authority and broad discretion to modify or suspend Congress's interconnection and access provisions where, among other things, the provisions are "unduly economically burdensome." *Id.* § 251(f)(2).

In short, in numerous provisions of the Act, Congress preserved state commission authority to continue regulating local telephone markets and expressly provided for state commissions, not the FCC, to make critical decisions concerning rates, modifications and waivers, and other local competition matters under the Act. As discussed at greater length under the first Argument heading, Congress's choice to leave regulatory authority principally in the hands of state regulators was deliberate, as reflected not only in the statutory text, but also in the Act's legislative history.

C. The FCC's Rulemaking

The FCC was unwilling to abide by Congress's twin decisions to encourage competition by relying principally on private negotiation backed by state commission mediation and arbitration, and to leave critical regulatory authority over pricing, waivers and other aspects of opening the local markets to competition to the state utility commissions. The FCC even ignored Congress's choice of federal district court review for state commission decisions,

expressly inviting aggrieved parties instead to seek review of those decisions before the FCC.

While some may consider statutory interpretation to be a creative endeavor, it is beyond dispute that the interpretive process should begin with the text of the statute itself. *See Staples v. United States*, 511 U.S. 600, 114 S. Ct. 1793, 1797 (1994); *Northern States Power Co. v. United States*, 73 F.3d 764, 766 (8th Cir. 1996). Yet the FCC rejected this fundamental rule of statutory interpretation in construing the 1996 Act. Instead, the FCC brought a set of presumptions to its interpretation of the Act that have no basis in the language or structure of the Act. Those presumptions led the FCC to imagine that Congress had granted it plenary authority to regulate all aspects of local telecommunications markets, to the virtual exclusion of state regulation. The FCC's predisposition to interpret the Act in this way was first evident in the agency's Notice of Proposed Rulemaking ("NPRM"), published in the Federal Register on April 25, 1996. J.A. 303. There, the FCC announced that the Act created a "new regulatory paradigm" for telecommunications and that Congress intended the FCC, through its rulemaking, to breathe life into that paradigm. J.A. 305. The FCC also announced that the only possible way to bring competition to local telecommunications markets would be through the promulgation of uniform, national rules, since such rules would supposedly produce certain efficiencies that might not be obtained if the state commissions were left to make their own decisions and promulgate their own rules for their home markets. J.A. 313-15.

The FCC's presumptions, while visible in the NPRM, were elevated to a fundamental premise of every aspect of the agency's First Report and Order [hereinafter FRO]. J.A. 403. Paying lip service to Congress's deliberate and bargained-for choice of a deregulatory and decentralized approach to opening local telecommunications markets to competition, the FCC, on August 8, 1996, issued a 700-

page, single-spaced decision that sets forth in minute and mind-numbing detail the agency's view of how it would have brought competition to local markets if it had written the Act. Exploiting what it saw as an opportunity to break from the legal shackles that for decades have barred it from regulating intrastate telecommunications, the FCC issued an order and rules that were revolutionary in scope. Explicit in its mammoth order is the FCC's view that Congress had chosen the FCC to be the new chief regulator and overseer of every local market in the country and that the FCC alone had the knowledge and expertise to determine the future of the numerous local markets and approximately 1,000 incumbent LECs throughout the United States. From the FCC's perspective, uniform national rules—which only it could promulgate—were absolutely essential to efficient implementation of the Act, and without such rules, chaos would reign in local markets and incumbent LECs would purposefully inhibit or delay the efforts of new entrants. FRO ¶¶ 50, 56, 102, 104-20, 179, 625 (J.A. 429, 432, 455-65, 495-96, 721).

In the First Report and Order, two additional critical presumptions of the FCC emerged: (1) Congress's preference for a private, voluntary negotiation-based approach to establishing interconnection and access agreements would never work; and (2) state commissions could not be trusted to fulfill the responsibilities that Congress had expressly entrusted to them under the Act. It would not be unfair to say that the First Report and Order as a whole reflects, at best, a patronizing attitude toward state commissions, and, at worse, utter contempt towards states. This view persists in the Government's briefs as well. For example, in briefs submitted in the Eighth Circuit, the FCC made no apologies for its conclusion that absent its own particular national rules, state commissions "likely would tilt [the terms of competitive entry] in the incumbent monopolists' favor." Mem. of FCC & USA in Opp. to Mot. for Stay at 3, *Iowa Utilities Bd. v. FCC*, No. 96-3321 (8th Cir., filed Sept. 20, 1996).

Indeed, one month before the release of the First Report and Order, the then-Chairman of the FCC candidly admitted that the agency was seeking to consign state regulation of local exchange markets to the "trash can of history." *See* Interview with Reed Hundt, *in* Telecommunications Report, Supp. at 10 (July 9, 1996).

Chairman Hundt was right about the FCC's purpose in issuing the First Report and Order. The following are just several of many examples of the FCC's disdain for state regulation of local telephone markets and for the choices made by Congress in enacting the Act:

- Whereas Congress chose voluntary negotiations as the preferred method of achieving interconnection agreements between incumbent LECs and new entrants (47 U.S.C. § 252(a)(1)), and required incumbent LECs to bargain with new entrants in good faith (*id.* § 251(c)(1)), the FCC concluded that incumbents had no "economic incentive . . . to provide potential competitors with opportunities to interconnect with and make use of the incumbent LEC's network and services." FRO ¶ 55 (J.A. 432). The agency therefore decided that it had no choice but to impose "proxy" prices that, by its own admission, were "presumptive ceilings" that would restrict the scope of voluntary negotiations. *Id.* ¶ 768 (J.A. 790-91).

- Whereas Congress, in 47 U.S.C. § 251(d)(3), expressly constrained the FCC's authority to preempt state interconnection and access regulations and policies, the FCC pronounced *ex cathedra* in a single paragraph of its 700-page First Report and Order that "state regulations that are inconsistent with our rules *may* 'substantially prevent implementation of the requirements of this section and the purposes of [Part II of Title II]'." FRO ¶ 102 (J.A. 456) (emphasis added) (quoting 47 U.S.C. § 251(d)(3)).

- Whereas Congress, in 47 U.S.C. § 251(f)(2), expressly granted state commissions the authority to suspend or modify any of the requirements of 47

U.S.C. § 251(b), (c) for small and mid-sized LECs if a state commission found the requirement to be "unduly economically burdensome" to the LEC, the FCC narrowly restricted the suspension and modification authority of state commissions to situations where the requirement "would be likely to cause undue economic burden *beyond the economic burden that is typically associated with efficient competitive entry*." 47 C.F.R. § 51.405(d) (emphasis added).

- Whereas Congress expressly provided in 47 U.S.C. § 252(c)(2), (d) that state commissions would determine and establish the rates for interconnection and unbundled access to network elements, the FCC established a uniform, national pricing methodology and announced that state commissions were required to adhere to that methodology. FRO ¶ 111 (J.A. 461-62).
- Whereas Congress expressly provided in 47 U.S.C. § 252(e)(6) that a party aggrieved by a determination of a state commission may appeal to the appropriate federal district court, the FCC announced that an aggrieved party "may elect to either bring an action for federal district court review *or* a section 208 complaint to the Commission against a common carrier." FRO ¶ 128 (J.A. 468) (emphasis added).[10]

Together, these regulatory pronouncements of the FCC reflect an agency that simply cannot conceive of a world in which Congress has legislated to open local telecommunications markets to competition but has not given the FCC the central role. In the face of provision after provision of the Act in which Congress gave state commissions, not the FCC, primary regulatory and oversight authority, the FCC audaciously sought to transform a six-month time limitation on issuance of FCC regulations in

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[10] Section 208 merely gives the FCC jurisdiction to hear complaints "of anything done or omitted to be done by any common carrier." 47 U.S.C. § 208. As argued below, that statute does not authorize FCC review of the regulatory actions taken by state commissions.

section 251(d)(1) into a sweeping and unprecedented grant to the FCC of plenary authority to establish binding regulations regarding *all* aspects of telecommunications services in *all* local markets. With an arrogance that apparently knows no bounds, the FCC announced that its interpretation "is the *only* reasonable way to reconcile the various provisions of sections 251 and 252, and the statute as a whole." FRO ¶ 84 (J.A. 448) (emphasis added).

The FCC was correct that the Act did create a "new regulatory paradigm" in the sense that Congress had decided for the first time to put an end to local telephone providers' legal monopoly and to open all local telephone markets to competition. The Commission fundamentally erred, however, in concluding that Congress had placed the FCC at the center of that paradigm. In fact, Congress had opted to rely principally upon private negotiations, backed up by state commission mediations and arbitrations, as the means of implementing the broad goals of the Act.

D. The Court of Appeals' Decision

On October 15, 1996, the Eighth Circuit, in response to motions of several parties, granted a stay of the FCC's pricing and "pick-and-choose" rules pending final review on the merits.[11] J.A. 224. The FCC and other petitioners applied to this Court twice to vacate the stay, but the Court declined to interfere with the Eighth Circuit's stay. 117 S. Ct. 379 (1996) (Thomas, J., in chambers); 117 S. Ct. 429 (1996). Accordingly, the FCC's pricing rules have not been in effect for nearly two years. After extensive briefing and several hours of oral argument, the court of appeals issued its full decision on the merits on July 18, 1997, and amended that decision on rehearing on October 14, 1997. No party has applied to this Court for a stay of the court of appeals' decision.

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[11] By order dated September 27, 1996, the Eighth Circuit entered an interim stay of the First Report and Order pending a decision on the motions for stay, so that the rules would not go into effect while the court considered the motions.

In stark contrast to the FCC, whose interpretation of the Act proceeded from the belief that competition could never occur in the absence of its own uniform national rules and that state commissions could not be trusted to execute their responsibilities under the Act, the Eighth Circuit focused its analysis on the plain language of the Act. Moreover, unlike the FCC, the Eighth Circuit engaged in that analysis unfettered by any desire to be at the center of the new local telephone market playing field. It also emphasized at the outset that its "review [did] not encompass any determination regarding the wisdom or prudence of the policies Congress set forth in the Act, those considerations being the Constitutionally-assigned prerogatives of the Legislative Branch of our national government." Pet. App. 8a.

Relying upon the plain language of 47 U.S.C. § 252 (c)(2), (d), the court of appeals held that the Act "undeniably authorize[s] the state commissions to determine the prices an incumbent LEC may charge for fulfilling its duties under the Act." Pet. App. 11a. The court also held that the FCC's blanket preemption of all state rules and regulations that were in any way inconsistent with its own regulations was invalid in light of section 251(d)(3). As the court observed, "The FCC's blanket statement that state rules must be consistent with the Commission's regulations promulgated pursuant to section 251 is not supportable in light of subsection 251(d)(3). With subsection 251(d)(3), Congress intended to preserve the states' traditional authority to regulate local telephone markets and meant to shield state access and interconnection orders from FCC preemption so long as the state rules are consistent with the requirements of section 251 and do not substantially prevent the implementation of section 251 or the purposes of [the Act]." Pet. App. 39a-40a.

The court further held that the FCC had exceeded its statutory authority in promulgating regulations restricting the authority of state commissions under 47 U.S.C. § 251 (f)(2) to modify or suspend certain requirements of the Act for small and mid-sized LECs. Pet. App. 27a-30a.

And the court disagreed with the FCC's claim of authority under 47 U.S.C. § 208 to review interconnection agreements approved by state commissions, holding instead that Congress vested regulatory authority over interconnection agreements solely in the state commissions, subject to a right of appeal to the appropriate federal district court. Pet. App. 30a-34a. In short, the Eighth Circuit rejected the FCC's exaggerated perception of the agency's authority under the Act.

In addition, the Eighth Circuit considered the validity of certain FCC rules concerning the unbundled access and resale provisions of the Act. The FCC took the position in the First Report and Order that a new entrant without any facilities of its own could provide finished telephone service by purchasing from an incumbent *all* of the network elements required to provide such service. FRO ¶¶ 328-41 (J.A. 571-76). The incumbents had argued that the FCC's position eviscerated the distinction between 1) the resale provisions of the Act, pursuant to which a new entrant could purchase an incumbent's finished telephone service at wholesale rates; and 2) the unbundled access provisions, pursuant to which a new entrant could purchase network elements at cost-based rates. Specifically, the incumbents argued that by permitting new entrants to purchase all of the network elements necessary to provide finished telephone service at cost-based rates, the FCC had rendered the resale provisions of the Act a nullity, since no rational new entrant would pay higher wholesale rates for a service that it could purchase at cost.

The Eighth Circuit agreed with the incumbent LECs that any valid interpretation of the Act needed to recognize and maintain the purposeful distinction made by Congress between resale and purchase of unbundled network elements. Pet. App. 71a. Nevertheless, the court upheld the FCC's ruling in the First Report and Order that a new entrant may purchase all of the network elements needed to provide finished telephone service. The court concluded that its vacatur of 47 C.F.R. § 51.315(b)-(f)—which contrary to 47 U.S.C. § 251(c)(3) required incumbents

(rather than requesting carriers) to recombine network elements that are purchased by the requesting carriers on an unbundled basis—would be sufficient to maintain Congress's distinction. Pet. App. 56a-57a, 70a-71a.

E. Impact of the FCC's Rules and the Court of Appeals' Decision on Competition

Consistent with their view that the states cannot be trusted and that private, voluntary negotiations between incumbents and new entrants, backed by state commission arbitrations, cannot work, petitioners predictably claim that the Eighth Circuit's decisions, including its earlier stay of the pricing rules, are somehow responsible for any delay in the achievement of full competition in the local markets. *See, e.g.*, AT&T Pet. 12. Nothing could be further from the truth. Indeed, the Assistant Attorney General in charge of the Justice Department's Antitrust Division has recently testified that competition in the local exchange markets is proceeding forward as fast as one could expect in such a complex matter.[12] The FCC has also elsewhere praised the states for largely adopting on a voluntary basis the FCC's pricing methodology.[13] If, as it contends, most states have *voluntarily* followed the FCC's pricing methodology, the FCC can hardly claim that the Eighth Circuit's decision that the FCC may not *require* states to adopt its preferred methodology has frustrated the pro-competition goals of the Act. To the extent that there has been any undue delay in accomplishing what Congress recognized would be the difficult, complex and time-consuming task of opening all telecommunications

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[12] Joel I. Klein, *Bringing Competition to Local Telephony: The Department of Justice's Perspective*, Statement before the Senate Judiciary Committee, Subcommittee on Antitrust, Business Rights, and Competition (Mar. 4, 1998) ("The fact that the market is being opened—albeit more quickly in some places than in others—seems clear from the fact that entrepreneurs are seizing the opportunity to enter a $100 billion market heretofore closed to competition").

[13] *See, e.g.*, Reed Hundt, Chairman, FCC, remarks to the Chamber of Commerce, Washington, D.C. (May 29, 1997) (as prepared for delivery) ("[V]irtually every state in the Union has adopted our [pricing] policies").

markets to full competition,[14] it is attributable in large measure to the FCC's own misguided attempts to displace the pro-competition efforts of various states and to new entrants' singular focus on trying to pick off only lucrative business customers instead of investing in the facilities or services necessary to provide quality local service to all local customers—residential and commercial alike.[15]

Thus, in the months after Congress passed the Act, many state commissions had already moved to adopt rules and policies designed to foster interconnection and access in the manner envisioned by Congress, and many parties were in the process of negotiating agreements to provide interconnection and access. The FCC itself recognized in the NPRM that as of 1996, 19 states had already taken action to open local markets to competition, including seven states in which competing firms had already begun to offer switched service. J.A. 306. *See supra* at notes 6-9 and accompanying text. Moreover, in a contested proceeding after passage of the Act, the Connecticut DPUC concluded that its actions in setting standards for interconnection, unbundled access and resale competition—including its methodology for determining just and reasonable rates—were consistent with the Act.[16] As the Eighth Circuit found, however, the FCC's adoption of its rules, and its attempt to dictate every conceivable contract term and preempt every state rule on pricing and other aspects of interconnection, was leading to the break-

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[14] *See* H.R. Rep. No. 104-204, at 72 (1995); *see also* Statement of FCC Chairman Reed Hundt on S. 1822, the Communications Act of 1994, United States Senate (Feb. 23, 1994).

[15] *See, e.g.*, J. Keller, *AT&T's New Chief Plans Bold Agenda*, Wall Street J., Dec. 3, 1997, at A3 (reporting that AT&T's new CEO is laying groundwork for possible mega-merger); M. Mills, *WorldCom Would Shift MCI's Focus*, Washington Post, Oct. 3, 1997, at A1 (quoting WorldCom's Vice Chairman; "Our strategy is not in the consumer business"); *WorldCom Makes Unsolicited $29 Billion Stock Bid For MCI*, Communication Daily, Oct. 2, 1997 (reporting on WorldCom's $29 billion bid for MCI).

[16] *See In re The Southern New England Telephone Co.*, Docket No. 95-11-08, 1996 WL 497056 (Conn. D.P.U.C. July 17, 1996).

down of negotiations and, absent a stay, would have "derail[ed] current efforts to negotiate and arbitrate agreements under the Act." J.A. 238 (ruling on motions for stay); *see also* Pet. App. 10a n.9.

The Eighth Circuit issued its stay of the pricing and "pick and choose" provisions to permit the negotiations and arbitrations envisioned by the Congress to proceed. And proceed they did. The fact is that nearly 200 interconnection agreements had been signed by February 1997, within four months of the Eighth Circuit's stay opinion. By November 1997, just 20 months after passage of the Act, over 280 companies had voluntarily signed well in excess of 1,700 interconnection agreements to provide local service of some kind in over 450 cities through the country.[17] It should hardly be surprising to anyone that with thousands of interconnection agreements and numerous arbitrations, there should be (as petitioners claim) between 70 and 100 review proceedings in the federal district courts.

Not only have companies negotiated and signed interconnection agreements, but they have also begun to offer local telephone service under the watchful oversight of state commissions, precisely in the manner envisioned by Congress. For example, in Connecticut—one of the first states targeted by petitioners such as AT&T, MCI and others for local competition[18]—the state utility commis-

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[17] United States Telephone Ass'n, *Competition Report* (Nov. 3, 1997) (the *"USTA Competition Report"*) (*see* Appendix to the Mid-Sized LECs' Brief in Opposition to Petitions for Certiorari at A-1); New Paradigm Resources Group, Inc. and Connecticut Research Group, Inc., 1997 Annual Report on Local Telecommunications Competition (8th ed. 1997).

[18] *See* K. Donnelly, *MCI Celebrates the Anniversary of Connecticut Local Telecommunications*, Business Times—New Haven, Connecticut, May 1997, at 1; S. Higgins, *AT&T Goes Local With Service Today*, New Haven Register, Mar. 1, 1997, at A1 (reporting that "AT&T chose Connecticut for its first major thrust" into local markets); B. Keveney, *TCI Service to Expand Next Month*, Hartford Courant, Dec. 20, 1995, at A3 (reporting that TCI chose Hartford for one of its first forays into local telephone competition).

sion has certified over 36 companies to provide local exchange service and over 200 companies to offer intrastate toll services, and it has ruled that beginning in January 1999 every residential and small business customer of respondent SNET, the incumbent local carrier, will be required to select by ballot which carrier from among SNET and the many certified new entrants it wishes to use for local telephone service. *In re DPUC Investigation of The Southern New England Telephone Company*, Docket No. 94-10-05 (Conn. D.P.U.C. June 25, 1997), *as revised by* Final Decision (Conn. D.P.U.C. Dec. 22, 1997) (not available on Westlaw); *see also DPUC Administration of the Local Exchange Co. Election Process*, Docket No. 97-08-12 (Conn. D.P.U.C., docket opened Aug. 27, 1997) (developing technical standards for balloting in meetings that include representatives of new entrants). Nine of the 36 certified local exchange carriers are currently offering local telephone service in Connecticut, including petitioners AT&T and MCI. Similar competition is occurring in other states' markets. All of this progress toward competition in local markets has occurred without the FCC dictating pricing methodologies to the state commissions and competing carriers and without the FCC preempting every state policy or rule on intervention and access that differs from the FCC's own rules.[19] That progress will continue if the Eighth Circuit's decision is affirmed.

SUMMARY OF ARGUMENT

The Mid-Sized LECs do not question the wisdom of introducing competition to the local exchange market. The question is on whose terms will that competition take

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[19] For example, respondent Cincinnati Bell Telephone Co. has voluntarily negotiated and entered into, and has arbitrated, numerous interconnection agreements in Ohio, Kentucky and Indiana. MCI and Time Warner are already providing facilities-based local telephone service in Cincinnati. The Nebraska Public Service Commission has certified 13 companies as Local Competition carriers and approved 19 interconnection agreements. *See USTA Competition Report*.

place. Contrary to the position of the FCC, the Mid-Sized LECs, like the Eighth Circuit, believe that it is Congress's terms that should govern.

In constructing its pro-competition, deregulatory framework for ensuring that citizens of all states share in the benefits of competition in local telecommunications markets, Congress expressly eschewed a single set of detailed national rules, recognizing that all local markets and all LECs are not the same—that solutions that work in New York City or in Los Angeles might be disastrous in Des Moines or Fargo, and that requirements that might merely annoy a large national LEC might threaten the very existence of a small or mid-sized LEC. Congress, therefore, sought to take advantage of the local knowledge and experience of state utility commissions in regulating their home markets by giving them, among other powers: (1) the exclusive authority to establish prices where the parties themselves have failed to agree; (2) the sole responsibility to modify or suspend portions of the Act for small and mid-sized LECs; and (3) the explicit right to continue to design and apply their own locally sensitive regulatory policies to ensure fulfillment of the Act's goals. *See* 47 U.S.C. §§ 251(d)(3), (f)(2), 252(c)(2), (d), 261(b).

The 104th Congress would not recognize the detailed, centralized edifice designed by the FCC as the pro-competitive, deregulatory program that Congress passed in February 1996. As the Eighth Circuit correctly recognized, the underlying premise and rationale of the FCC's approach to its jurisdiction over pricing and non-price rules relating to local competition is fundamentally at odds with the language, structure and legislative history of the Act. Under the FCC's vision, the system of private negotiations desired by Congress, backed up by state-run mediation or arbitration, is the wrong way to encourage competition in local markets. Thus, instead of reducing regulatory costs and burdens through private negotiation and preserving traditional state control over countless local

markets and providers of local telephone service, the FCC rules impose a new layer of agency regulation and bureaucratic micro-management. The FCC's rules radically shift local telecommunications regulation from the states to Washington, D.C.; they disable small and mid-sized incumbent LECs from remaining vigorous and innovative competitors in the markets they know best and currently serve; and they inhibit the facilities-based competition that permits companies to distinguish themselves by price, service and technology, the essential ingredients of true competition. In short, as the Eighth Circuit recognized, the FCC's rules are neither pro-competitive nor deregulatory in purpose or effect.

ARGUMENT

I. CONGRESS NARROWLY CIRCUMSCRIBED THE FCC'S REGULATORY AUTHORITY OVER LOCAL TELEPHONE SERVICE.

Petitioners' briefs have two points in common. First, their jurisdictional arguments proceed from a shared premise: because Congress passed legislation to open local telephone markets to competition in states that had not already undertaken that effort on their own, Congress must also have intended that the FCC would have plenary authority to oversee implementation of the 1996 Act. Second, petitioners apparently hope that by merely labeling a host of discrete statutory issues as "jurisdictional," they can obtain review and reversal of the Eighth Circuit's decision on those issues without actually addressing each part of the court's decision in their briefs. These issues include: (1) whether the FCC has authority under 47 U.S.C. § 251(d)(3) to preempt *en masse* all regulatory policies of state commissions enforcing the interconnection and access obligations of section 251; (2) whether the FCC has any power under 47 U.S.C. § 251(f)(2) to constrict the authority given by Congress solely to state commissions to modify or suspend the requirements of section 251(b) or (c) for small and mid-sized LECs; and

(3) whether, under 47 U.S.C. § 208, the FCC may review the decisions made by state commissions when arbitrating, approving or rejecting interconnection agreements under section 252, even though 47 U.S.C. § 252 (e)(6) provides solely for judicial (not FCC) review of state commission determinations.

Contrary to the claim of petitioners, in opening local markets to competition, Congress did not grant the FCC plenary authority to regulate those markets to the virtual exclusion of state commissions who had historically exercised that important responsibility. Instead, as the Mid-Sized LECs show in Part I.A. below, Congress purposely chose an approach that preserved the regulatory authority of state commissions. This is seen not only in the Act's delegation of pricing authority to state commissions, a subject thoroughly explored in the briefs of the BOCs and GTE filed today, but also in the other sections of the Act listed above. These provisions show that Congress made numerous conscious choices about the division of responsibility between federal and state regulators during the drafting and debate of the legislation. As the language and legislative history of each section reveals, Congress consistently chose to amend pending legislation to leave regulatory authority in the hands of state regulators—and not just on pricing issues. Viewed collectively, these additional sections of the Act put the lie to petitioners' claim —which they use specifically to support their pricing jurisdiction arguments—that the guiding principle of the 104th Congress was to replace state regulation of local telephone markets with centralized FCC control from Washington.

Petitioners are also wrong in their apparent belief that if the Eighth Circuit's pricing jurisdiction ruling is reversed, the Court must necessarily also reverse the Eighth Circuit's separate rulings vacating the FCC's construction and application of sections 251(d)(3), 251(f)(2), and 252(e)(6), cited above. In Part I.B., the Mid-Sized LECs address the specific text of each of these critical sec-

tions that petitioners largely ignore in their briefs.[20] Petitioners should not be able to obtain relief in this Court on these matters of great importance without separately addressing the merits of each of these sections.[21] Each of these issues was extensively briefed and argued before the Eighth Circuit and was the subject of a separately reasoned ruling by that court under separate headings in its opinion. Pet. App. 27a-34a, 36a-40a. The Eighth Circuit did not link the different parts of its decision together, so that each would fall if any one of them fell. That court

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[20] Petitioners mention the Eighth Circuit's decision on these sections only in passing, in footnotes or in parenthetical references in text, devoting virtually all of their argument on FCC "jurisdiction" to the question of whether the Eighth Circuit erred in vacating the FCC's rules concerning pricing. For example, the only parties who discuss the Eighth Circuit's ruling on the scope of section 251(d)(3) are the FCC (Br. 22-23) and respondent GST Telecom, Inc. in support of petitioners (Br. 9-10). Neither the FCC nor GST Telecom, however, devote more than two paragraphs of their briefs to the section. Also, the FCC addresses only in a string cite, without discussion, the Eighth Circuit's ruling on the FCC's rule governing waivers under section 251(f)(2), and the Eighth Circuit's ruling on the FCC's purported authority under section 208 to review state commission determinations under section 252. FCC Br. 26 n.9. Other petitioners give the subject little attention in their arguments. MCI Br. 38 (one paragraph on section 208); AT&T Br. 21 (reference to section 251(f)(2) in string cite); AT&T Br. 31 (one paragraph on section 208).

[21] Petitioners' improper stratagem of sweeping every Eighth Circuit ruling they do not like into their argument on pricing jurisdiction is starkly exposed in AT&T's brief. AT&T takes issue with parts of the Eighth Circuit's decision that vacated FCC rules on wholly non-jurisdictional grounds, even though those parts of the decision are not subsumed in any of the questions presented by AT&T or any other petitioner. AT&T Br. 32-34. AT&T is simply wrong that the Eighth Circuit's decision on these issues was affected by its jurisdictional holding. For example, the Eighth Circuit vacated an FCC rule requiring incumbent LECs, upon the request of a competitor, to provide interconnection and access to the competitor that is superior in quality to what the incumbent provides itself. The court's decision was based on "the plain terms of the Act," Pet. App. 51a, and cannot in any way be described as a "jurisdictional" ruling, as AT&T claims.

understood, as petitioners fail to recognize, that it could not decide the validity of all of the FCC's orders and rules solely on the basis of a discussion of the FCC's power to issue rules generally or pricing rules in particular. The court correctly grounded each of its rulings in the text and legislative history of the particular provision of the Act in question, and not just in the FCC's jurisdictional authority generally as petitioners claim in their briefs. The court's rulings should therefore be affirmed.

A. The Act Preserves State Commission Authority to Regulate the Local Telephone Market.

1. In section after section of the local competition provisions of the 1996 Act, Congress, as it did in the 1934 Act, expressly preserved the historical role of state utility commissions as the regulators of local telephone markets and the numerous companies that provide local service in those markets. Thus, in recognition of the leading role that many states had played in developing regulations and policies that fostered local competition, Congress explicitly barred the FCC in section 251(d)(3) from "preclud[ing] the enforcement of any regulation, order, or policy of a State commission that—(A) establishes access and interconnection obligations of local exchange carriers; (B) is consistent with the requirements of this section; and (C) does not *substantially prevent* implementation of the requirements of this section and the purposes of this part [§§ 251-261]." 47 U.S.C. § 251(d)(3) (emphasis added).

In section 261(b), Congress emphasized more generally that state commissions have a critical responsibility to implement the federal statute. Section 261 provides that nothing in the Act "shall be construed to prohibit any State commission from enforcing regulations prescribed prior to February 8, 1996, or from prescribing regulations after such date of enactment, *in fulfilling the requirements of this part*, if such regulations are not inconsistent with the provisions of this part [§§ 251-261]." *Id.* § 261(b) (emphasis added). In addition, section 252(e)(3) provides that "subject to section 253 [of this title], nothing in

this section shall prohibit a State commission from establishing or enforcing other requirements of state law in its review of an [interconnection] agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements." 47 U.S.C. § 252(e)(3). Sections 253(b) and (c) further confirm the state's continued authority to "preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers" and to "manage the public rights-of-way." 47 U.S.C. § 253(b), (c). And, significantly, section 601(c)(1) of the 1996 Act (not codified in Title 47) provides that "[t]his Act . . . shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided . . . ."

Congress also recognized that certain obligations of the Act could place small and mid-sized incumbent LECs at a grave disadvantage when suddenly faced with competition from large, global entities and that state utility commissions, with their knowledge of local markets and local companies, were best positioned to determine whether smaller companies in those local markets needed relief from the Act's requirements. Accordingly, in section 251(f)(2), Congress gave state commissions the sole authority and broad discretion to modify or suspend Congress's interconnection and access provisions where, among other things, they were "unduly economically burdensome," 47 U.S.C. § 251(f)(2), so that companies with far fewer resources than "large global or nationwide entit[ies]" could effectively adjust to the new competitive environment. S. Rep. No. 104-23, at 22 (1995). In crafting the waiver provision, the Senate Committee stated:

> The Committee intends that *the . . . State* shall, consistent with the protection of consumers and allowing for competition, use this authority to provide a level playing field, particularly when a company or carrier to which this subsection applies faces competition from a telecommunications carrier that is a large glo-

> bal or nationwide entity that has financial or technological resources that are significantly greater than the resources of the company or carrier.

Id. (emphasis added).

The text of provisions such as sections 251(d)(3), 261(b) and 251(f) thus affirm the primacy of state commissions as not only the regulators of the local telecommunications markets, but also the regulators of first resort in implementing the broad local competition standards in section 251. Congress's message could not have been clearer: except where expressly provided, the Act does not preempt state commission regulations designed to open local markets to competition. To the extent that Congress granted the FCC any regulatory authority in section 251, Congress explicitly barred the FCC from exercising that authority to preclude enforcement of a state commission's own regulations and policies, unless the FCC finds that the regulations and policies: (1) are inconsistent with the broad standards in section 251 (not the FCC's own regulations); or (2) substantially prevent implementation of the requirements of section 251 and the purposes of the local telephone competition provisions of the 1996 Act.

Section 252 further confirms the Act's orientation toward state regulation of competition in the local exchange market. As noted above, Congress provided that state commissions would mediate and, if necessary and requested by a party, arbitrate open issues between parties negotiating interconnection agreements. 47 U.S.C. § 252(a)(2), (b). In addition to giving state commissions these integral roles in ensuring that private parties reach agreement on interconnection matters, through mediation and arbitration, Congress left to state commissions the sole authority to approve or reject interconnection agreements once they are finalized and submitted by the parties. 47 U.S.C. § 252(e). Congress further provided that any party aggrieved by a determination of a state commission under section 252 "may bring an action in an appropriate Federal district court to determine whether the agreement . . .

meets the requirements of Section 251 and this section." 47 U.S.C. § 252(e)(6).

In those instances when the parties are unable to agree on issues generally, and request arbitration, Congress directed state commissions to ensure that resolution of those issues meets the requirements of section 251, including any of the FCC's validly promulgated and enforceable regulations under section 251. Section 252, however, included requirements wholly apart from those in section 251, and which Congress directed state commissions alone to enforce when conducting arbitrations. In particular, Congress directed state commissions to "establish any rates for interconnection, [resold] services, or network elements according to subsection (d) [of section 252]." 47 U.S.C. § 252(c)(2). In subsection (d), Congress set forth the specific factors that a state commission must use when it makes its rate "[d]eterminations." 47 U.S.C. § 252(d)(1)-(3). Significantly, the provisions of section 252 that directly authorize the state commissions to establish prices in arbitrations are devoid of any reference to FCC regulations.

2. It was no accident that Congress largely preserved traditional state authority over the local exchange market and that it gave state commissions exclusive authority over pricing issues. Rather, it was a purposeful choice reflected in numerous sections of the Act and in its legislative history. Like most legislation, "the Act was the product of many successful compromises among a variety of competing views and interests, and reflects the customary give and take of the legislative process." [22] Perhaps nowhere in the Act, however, are the outcomes of those legislative compromises more clear than in the text of many of the above provisions, as passed by Congress and signed into law by the President. In one provision after another, Congress removed language referring to or giving the FCC

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[22] Brief of Amici Curiae Congressman Bliley, *et al.*, at 3, *Iowa Utilities Bd. v. FCC*, No. 96-3321 (8th Cir., filed Dec. 23, 1996); *see also* Brief of Amici Curiae Congressman Dingell, *et al.*, *Iowa Utilities Bd. v. FCC*, No. 96-3321 (8th Cir., filed Nov. 15, 1996).

regulatory authority over issues that fundamentally affect the local exchange market.

For example, Congress rejected earlier versions of section 251(f)(2) that had provided for *dual* FCC/state commission authority over decisions to modify or suspend interconnection and access obligations for small and mid-sized LECs, concluding instead that those decisions required a thorough knowledge of the small and mid-sized LECs and the local markets and should thus be handled exclusively by state commissions. *See* S. Rep. No. 104-23, at 22, 93 (1995) (§ 251(i)); H.R. Rep. No. 104-204, at 74, 144 (1995) (§ 252(e)). Thus, on the day that the Senate passed the Act, Senator Daschle (the minority leader) remarked: "The bill before us also recognizes the important role that must be played by Public Utilities Commissions (PUC's) in *rural States*. PUC's are the best entities to judge whether a given market within their State can support competition. *That's not a judgment we should make from Washington.*" 142 Cong. Rec. S709 (daily ed. Feb. 1, 1996) (emphasis added).

Similarly, the House amended H.R. 1555 on the day it passed that bill to add the precursor to section 251(d)(3), which "[p]reserve[s] state access regulations." The House version was identical in every respect to the final text of section 251(d)(3) as later amended in Conference and enacted into law, except that the House originally sought to uphold the enforceability of state commission regulations, orders and policies regarding interconnection and access obligations only if they would "not substantially prevent *the* [*FCC*] from fulfilling the requirements of this section and the purposes of this part." 141 Cong. Rec. H8444, cols. 2-3 (daily ed. Aug. 4, 1995) (inserting new subparagraph (B) in House Commerce Committee's version of section 242(b)(4), reprinted in 141 Cong. Rec. H8427, col. 1) (emphasis added). However, in response to concerns expressed by state commissions,[23] the Confer-

[23] The Chair of the Wisconsin Public Service Commission expressed her concern in a letter to Representative Watts that the House bill reported out of committee wrongfully expanded the

ence deleted reference to the FCC in the above-quoted phrase, leaving section 251(d)(3) as preserving state regulations, orders and policies that do "not substantially prevent implementation of the requirements of this section and the purposes of this part." In short, section 251(d)(3) confirms the states' independent role in executing Congress's plan to introduce competition to the local markets of all states. That role is further confirmed by section 261(b)'s general preservation of state commission authority to promulgate regulations that fulfill the requirements of the local telephone provisions of the 1996 Act, independent of any regulations that the FCC might also promulgate (pursuant to the limited authority Congress gave the FCC).

The legislative history of the Act also confirms what the language and structure of sections 251 and 252 show—that Congress made a conscious choice to reserve exclusive control over pricing issues to state commissions. Earlier versions of the 1996 Act had given the FCC control over pricing, but those provisions were modified in Conference to place pricing standards under the control of state commissions under a new section 252. *See Joint Explanatory Statement* at 13; *see generally id.* at 117-26. In the bill that was enacted into law, Congress made numerous clear distinctions between "the requirements" of section 251 and the separate "requirements of section 252," including the pricing standards set forth in section 252(d). *See, e.g.*, 47 U.S.C. §§ 251(c)(2)(D), (c)(3), 252(e)(2)(B). Although Congress sometimes referred to FCC rules when also referring to the requirements of section 251, it never referred to such rules when separately

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FCC's authority and that the "manager's amendment" on the House floor, which added the precursor to section 251(d)(3) discussed above in text, "does not give us everything we had asked for, [but] it certainly does a better job of balancing federal and state jurisdiction." The state commission Chair further wrote that "[to] the extent that your efforts would give the states a stronger chance to gain some ground *on the jurisdictional issues in conference committee*, I would tend to support your efforts." 141 Cong. Rec. H8453 (daily ed. Aug. 4, 1995) (emphasis added).

referring to the pricing standards of section 252. *See, e.g., id.* § 252(c)(1), (c)(2), (e)(2)(B), (f)(1), (f)(2).[24]

3. Congress did not leave the FCC without any role to play under the 1996 Act. The requirements of section 251 include several specific references to FCC regulations under that section.[25] At the same time, however, section 251(d)(3) expressly preserves the ability of the state commissions themselves to implement the interconnection and access requirements of section 251, so long as their policies are in keeping with the text of section 251 and the overall purposes of the local competition part of the 1996 Act. On those specific subjects where Congress has authorized the FCC to implement section 251, the FCC may preclude enforcement of a state commission's policies, but only if those state policies do not satisfy the broad guidelines of the Act. Nowhere does section 251(d)(3) reference FCC regulations. Moreover, Congress preserved state commissions' exclusive authority to implement the requirements of section 252, including the arbitration and approval of interconnection agreements and the setting of prices in arbitration. Congress provided that if, but only if, a state commission fails to execute its responsibilities under section 252 with respect to a particular matter, the FCC "shall issue an order preempting the State commission's jurisdiction of that proceeding or matter

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[24] For example, in 47 U.S.C. § 252(e)(2)(B), Congress provided that a state commission may reject an interconnection agreement adopted by arbitration only if the state commission "finds that the agreement does not meet the requirements of Section 251, including the regulations prescribed by the [FCC] pursuant to Section 251, or the standards set forth in subsection (d) of this section." While the FCC plainly has some regulatory authority under section 251, the breadth of that authority is limited, as described more fully in the briefs filed by the BOCs and GTE.

[25] *E.g.*, 47 U.S.C. § 251(b)(2) (number portability); *id.* § 251(c)(4)(B) (prohibitions on resale); *id.* § 251(d)(2) (network elements); *id.* § 251(e) (numbering administration); *id.* § 251(g) (exchange access); *id.* § 251(h) (treatment of comparable carriers and incumbents).

. . . and shall assume the responsibility of the State commission under this section [252] with respect to the proceeding or matter and act for the State commission." 47 U.S.C. § 252(e)(5).

Put another way, Congress gave the FCC the role of backup regulator of the local exchange market. In those states where regulators are willing and able to take affirmative steps to open their local markets to competition consistent with the broad guidelines established by the Act, Congress permitted those regulators to continue to exercise their historical control without interference from the FCC. However, in states where regulators have abdicated that responsibility and are unwilling either to enforce the congressional mandates of section 251 or to undertake their regulatory responsibilities in section 252 to arbitrate disputes or review interconnection agreements, the FCC may regulate in lieu of the state commission as if it were the state commission. In this way, Congress preserved the historical role of the state commissions as regulators of intrastate telecommunications service, while ensuring that all citizens enjoy the benefits of local competition by permitting the FCC to fill any void left by states that had not acted to open their local markets to competition.[26]

The plain language and legislative history of numerous sections of the Act thus undermine the central premise of petitioners' jurisdictional arguments, including their arguments on pricing—that Congress intended to bring about competition in the local exchange through detailed FCC rules on every conceivable subject that would bind all state commissions throughout the country. To the contrary, viewed as a whole, the Act establishes Congress's clear objective to preserve state commission regulatory

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[26] An exception to this scheme is found in 47 U.S.C. § 251(e)(1), which grants "exclusive jurisdiction" to the FCC "over those portions of the North American Numbering Plan that pertain to the United States." That reference to the FCC's "exclusive jurisdiction" is the only such reference in section 251.

authority over local telephone markets and to deny the FCC the plenary regulatory authority over those markets that it seeks.

B. The Eighth Circuit's Rulings on the Scope of FCC Authority Under Sections 251(d)(3), 251(f)(2) and 252(e)(6) Are Consistent With the Plain Terms and Legislative History of the Act.

As discussed above, in addition to giving state commissions exclusive authority to establish the rates for interconnection and access, Congress also gave state commissions: (1) the explicit right in section 251(d)(3) to apply their own regulatory policies to implement the broad competition goals of the Act; (2) the sole authority in section 251(f)(2) to waive or modify portions of the Act for mid-sized and small LECs; and (3) the exclusive regulatory authority to approve or reject interconnection agreements, subject only to review in federal district courts under section 252(e)(6). The court of appeals' rulings on each of these sections is independently supported by the text and legislative history of each provision. Contrary to petitioners' suggestions, therefore, the Eighth Circuit's decision on each of these sections must be affirmed regardless of the Court's disposition of petitioners' arguments on the scope of the FCC's jurisdiction over pricing.

1. *Section 251(d)(3) Limits Whatever Regulatory Authority the FCC May Validly Exercise to Implement the Requirements of Section 251.*

The FCC argues that 47 U.S.C. § 251(d)(1) expressly grants it the statutory authority to implement every provision of the local competition portion of the Act. FCC Br. 19; *see also* AT&T Br. 23; MCI Br. 27. As the BOCs and GTE demonstrate in their briefs, Congress's direction to the FCC to establish regulations within six months cannot possibly be transformed into a revolutionary grant of plenary authority to the FCC over every aspect of intrastate telecommunications governed by section 251.[27] How-

[27] By its terms, section 251(d)(1) addresses "the requirements of this section," 47 U.S.C. § 251(d)(1), and therefore does not

ever, regardless of the subject matters that the FCC may permissibly regulate under section 251, and regardless of the statutory source of whatever regulatory authority the FCC may have, the FCC may not ignore the language of section 251(d)(3), which operates as an express limitation upon *any* FCC authority exercised to implement the requirements of section 251. Nevertheless, in its First Report and Order the FCC did just that, by issuing binding, national rules and requiring all state commissions uniformly to adhere to the FCC's rules to the exclusion of the state commission's own rules and policies that may differ from the FCC's. FRO ¶¶ 53-62, 101-03, 179 (J.A. 431-36, 455-56, 495-96). The Eighth Circuit correctly rejected the FCC's attempt to nullify Congress's clear command in section 251(d)(3) to preserve state regulation of interconnection and access. Pet. App. 36a-40a.

The FCC seeks to dismiss section 251(d)(3) as nothing more than a provision to "ensure that state commission orders consistent with federal law are not invalidated on the theory that the Commission's rules preempt a regulatory field." FCC Br. 22. That argument ignores the text of the Act. Congress made absolutely clear in section 261(b) that the Act, which necessarily includes any FCC regulatory authority thereunder, was not intended to have field preemptive effect.[28] Congress did not need to repeat

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address rulemaking by the FCC to implement the requirements of other sections, such as section 252 (including the pricing standards of section 252(d)). Consequently, section 251(d)(3), like section 251(d)(1), is properly read only to address non-pricing regulations to fulfill the requirements of section 251. However, if petitioners were correct in their erroneous argument that the FCC has authority to issue pricing rules because the requirements of section 251 supposedly incorporate by reference the pricing standards of section 252, then the anti-preemption provision of section 251(d)(3) would necessarily be equally applicable to the FCC's pricing rules.

[28] As previously noted, section 261(b) provides, "Nothing in this part [*i.e.*, sections 251-261] shall be construed to prohibit any State commission from enforcing regulations prescribed prior to February 8, 1996, *or from prescribing regulations after such date of enactment, in fulfilling the requirements of this part,* if such regulations

this point in section 251(d)(3), as the FCC's argument necessarily suggests. Instead, Congress went even further in section 251(d)(3) by limiting the FCC's power to preempt *specific* state regulations, orders or policies. It bears emphasizing that in section 251(d)(3), entitled "Preservation of state access regulations," Congress explicitly barred the FCC, when exercising whatever limited regulatory authority it possesses to implement section 251, from "preclud[ing] the enforcement of any regulation, order, or policy of a State commission that—(A) establishes access and interconnection obligations of local exchange carriers; (B) is consistent with the requirements of this section; and (C) does not *substantially prevent* implementation of the requirements of this section and the purposes of this part [*i.e.*, sections 251-261]." 47 U.S.C. § 251 (d)(3) (emphasis added). Thus, section 251(d)(3) is far more specific, and far more restrictive of FCC authority, than an anti-field preemption provision.

The FCC also claims that because section 251(d)(1) —in the FCC's view—authorizes the FCC to issue regulations to implement the provisions of section 251, the enforcement of any state regulation that is inconsistent with an FCC regulation would by definition "substantially prevent" implementation of the Act. FRO ¶ 103 (J.A. 456). Yet that assertion can succeed only if Congress intended the FCC to be the sole implementor of section 251 or if there were only one reasonable way to implement the broad goals of the Act. For several reasons, neither premise can be sustained.

First, as noted above, section 261(b)—which the FCC does not even cite, let alone discuss, in its brief—provides that state commissions may issue regulations to fulfill the requirements of the Act. In light of this section, any argument that the FCC is the sole entity that Congress authorized to implement the broadly worded goals of the Act is completely without merit. Just as important, sec-

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are not inconsistent with the provisions of this part." 47 U.S.C. § 261(b) (emphasis added).

tions 261(b) and 251(d)(3) are consistent in permitting state commissions to fulfill the requirements of section 251 (and, for section 261(b), also to fulfill the requirements of section 252) *without regard to FCC regulations.* It does no good for the FCC to point to the language in 47 U.S.C. § 252(c)(1) directing state commissions to ensure that the resolution of open issues in arbitration "meet[s] the requirements of Section 251, including the regulations prescribed by the [FCC] pursuant to Section 251." Under the highly specific and sweeping terms of section 251(d)(3), FCC regulations that are otherwise proper under section 251 are not enforceable to override a state commission's own regulations and policies.[29]

Any other reading of section 252(c)(1) would write section 251(d)(3) out of the Act, which is what the FCC apparently would like to do. However, as discussed at page 31, *supra,* Congress consciously inserted section 251(d)(3) into the Act to address the concerns of state regulators. Congress did not accept the House version of section 251(d)(3) that went into the Conference Committee, which would have limited state regulation to policies that would not "substantially prevent *the FCC from fulfilling* the requirements of this section and the purposes of this part." *See* pages 31-32, *supra.* By removing "the FCC" from the final text of the section, Congress made clear its position that more than one way existed to implement section 251 and that a state regulation could differ from an FCC regulation, yet still be consistent with section 251 and not "substantially prevent" implementation of the goals of the local competition provisions of the Act. *See INS v. Cardoza-Fonseca,* 480 U.S. 421, 442-43 (1987) ("Few principles of statutory construction are more com-

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[29] As discussed *supra* at page 34 n.26, Congress did grant "exclusive jurisdiction" to the FCC "over those portions of the North American Numbering Plan that pertain to the United States." 47 U.S.C. § 251(e)(1). A state commission would therefore be bound by FCC regulations under that lone provision conferring "exclusive jurisdiction" on the FCC.

pelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language") (internal quotations omitted).[30] In short, the FCC's argument on the meaning of section 251(d)(3) is nothing more than an effort to reverse a legislative defeat.

Second, if the FCC were correct that it has plenary power to regulate under section 251 and that the enforcement of any state regulation inconsistent with an FCC regulation would, by definition, "substantially prevent" implementation of section 251, then section 251(d)(3) would once again be a meaningless provision. Under current preemption law, if the FCC did have the plenary regulatory authority it erroneously claims, state rules that were directly inconsistent with the FCC's own rules or that stood "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *i.e.*, rules that "substantially prevented" implementation of the FCC's regulations, would be preempted without the need for section 251(d)(3) to say so. *See Fidelity Federal Savings & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982). Congress obviously included section 251(d)(3), not as a meaningless gesture, but as an express limitation on whatever regulatory authority the FCC was given under section 251.

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[30] The FCC's construction of the statutory scheme ignores not only the legislative history of the section, but also the established principle of statutory construction that a specific statutory provision prevails over a more general provision. *See Bigger v. American Commercial Lines, Inc.*, 862 F.2d 1341, 1344 (8th Cir. 1988) (*citing MacEvoy Co. v. United States*, 322 U.S. 102, 107 (1944)); *accord Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 228-29 (1957). It also ignores this Court's repeated admonition that "we start with the assumption that the historic police powers of the States [are] not to be superseded by [a] Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *see Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983) ("the regulation of utilities is one of the most important of the functions traditionally associated with the police powers of the States").

The FCC also argues that there is no valid distinction between a state regulation that is inconsistent with the Act and a regulation that is inconsistent with the FCC's own application of the standards of the Act. FCC Br. 23 n.7. This argument, however, ignores the text of the interconnection and access standards of section 251, which are sufficiently general to sustain differing implementations by state commissions. The FCC and other petitioners concede as much by their reliance on the *Chevron* doctrine of deference in support of the merits of the FCC's rules, which they would not need if the statutory standards were susceptible of only a single interpretation. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council,* 467 U.S. 837 (1984). Thus, as the Eighth Circuit held, a state regulation can be consistent with section 251 if it represents a reasonable approach to implementing that section's requirements, even if the state's method of implementation differs from the FCC's preferred approach. Pet. App. 37a-38a. Section 251(d)(3), therefore, represents an explicit congressional rejection of the usual rule that when a federal and state regulation are in conflict, the federal regulation always prevails.

In the First Report and Order, the FCC sought to avoid the clear implications of sections 251(d)(3) and 261(b) by attempting to discover its preemption authority in section 261(c). FRO ¶ 98 (J.A. 454). The FCC's effort to locate preemption authority in that section, however, is unavailing. Section 261(c) authorizes states to impose additional legal requirements intended to open local telephone markets to competition, so long as those requirements are consistent with this part of the Act (sections 251-261) and any regulations validly promulgated by the FCC under this part. 47 U.S.C. § 261(c). As the Eighth Circuit found, sections 261(b) and 251(d)(3)—unlike section 261(c), which addresses state laws wholly apart from the 1996 Act—deal specifically with state commission regulations that fulfill the requirements of the 1996 Act, not with *additional* state legal requirements. Pet. App. 39a. The FCC cannot minimize the import of Congress's omis-

sion in the anti-preemption provision of section 251(d)(3), and in the preservation of state commission authority in section 261(b), of any requirement that state commission regulations comport with FCC rules. *See Russello v. United States*, 464 U.S. 16, 23 (1983).

Finally, the FCC's reliance upon section 261(c) ignores the settled principle that a specific statutory provision prevails over a more general provision. Section 251(d)(3) is expressly and specifically applicable to every state "regulation, order, or policy" that "establishes access and interconnection obligations of local exchange carriers."[31] By contrast, section 261 lacks this specificity. In addition, section 261(b) expressly addresses the authority of state commissions to prescribe regulations that fulfill the requirements of the 1996 Act. Once again, section 261(c) lacks such specificity. Accordingly, where state regulation of interconnection and access obligations is concerned, section 251(d)(3) must control.

Congress's considered decision to allocate regulatory authority in this manner, and to place express limitations on the FCC's preemption power, also serves to distinguish the cases that the FCC relies upon to support its position —*City of New York v. FCC*, 486 U.S. 57 (1986), and *Fidelity Federal Savings & Loan Ass'n v. de la Cuesta*, 458 U.S. 141 (1982). In neither of those cases did Congress expressly limit the preemptive authority of the federal agency, as it so clearly did here. To the contrary, *de la Cuesta* held that the statutory language authorizing the Federal Home Loan Bank Board to regulate federal savings and loans "suggest[ed] that Congress expressly contemplated, and approved, the Board's promulgation of regulations superseding state law." 458 U.S. at 162. Similarly, *City of New York v. FCC* upheld FCC regulations that established technical standards governing the quality

[31] This reference to the "access and interconnection obligations of local exchange carriers," 47 U.S.C. § 251(d)(3)(A), is a broad, shorthand reference to the numerous obligations of LECs set forth in subsections (b) and (c) of section 251.

of cable television signals and that prohibited local authorities from imposing more stringent technical standards. In so doing, the Court noted, "[i]t is also quite significant that nothing in the Cable Act or its legislative history indicates that Congress explicitly disapproved of the Commission's preemption of local technical standards." 486 U.S. at 67. In sum, in both *de la Cuesta* and *City of New York*, the Court recognized that Congress could have limited the preemption authority of the respective regulatory agencies if it had wanted to, though in each case it did not. In the 1996 Act, however, Congress explicitly did limit the FCC's preemption authority. Congress's choice must be respected.

2. *The FCC Never Determined That Any State Regulation, Order or Policy Was Inconsistent With Section 251 or "Substantially Prevented" Implementation of the Requirement of Section 251 or the Purposes of the Act.*

For an additional reason, the Eighth Circuit correctly rejected the FCC's position that its uniform, national interconnection and access rules are binding on the states: the FCC never actually determined that any particular state regulation, order or policy was, in fact, contrary to the requirements of section 251 or would "substantially prevent" implementation of the requirements of section 251 or the purposes of the local competition provisions of the 1996 Act. To the contrary, the FCC simply pronounced in the First Report and Order that "state regulations that are inconsistent with our rules *may* 'substantially prevent implementation of the requirements of this section and the purposes of [Part II of Title II]'." FRO ¶ 102 (J.A. 456) (emphasis added) (quoting 47 U.S.C. § 251(d)(3)); *see also id.* ¶¶ 177-80 (J.A. 494-96) (new entrants need not "comply with a multiplicity of state variations" in interconnection requirements). The FCC's use of the word "may" in its order is telling and not surprising, since a "substantial prevention" finding would have been impossible given the FCC's failure to examine—or even in the

NPRM to request comments on—whether any particular state's regulations implementing section 251 had actually hindered competition in that state. The FCC simply assumed (as it has here as well), without any basis in the record, that state regulations that differed in any way from its own regulations might have that effect.[32] However, if section 251(d)(3) has any meaning at all, it is that the FCC must make specific findings and conclusions about the real impact of particular state commission regulations, orders and policies on the pro-competitive goals of the Act before issuing or enforcing preemptive regulations.[33]

Yet, the FCC did the one thing that Congress explicitly said it could not do: preempt all state regulations that differed from its own uniform, national rules without first determining whether the state regulations were consistent with section 251 or whether they substantially prevented implementation of that section or the purposes of the Act. Because it failed to take these predicate steps to a preemption order, the Eighth Circuit properly held that the "FCC's blanket statement that state rules must be consistent with the Commission's regulations promulgated

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[32] Significantly, some state commissions, such as Connecticut's Department of Public Utility Control, have expressly concluded in contested proceedings *after* passage of the 1996 Act that their rules and policies for interconnection, unbundled access to network elements and resale competition—even where different from the FCC's rules—are consistent with the 1996 Act and its goals. See page 20 n.16, *supra*.

[33] Because the FCC did not develop *any* record on the effect of state interconnection and access rules on competition, the FCC's defense of its preemption ruling in this proceeding is necessarily limited to establishing that *all* state commission regulations, orders and policies that differ in any way from the FCC's rules must be preempted on their face. In other words, to uphold the FCC's actions and reverse the Eighth Circuit, this Court would have to find that there is no possible set of circumstances under which a state commission's actions that varied from the FCC's rules would satisfy the requirements of section 251(d)(3). *See California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 580, 588-89 (1987). There is no basis for making that finding on this record.

pursuant to section 251 is not supportable in light of section 251(d)(3)." Pet. App. 39a.

3. *The FCC Unlawfully Restricted State Commissions' Statutory Authority to Modify or Suspend Obligations for Small and Mid-Sized LECs.*

Further underscoring Congress's confidence in the states, 47 U.S.C. § 251(f)(2) gives to state commissions alone the authority to suspend or modify the requirements of section 251(b) or (c) in certain circumstances for LECs in their state that serve fewer than two percent of the nation's subscriber lines.[34] Those circumstances include when the LEC can demonstrate in a petition filed with the state commission that section 251(b) or (c) imposes "a requirement that is unduly economically burdensome."[35] In purporting to construe section 251(f)(2), the FCC issued Rule 405(d), which impermissibly narrows the circumstances under which Congress intended that a smaller LEC may obtain relief from the requirements of section 251(b) or (c). The rule does so by requiring smaller LECs to prove that a section 251 requirement "would be likely to cause undue economic burden *beyond the economic burden that is typically associated with efficient competitive entry.*" 47 C.F.R. § 51.405(d) (emphasis added) (Pet. App. 307a-308a). Rather than interpreting

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[34] Under section 251(f)(2), only LECs with fewer than two percent of the nation's subscriber lines in the aggregate qualify for this "2% waiver" provision. That definition includes all of the Mid-Sized LECs. The Mid-Sized LECs have a unique interest in the application of this provision because, unlike smaller, rural LECs that make up the vast majority of LECs in this country, many of the Mid-Sized LECs do not qualify for the automatic rural exemption of 47 U.S.C. § 251(f)(1)—a provision addressed at length in the Brief for the United States Telephone Association and Rural Telephone Coalition ("USTA Brief"), which brief the Mid-Sized LECs fully endorse.

[35] The "unduly economically burdensome" test is just one of three alternative tests in section 251(f)(2) for justifying a waiver, but the FCC conceded below that its rules neither address nor purport to limit a LEC's right to resort to the other two tests.

the statute, the FCC's rule changed the text of the statute, by adding words of limitation to the straightforward phrase used by Congress in the statute.

In other words, if "efficient competitive entry"—the FCC's phrase, not Congress's—would "typically" cause the demise of the smaller LEC with a strong historical tie to its service area, due to the entry of a multinational competitor with no long-term commitment to that area, the FCC's rule would disable the state commission from even temporarily suspending or modifying any of the requirements of section 251. Yet, that scenario is precisely what Congress intended would satisfy the "unduly economically burdensome" test for waivers under section 251 (f)(2). *See* pages 28-29, *supra*. By definition, the numerous small and mid-sized LECs are not "typical," but are each characterized by a unique history and market. The statutory phrase, and not the one made up by the FCC, governs when a state commission may tailor a requirement to the uniquely local situation to *enhance* competition by ensuring the local company's survival.

These defects in the FCC's rule are not surprising given the FCC's own conclusion that its rulemaking record did not afford the agency a sufficient basis to establish national rules governing section 251(f). In its First Report and Order, the FCC found "convincing assertions that it would be an overwhelming task at this time for the Commission to try to anticipate and establish national rules for determining when our generally-applicable rules should *not* be imposed upon carriers." FRO ¶ 1253 (emphasis in original) (J.A. 1020). That finding—which the FCC then promptly ignored by issuing Rule 405(d) as a binding, national rule—comported with Congress's intent in enacting section 251(f), which gives the FCC *no* role to play in that purely local decision. Indeed, Congress deleted any reference to FCC jurisdiction in section 251 (f)(2) and decided instead that waiver decisions requiring a thorough knowledge of small and mid-sized LECs should be handled *only* by state commissions, which are

best equipped to make such determinations on a company-by-company basis, and not from Washington. *See* page 31, *supra*. Once again, the FCC may not claim authority specifically rejected by Congress. *Cardoza-Fonseca*, 480 U.S. at 442-43.

The Eighth Circuit therefore did not need to address the merits of the FCC's rule when vacating it as beyond the FCC's statutory authority. The Eighth Circuit relied on the express statutory text and clear legislative history of section 251(f)(2), which vested regulatory authority over waivers solely in state commissions, and the court independently supported its decision by reference to section 2(b) of the Communications Act. Pet. App. 28a. For these reasons, and for the reasons set forth in USTA's brief, there are no grounds to disturb the Eighth Circuit's ruling vacating Rule 405(d), either on the basis of the text of section 251(f) itself or on broader, jurisdictional grounds.

4. *The FCC Unlawfully Ordered That Parties Aggrieved by a State Commission Determination Under Section 252 May Bypass District Court Review and Seek Review Directly From the FCC.*

In yet another usurpation of a power that Congress did not grant the FCC, the FCC ruled in the First Report and Order that any party dissatisfied with the action taken by a state commission under section 252 to approve or reject a negotiated or arbitrated interconnection agreement may seek review of that state action before the FCC. FRO ¶¶ 121-29 (J.A. 465-69). However, as with its pricing and waiver provisions, Congress nowhere granted the FCC this regulatory power. In section 252, Congress placed each state commission—not the FCC—at the center of responsibility for overseeing the efforts of private parties to enter into agreements for local interconnection, network elements, or services. If negotiating parties remain unsatisfied after a state has acted to arbitrate, approve, or reject interconnection agreements, Congress expressly em-

powered the federal district courts, not the FCC, to review state commission determinations.

Congress could not have made its intent clearer. Thus, section 252(e)(6), entitled "Review of State commission actions," states:

> In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action *in an appropriate Federal district court* to determine whether the agreement or statement meets the requirements of section 251 of this title and this section.

47 U.S.C. § 252(e)(6) (emphasis added). Congress provided only one venue, "an appropriate Federal district court," for parties aggrieved by state commission determinations.

Despite this clear congressional mandate, the FCC once again sought power that Congress did not give it, and it therefore added words and requirements that Congress never enacted. Thus, while the Act states that parties aggrieved by a state commission determination have a single option, the FCC "conclude[d] that parties have several options for seeking relief." FRO ¶ 124 (J.A. 467). And while the Act states that aggrieved parties must seek review in a federal district court, the FCC "conclude[d] that a person aggrieved by a state determination under sections 251 and 252 of the Act may elect to either bring an action for federal district court review *or* a section 208 complaint to the Commission against a common carrier." *Id.* ¶ 128 (J.A. 468) (emphasis added). Moreover, the FCC made it clear that its assertion of review authority would not be limited to determining whether a common carrier has complied with a state commission determination. It would also extend to reviewing carrier actions *"even if the carrier is in compliance with an agreement approved by a state commission."* *Id.* ¶ 127 (J.A. 468) (emphasis added). In other words, the FCC claims plenary authority to review the terms of state-approved interconnection agreements.

The statutory mechanism for negotiating and approving interconnection agreements under section 252 excludes any direct, or even indirect, oversight role by the FCC. Congress relied on state commissions alone to mediate or arbitrate open issues during negotiations, and regardless whether the parties reach agreement solely through negotiation or through a combination of negotiation and arbitration, Congress required that the agreement be submitted to the state commission for approval or rejection. 47 U.S.C. § 252(e)(1). Congress also specified the standards to be followed by the state commission in determining whether to approve or reject agreements. *Id.* § 252(e)(1)-(4). The state commissions, therefore, have exclusive jurisdiction to determine the validity of such agreements, subject only to review by a federal district court. *Id.* § 252(e)(6).

Congress authorized the FCC to exercise authority over interconnection agreements in one limited instance—where the state commission fails to exercise its responsibilities under section 252. The sole provision authorizing FCC involvement in the process is section 252(e)(5), entitled "Commission to act if State will not act." This statute provides:

> If a State commission fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the Commission shall issue an order preempting the State commission's jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission.

Id. § 252(e)(5). The title and explicit language of this provision could not be clearer: the FCC may enter this area of state concern only if the State commission does not fulfill its specific statutory responsibilties. Even then, the FCC is limited to exercising the same authority that the state commission may exercise under section 252.

These words are unambiguous and must be the starting and ending point of statutory interpretation.

Because Congress expressly excluded the FCC from any role in reviewing state commission determinations, the Court must reject the FCC's attempt to justify its power grab by concocting a new interpretation of its jurisdiction over complaints against interstate common carriers under 47 U.S.C. § 208, a provision that predates the 1996 Act. The FCC's conclusion that "[s]ection 252(e)(6) does not divest the Commission of jurisdiction, in whole or in part, over complaints that a common carrier violated section 251 or 252 of the Act," FRO ¶ 126 (J.A. 468), is premised upon the FCC's mistaken belief that its generalized section 208 complaint jurisdiction already provides the agency with power to adjudicate the new rights, responsibilities and procedures Congress detailed in the Act.

Section 208 does no such thing, for three fundamental reasons. First, the FCC has repeatedly stated that it does not have section 208 jurisdiction to hear complaints relating to *intrastate* matters. *See, e.g., Just Aaron*, 10 FCC Rcd. 11519 (1995); *ACC Long Distance Corp.*, 8 FCC Rcd. 85 (1993); *HAP Services, Inc.*, 2 FCC Rcd. 2948 (1987). As the FCC itself has acknowledged, local exchange service is the "paradigmatic intrastate market." *See* page 3 n.3, *supra*.

Second, the express language of section 208 does not support expanded FCC jurisdiction. That section gives the FCC general jurisdiction to supervise wrongs done by "common carriers." Nothing in that section purports to grant authority to review and override the decisions of a state utility commission. Complaints regarding the arbitration, approval or rejection of an interconnection agreement are all complaints about the state commission's determinations under section 252. The FCC's novel ruling on the scope of section 208 therefore collides with the plain meaning of that provision.

Third, nothing in the Act demonstrates that Congress intended to expand the FCC's complaint jurisdiction under section 208. The FCC therefore relied on an argument

that Congress, in the general savings clause in section 601(c) of the Act (uncodified in Title 47), somehow indirectly modified the express provision for federal district court review in section 252(e)(6), *and* expanded the jurisdictional reach of section 208 to intrastate matters.[36] Again, that assertion of jurisdiction rests entirely upon a contorted and improper reading of section 208 as governing state regulatory action, and an indifference toward Congress's choice that parties aggrieved by state commission actions may seek review only in federal district courts.

The Eighth Circuit overturned the FCC's ruling regarding the scope of its complaint jurisdiction under section 208. The court held that traditional rules of statutory construction require interpreting Congress's choice of federal district court review of state commission decisions as the exclusive means of review. Pet. App. 31a-32a (citing cases). The absence of any reference in section 252 to FCC review reinforced the court's conclusion in this regard. *See id.* at 33a. The court correctly noted:

> The only grant of any review or enforcement authority to the FCC is contained in subsection 252(e)(5), and this provision authorizes the FCC to act only if a state commission fails to fulfill its duties under the Act. The FCC's expansive view of its authority under section 208 is thus contradicted by the language, structure, and design of the Act.

Id. Only after rendering its conclusion based on "the language, structure, and design of the Act" did the court separately and independently hold that section 2(b) of the Communications Act *also* precludes the FCC from exer-

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[36] In the First Report and Order, the FCC stated: "Section 601(c)(1) of the 1996 Act provides that the 1996 Act 'shall not be construed to modify, impair or supersede' existing federal law—which includes the section 208 complaint process—'unless expressly so provided.' Sections 251 and 252 do not divest the Commission of its section 208 complaint authority." FRO ¶ 126 (J.A. 468). Additionally, the FCC seized on the fact that Congress in section 252(e)(6) omitted the word "exclusive" when it expressly gave jurisdiction to the federal courts to review state determinations. *Id.* ¶ 124 (J.A. 467).

cising authority under section 208 to review state commission decisions on interconnection agreements. It so held because many aspects of those agreements, such as pricing, are outside the FCC's jurisdiction. *See id.* at 33a-34a. The Act's general savings clause in section 601(c) is hardly the straightforward and unambiguous grant of intrastate authority that *Louisiana PSC* requires. *See* 476 U.S. at 377.

Following Congress's explicit choice to limit review of state commission decisions to the federal district courts is particularly important for small and mid-sized LECs. These LECs are especially vulnerable to efforts by large well-financed entrants to grind them down through multiple and duplicative regulatory proceedings. The FCC cannot ignore Congress's plainly expressed intention that parties to an agreement need only pass one regulatory hurdle —the state commission—when entering into interconnection agreements. Accordingly, the FCC should not be permitted to seize regulatory authority over interconnection agreements through the back door of section 208, when Congress itself directly denied the FCC such authority under the Act. The Eighth Circuit was therefore correct to reject the FCC's effort to rewrite section 252 by placing review of state commission determinations within the FCC's jurisdiction.

C. The Text and Structure of the Act as a Whole Undermine Petitioners' Argument that the Act Necessarily Gives the FCC Power to Issue Binding National Rules on Pricing Matters.

As this discussion has demonstrated, there is no basis for petitioners' arguments that Congress rejected the historical model of local telephone regulation and sought to concentrate regulatory authority over the local markets in the FCC. The FCC can argue all it wants that regulation by fiat from Washington is supposedly the most "efficient" way to ensure competition. Congress had other interests to balance when it passed the 1996 Act.

Rather than address all of petitioners' pricing jurisdiction arguments in this brief, the Mid-Sized LECs fully support and incorporate by reference herein the arguments of the BOCs and GTE concerning the FCC's lack of statutory authority to promulgate national pricing rules. It should come as no surprise that Congress listened to the wishes of those who sought to keep pricing authority in the local market solely in the hands of state regulators, where it had always been. Even the FCC concedes that under the Act state commissions retain exclusive regulatory authority over retail rates for local telephone service. FCC Br. 32 n.12. It is hardly a leap in logic to conclude that the 104th Congress had sufficient confidence in the knowledge and abilities of state regulators to permit them to maintain exclusive regulatory authority over the rates that incumbents charge to new entrants as well. After all, the Act expressly states that wholesale rates shall be based upon the retail rates that even the FCC concedes state commissions, and state commissions alone, may set. *See* 47 U.S.C. § 252(d)(3) ("a State commission shall determine wholesale rates on the basis of retail rates"). Furthermore, a key input to any determination of a retail rate is the price charged for interconnection and network elements. Given the state commissions' experience and know-how in analyzing the cost and profit structures of each of the over 1,000 incumbent LECs, it was logical for Congress to give the state commissions exclusive authority to determine the inputs to retail rates in addition to the retail rates themselves.[37]

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[37] Congress's enactment of a statute preserving state regulatory authority subject to newly enacted federal standards is not novel, and contrary to the claims of petitioner MCI (Br. 40), poses no constitutional problems. *See, e.g., Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 288-89 (1981) (upholding statute against constitutional challenge), *cited in Printz v. United States*, 117 S. Ct. 2365, 2380 (1997). If a state chooses not to continue to regulate its local telephone market in the manner prescribed in the Act, Congress provided that the FCC would then, and only then, assume the responsibilities of the state commission. 47 U.S.C. § 252(e)(5).

This Court should therefore affirm the Eighth Circuit in its decision to vacate the FCC's pricing rules and the other FCC orders and regulations discussed in Part I of this Argument. Each aspect of the court of appeals' decision, whether it involves pricing, preemption, waivers, or review of state commissions, is independently supported by the text, structure and legislative history of the specific statutory provision at issue and the local competition part of the 1996 Act generally. Furthermore, the court of appeals' well-reasoned construction of section 2(b) of the Communications Act independently supports each aspect of its decision. Though each ruling by the court of appeals on the various orders and regulations stands alone, the court's rulings also support each other and are internally consistent, as they fit with Congress's overall desire to introduce competition into the local telephone markets, not by detailed one-size-fits-all national rules promulgated by the FCC, but by voluntary negotiation and, only when necessary, by state regulation subject to federal district court review.

II. THE FCC'S UNBUNDLING RULES EVISCERATE THE RESALE PROVISIONS OF THE ACT.

There is no disagreement that the Telecommunications Act of 1996 establishes distinct modes for opening local telephone markets to competition for new entrants that lack some or all of the network facilities needed to provide local service—interconnecton with, and use of, unbundled elements of the incumbent's network, or resale. FRO ¶ 12 (J.A. 413). Nor can there be any disagreement that Congress intended the Act to promote facilities-based competition. As one member who later sat on the Conference Committee put it, "it is no exaggeration to say that the entire bill is premised on the existence of robust facilities-based competition." Hearings before House Subcomm. on Telecommunications & Finance of the House Comm. on Commerce, 104th Cong., Serial No. 104-34, at 9 (daily ed. Aug. 4, 1995); *see also* 141 Cong. Rec. H8465 (daily ed. Aug. 4, 1995) (the Act is intended to

"give[] new entrants the incentive to build their own local facilities-based networks, rather than simply repackaging and reselling the local services of the local telephone company"). To encourage facilities-based competition, however, the Act established distinct pricing standards for the two very different modes of competition. Thus, the Act allows new entrants seeking to compete through the use of their own incomplete network facilities to fill in the gaps in those facilities by purchasing, *at cost-based rates*, discrete elements from an incumbent's network. By contrast, those new entrants seeking to compete with an incumbent LEC by doing nothing more than purchasing finished retail telephone services from the incumbent and reselling the services must pay the incumbent a statutorily defined discount from the retail rate (*i.e.*, a *wholesale rate*) to buy the finished service.

There is a disagreement of the most fundamental nature, however, about the impact of the FCC's unbundled access rules upon Congress's careful distinction between resale and the purchase of unbundled network elements. The Mid-Sized LECs and other cross-petitioners contend that the FCC's rules—which permit a new entrant to obtain from a LEC at cost-based rates a fully assembled platform containing all of the network elements necessary to provide finished telephone service—render the resale provisions of the Act a nullity. For if a requesting carrier could simply purchase all of the pre-assembled network elements that an incumbent LEC uses to provide retail telephone service, the carrier (at a minimum) would get the same thing as if it had simply purchased the incumbent LEC's finished telephone service and then resold it without the need for interconnection with the incumbent's facilities. There would, however, be one very critical difference—the requesting carrier would obtain the finished telephone service at the cost-based rates provided for in 47 U.S.C. § 251(c)(3), rather than at the wholesale rate separately provided for in the resale provisions of 47 U.S.C. § 251(c)(4).

The Mid-Sized LECs submit that while the Eighth Circuit's decisions on the issues discussed in Part I of this Argument are correct and should be affirmed, the court of appeals unfortunately erred in concluding that the FCC's rules preserved the congressional distinction between resale and unbundled network elements. For several reasons, the decision of the Eighth Circuit on this critical issue should be reversed.[38]

First, the text of several sections of the Act establishes the obligation of incumbent LECs to provide requesting carriers with access to discrete pieces of their network infrastructure. The duty to provide unbundled access to network elements, however, does not require the incumbent to make available all of the network elements necessary to provide a finished retail service, and it certainly does not require the sale of a fully assembled platform of those elements. Thus, section 251(c)(3) provides, in relevant part, that incumbents shall provide "unbundled network elements in a manner that allows requesting carriers to combine such elements to provide . . . telecommunications service." 47 U.S.C. § 251(c)(3).[39] Section 251(d)(2) expressly limits an incumbent LEC's obligation to provide access to proprietary elements of its network. 47 U.S.C. § 251(d)(2).

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[38] In supporting their cross-petition on the merits, the Mid-Sized LECs do not wish to repeat all of the arguments made by the BOCs and GTE in support of their cross-petitions. The Mid-Sized LECs therefore respectfully refer the Court to the briefs filed this day by the BOCs and GTE and incorporate the arguments in those briefs by reference.

[39] Notwithstanding the plain language of section 251(c)(3), the FCC's unbundled access rules require the incumbent, not the requesting carrier, to bear the burden and expense of combining unbundled network elements. *See* 47 C.F.R. § 51.315(c)-(f) (Pet. App. 294a); *see also* FRO ¶¶ 294-95 (J.A. 552-53). The Eighth Circuit properly vacated these rules as contrary to the plain language of section 251(c)(3) (Pet. App. 52a-53a, 70a-71a), and the FCC does not challenge that ruling.

Second, the interconnection and unbundled access sections of the Act are integrated, interdependent provisions. Congress plainly intended that a requesting carrier would obtain access to the unbundled elements of an incumbent's network through physical interconnection with the incumbent's network. Thus, the right of interconnection necessarily implies that the requesting carrier has some facilities of its own to interconnect with the incumbent's facilities. Under the FCC's rules, however, a requesting carrier without any of its own network facilities can purchase a fully operational platform of network elements from the incumbent. Indeed, since the FCC has deemed operator and directory assistance services to be network elements, the requesting carrier can even require the incumbent to perform those services on its behalf. The net effect of the Eighth Circuit's acceptance of the FCC's rules is to permit a carrier that has no facilities of its own to obtain finished telephone service at cost-based prices. This necessarily obliterates the distinction between resale and unbundled elements that Congress was careful to create, and without which true competition from facilities-based competitors will never occur.

Third, the FCC's interpretation of the Act can lead only to what Congress itself feared: the inability of small and mid-sized LECs to withstand the economic calamity of new entrants picking off their large business customers by offering telephone service entirely with recombined unbundled elements priced at cost, rather than at an avoided-cost discount from the higher retail rate that state commissions have required LECs to charge business customers to support residential service. The House specifically amended its bill going into Conference to ensure that LECs need only provide resale at "wholesale rates" rather than "at economically feasible rates to the reseller." *Compare* 141 Cong. Rec. H8426 (§ 242(a)(3)) (daily ed. Aug. 4, 1995) *with id.* at H8444, col. 2 ("resale" amendment). Representative Dingell explained that the amendment was necessary to eliminate the requirement

that "local telephone companies . . . subsidize the long distance competitors," by "requir[ing] service which cost $25 to be sold to AT&T for $6; something which would have caused the necessity of subsidizing, then, AT&T at the expense of small business and local [residential] phone user, an outrageous situation." *Id.* at H8452 (also noting that Reps. Bliley and Fields worked to correct "this failure" in the bill).

It is readily apparent from a reading of the First Report and Order that the FCC anticipated that its rules obliging incumbents to provide new entrants with access to the full array of network elements necessary to provide retail telephone service would be attacked for eviscerating the resale provisions of the Act. Accordingly, the FCC sought to justify its rules by arguing that requesting carriers seeking to provide telephone service solely through the purchase of network elements, rather than through resale, assumed economic risks that were not present in the resale context. As a result of these purported risks, the FCC asserted, its rules did not obliterate the Act's resale provisions. Specifically, the FCC stated:

> A carrier purchasing unbundled elements must pay for the cost of that facility, pursuant to the terms and conditions agreed to in negotiations or ordered by states in arbitrations. It thus faces the risk that end-user customers will not demand a sufficient number of services using that facility for the carrier to recoup its cost. . . . A carrier that resells an incumbent LEC's services does not face the same risk.

FRO ¶ 334 (J.A. 573-74).

However, the FCC's economic argument is based on assumptions, not facts. Furthermore, actual experience proves those assumptions to be false. For example, as GTE and several BOCs pointed out to the court of appeals,[40] a number of state commissions have taken the

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[40] *See* Brief of GTE, SBC Communications, Inc., BellSouth Corporation and US West on Petition for Rehearing at 12 n.3, *Iowa Utilities Bd. v. FCC*, No. 96-3321 (8th Cir., filed Aug. 19, 1997).

position that requesting carriers can purchase or lease network elements on an "on demand" basis. Thus, a requesting carrier that has purchased a network element is only required to pay the incumbent for those times when the network element is actually in use by a customer. Such an arrangement thoroughly undermines the FCC's differential economic risk analysis, which was critical to its argument that its rules do not transform the resale provisions of the Act into mere vestiges.

For the foregoing reasons, the Mid-Sized LECs ask the Court to reject the FCC's position that incumbents must provide requesting carriers with access to *all* of the network elements necessary to provide retail telephone service and to vacate that part of the Eighth Circuit's decision upholding that position. However, if the Court should decide that the Eighth Circuit did not err in affirming the FCC's position, then at a bare minimum the Court must reject the FCC's effort to revive 47 C.F.R. § 51.315(b), which provides, "Except upon request, an incumbent LEC shall not separate requested network elements that the incumbent LEC currently combines." Pet. App. 294a. The Eighth Circuit (*see* Pet. App. 71a) vacated Rule 315(b) as inconsistent with section 251(c)(3) which, by its terms, only obligates incumbent LECs to provide access to network elements on an unbundled, *i.e.*, physically separated, basis.

The FCC and AT&T argue that Rule 315(b) simply prevents an incumbent from imposing gratuitous costs upon a requesting carrier by disassembling network elements that it currently combines, forcing the requesting carrier to bear the expense of reassembling them. FCC Br. 17; AT&T Br. 35-36. Thus, since incumbents already "currently combine" all of the network elements they use to provide finished retail telephone service, they should not be required to disconnect those network elements when the full array is purchased by a requesting carrier. This proffered justification for Rule 315(b) is, however, noth-

ing more than a post-hoc explanation of the Rule invented to create a loophole in the Eighth Circuit's initial decision prior to rehearing.

The FCC's current interpretation of and rationale for Rule 315(b) is quite different from the FCC's view in its First Report and Order. There, the FCC stated that under its interpretation of 47 U.S.C. § 251(c)(3), an incumbent is required to provide "as a single, combined element, facilities that could comprise more than one element. This means, for example, that, if a state commission requires incumbent LECs to provision subloop elements, incumbent LECs must still provision a local loop as a single, combined element when so requested, because we identify local loops as a single element in this proceeding." FRO ¶ 295 (J.A. 553). Thus, through Rule 315(b), the FCC simply sought to prohibit incumbents from unbundling certain network elements that could alternatively be viewed as a combination of several subelements. Nothing in the First Report and Order supports a reading of the rule as requiring an incumbent to turn over a fully assembled platform of network elements at cost-based rates.

However, after the Eighth Circuit invalidated the FCC's rules imposing the obligation to combine network elements on the incumbents (*see* page 55 n.39, *supra*), AT&T suddenly imbued Rule 315(b), which the court of appeals had not initially vacated, with an entirely new meaning. Specifically, AT&T argued in state commission proceedings that because an incumbent LEC "currently combines" all of the elements necessary for providing retail service to its own customers, Rule 315(b) prohibits the LEC from providing elements as separate, unbundled elements and requires the LEC instead to provide those elements "in combined form" at no extra charge.[41]

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[41] *See* Brief of GTE, SBC Communications, Inc., BellSouth Corporation and US West on Petition for Rehearing at 6 n.1, *Iowa Utiliites Bd. v. FCC*, No. 96-3321 (8th Cir., filed Aug. 19, 1997).

By challenging the Eighth Circuit's invalidation of Rule 315(b), the FCC seeks to reopen a claimed loophole in the court's original decision that the Eighth Circuit properly closed in its decision on rehearing. To the extent that the FCC, AT&T and others viewed Rule 315(b) as requiring an incumbent to provide requesting carriers with a pre-combined platform containing *all* of the network elements necessary to provide finished telephone service, the Eighth Circuit properly rejected that rule as contrary to the "careful distinctions Congress has drawn in [47 U.S.C.] subsections 251(c)(3) and (4)." Pet. App. 71a.

III. THE FCC UNREASONABLY EXPANDED THE DEFINITION OF "NETWORK ELEMENTS."

Just as its rules on access to network elements eviscerated the resale provisions of the Act, the FCC's interpretation of the term "network element" is so unreasonably broad as to render meaningless the distinction between network elements and telephone services themselves. The Eighth Circuit erred in deferring to the FCC's unreasonable construction of this critical term of the Act.

The Act defines a network element as a "*facility or equipment used in the provision* of a telecommunications service," including the "features, functions, and capabilities that are provided *by means of such facility or equipment*, including subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service." 47 U.S.C. § 153(29) (emphasis added). The crucial distinction that Congress drew between telecommunications "facilities or equipment" and the use of such to provide a telecommunications "service" shows that Congress rooted the definition of "network elements" in the *physical* parts of equipment of a network —loops, switches, etc.—including the "features, functions, and capabilities" provided by those physical elements.

Nevertheless, the FCC's network element rules distort beyond recognition the equipment/service distinction that is at the core of the network element definition. Thus,

significantly, the FCC's rules require incumbent LECs to provide unbundled access to their Operations Support Systems functions ("OSS"). *See* 47 C.F.R. § 51.319(f) (Pet. App. 301a). Those software systems, frequently proprietary in nature, include pre-ordering, ordering, provisioning, maintenance and repair, and billing functions supported by an incumbent's databases. Obviously, these software, databases and support systems are not physical elements of a network. They play no role in the physical delivery (*i.e.*, transmission or routing) of a telephone call. Rather, as their name suggests, they are business *support systems* that an incumbent uses to, among other things, process orders, dispatch repairmen, and keep track of a customer's service requests. Yet, in an invasion into the incumbent's business of extraordinary proportions, the FCC's rules require the incumbent to turn these important management systems over to the incumbent's competitors. The FCC has thus recklessly exposed business management systems that are critical to the operation of the LEC's own business to interface and other demands from the LEC's competitors that may conflict or compromise those systems. Anyone who has attempted the relatively simple task of interconnecting a home computer to an office network should understand the enormity of, and potential risks associated with, what the FCC has done. Congress could not have intended the LEC's competitors to have such unmitigated power over the systems that allow the LEC to control its own business.

The FCC's rules also improperly require incumbent LECs to provide unbundled access to their directory assistance and operator services. *See* 47 C.F.R. § 51.319(g) (Pet. App. 301a). Plainly, human operators are not "facilities or equipment," nor are they "features, functions or capabilities" provided by means of such "facilities or equipment." Requiring incumbents to make these personnel available to competitors obviously has nothing whatsoever to do with unbundling the pieces of the "network" that are actually used to deliver telephone calls. To hold

otherwise would expand the scope of "network elements" to include virtually all of the live support staff that a LEC employs to run its business operation. The absurdity of defining the term so broadly is reflected in an FCC determination that when a requesting carrier, such as AT&T, purchases unbundled access to a LEC operator, the operator must identify himself or herself as an AT&T operator whenever serving an AT&T local service customer. FRO ¶ 537 (J.A. 680). Given this determination, it is no stretch to imagine the FCC next requiring LEC telephone repair personnel to carry different velcro-backed uniform labels with the names of all requesting carriers and to attach the appropriate label to their uniforms whenever providing home repair services to a customer who subscribes to a particular requesting carrier.

Nevertheless, the Eighth Circuit upheld the FCC's characterization of operator services and directory assistance as "network elements" based on a construction of that term that, upon even a cursory inspection, proves to be as unbounded as the FCC's construction. The Eighth Circuit reasoned that because a "telecommunications service" is the "offering of telecommunications for a fee directly to the public" (47 U.S.C. § 153(46)), then any time a facility assists an incumbent in managing the business aspects of its operation, and thus incidentally assists the incumbent in providing retail telephone service, the facility is somehow "used in providing a telecommunications service." Pet. App. 42a-43a. As with the FCC's definition, however, if the court's construction were correct, anything and everything that assists an incumbent in the business aspects of its operation could be deemed a network element. Under the FCC's unbundling rules, all such elements would then have to be made available to a requesting carrier at cost-based rates. For example, office and repair personnel would be network elements, as would office equipment such as desks and personal computers. Once again, Congress could not have intended such an absurd result.

Finally, the Eighth Circuit erred in accepting the FCC's definition of network elements to include a LEC's "vertical services," such as caller ID and call waiting. Pet. App. 41a, 44a-45a. There is no dispute that these services are retail services that LECs must make available to requesting carriers but at wholesale rates. Yet, it is the FCC's position that these services are also discrete network elements that a requesting carrier can purchase from a LEC on an unbundled basis at cost-based rates. Treating vertical services as network elements eviscerates the Act's distinction between resale and unbundled elements and flies directly in the face of legislative history establishing that Congress decided that "services" were *not* to be included in the definition of network elements. *See* H.R. 1555 § 242(a)(2), 104th Cong., 1st Sess. (May 3, 1995) (unbundling provision of House bill originally applied to "services, elements, features, functions, and capabilities," but Conference Committee later eliminated term "services").

The FCC cannot justify the inclusion of caller ID and call forwarding within the scope of a LEC's unbundling obligations by reference to language in the Act's definition of network elements stating that such elements include "*information* . . . used in the transmission, routing, or *other provision* of a telecommunications service." 47 U.S.C. § 153(29) (emphasis added). According to the FCC, the phrase "other provision" expands the category of network elements to include *any* information related to the provision of telecommunications service. FRO ¶ 261 (J.A. 537-38). Such a construction of the Act, however, ignores settled principles of statutory interpretation that require a word to be interpreted in context. In particular, it ignores the principle of *ejusdem generis*, which requires general terms in a statute to be interpreted in accord with more specific terms preceding it. *See, e.g., Federal Maritime Comm'n v. Seatrain Lines*, 411 U.S. 726, 733 (1973). This principle requires the reference to "other provision" to be interpreted in accord with the specific

terms—"transmission" and "routing"—that precede it. The reference to "other provision" thus simply acknowledges that there are a series of discrete functions known by different technical names involved in transmitting a telephone call from one point in a network to another. In addition to "transmission" and "routing" there are signaling, switching, terminating, etc. Rather than reciting an exhaustive list of these terms, the Act uses a shorthand to encompass them all. Vertical services like call waiting and caller ID, however, are not involved in transmitting a call from point to point. Therefore, they are not "network elements," and the Eighth Circuit erred in upholding the FCC's inclusion of those services within the incumbent LEC's obligation to provide access to unbundled network elements.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the court of appeals in *Iowa Utilities Board v. FCC*, except that the Court should reverse the judgment insofar as it upheld the following: (1) the FCC's ruling that entrants—without using any of their own facilities—may rely solely on the purchase of network elements, at cost-based prices, to provide local service; and (2) the FCC's expansion of the statutory definition of network elements to include OSS, directory assistance, operator services, and vertical services.

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IN THE

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OCTOBER TERM, 1997

ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES, *et al.*,

Petitioners,

v.

IOWA UTILITIES BOARD, *et al.*,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Eighth Circuit

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OPPOSING BRIEF ON THE MERITS OF THE ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES, *et al.*

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QUESTION PRESENTED

1. Whether the FCC's Rule 51.315(b) can require incumbent phone companies to provision certain existing combinations of network elements priced at cost pursuant to § 251(c)(3) where such provisioning: (1) is similar to the resale of incumbent services, which is governed by the wholesale pricing standard of § 251(c)(4); and (2) is inconsistent with the Act's purpose of encouraging competitive investment.

LIST OF PARTIES AND RULE 29 DISCLOSURE STATEMENTS

The parties to the proceedings in the United States Court of Appeals for the Eighth Circuit are listed in the captions of the decisions below. *See* AT&T Corp. Appendix ("Pet. App."). A, 1a-4a; Pet. App. D, 73a-79a; Pet. App. E.

The Rule 29 Disclosure Statements for the Association for Local Telecommunications Services, e.spire Communications, Inc. (formerly American Communications Services, Inc.), ICG Telecom Group, Inc, NEXTLINK Communications, Inc., and WinStar Communications, Inc. are set forth in the petition for a Writ of Certiorari in consolidated case No.97-830.

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IN THE

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OCTOBER TERM, 1997

Nos. 97-826, 97-289, 97-830, 97-831,
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IOWA UTILITIES BOARD, *et al.*,

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On Writs of Certiorari to the United States Court of Appeals for the Eighth Circuit

OPPOSING BRIEF ON THE MERITS OF THE ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES, *et al.*

STATEMENT

The Association for Local Telecommunications Services and certain of its members (hereafter "ALTS and its members") hereby oppose the briefs on the merits filed by AT&T, MCI, and the government concerning the FCC's Rule 51.315(b).[1] Congress created a distinction in the Telecommunications Act of 1996 between the purchase of network elements from incumbents at cost (47 U.S.C. § 251(c)(3)), and the purchase of resold incumbent services

[1] ALTS is a national trade association representing facilities-based providers of competitive local telecommunications services.

at a wholesale discount (*id.* § 251(c)(4)). However, the FCC's Rule 51.315(b), which requires that all existing combinations of network elements be provided at cost, destroys this distinction in those situations where the combinations of network elements being purchased are functionally equivalent to or identical to resold incumbent services. ALTS and its members urge the Court to set aside Rule 51.315(b) because the Rule would "obliterate" the distinctions between sections 251(c)(3) and 251(c)(4) of the Telecommunications Act of 1996.

Accordingly, this Court's remand to the FCC needs to be clear that the Commission is free to craft a new rule addressing combinations that do not resemble resold incumbent services. ALTS and its members continue to support and endorse the positions of AT&T, MCI and the government concerning the FCC's jurisdiction, and the FCC's interpretation of 47 U.S.C. § 252(i). Brief of ALTS filed April 3, 1998, in No. 97-830.

Furthermore, the members of ALTS are currently making substantial capital investments in order to enter local telecommunications markets.[2] This investment is central to the 1996 Act's goal of: ". . . accelerat[ing] rapidly private sector deployment of advanced telecommunications and information technologies and service to all Americans . . . ."[3]

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[2] Local competitors have raised over $14 billion for local competitive investments since passage of the Telecommunications Act in February of 1996. Bear Stearns Report, March 1998.

[3] Joint Explanatory Statement of the Committee of Conference, H. Rep. No. 104-204, 104th Cong., 2d Sess. at 1 (1996).

The need to encourage this ongoing investment in competitive facilities is not vindicated by Rule 51.315(b). Therefore, ALTS and its members ask that Rule 51.315(b) be reversed and remanded to the FCC with instructions to preserve appropriate incentives for further competitive investments.

Competition Provisions of the 1996 Act

As part of Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 ("1996 Act"), Congress enacted an additional subtitle to the Communications Act, 47 U.S.C. §§ 251-61, for the purpose of developing local competitive markets.[4] This portion of the 1996 Act establishes a framework whereby telephone customers eventually could choose their local carrier in the same way as they choose long distance providers today.

The 1996 Act imposes a duty on all incumbent local exchange carriers ("incumbents") to permit new market participants to utilize the incumbent's network and facilities in order to provide competing local service. In general, the 1996 Act provides three methods by which competitors can enter local telephone markets.

First, section 251(c)(2) directs incumbents to interconnect their local exchange networks with those of competing carriers at "rates, terms, and conditions" that are "just, reasonable, and nondiscriminatory," for the purpose of exchanging traffic with the competing providers.

Second, section 251(c)(3) requires incumbents to allow

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[4]H.R. Rep. No. 104-204, at 89 (1996).

new entrants to purchase, on an unbundled basis, separate elements of the incumbent local exchange carrier networks at "rates, terms, and conditions" that are "just, reasonable, and nondiscriminatory," and based on cost.

Third, section 251(c)(4) requires incumbents to offer to new entrants their retail exchange services at wholesale rates. Unlike the prices for unbundled elements, which section 251(c)(3) requires be "based on the cost ... of providing" the elements, the wholesale rates for resold services are determined "on the basis of the [incumbent's] retail rates charged to subscribers" minus only the expenses that "will be avoided" by selling at wholesale instead of retail.

Implementing Regulations

The FCC issued a notice of proposed rulemaking to implement the 1996 Act's requirements in accordance with section 251(d)(1) and the FCC's general rulemaking authority. In its *First Report and Order*[5], issued on August 8, 1996, the Commission adopted rules that detailed certain of the pricing and non-pricing requirements of sections 251(c) and 252.

An important issue in the Commission proceedings concerned the possibility that certain combinations of existing elements could be ordered that would be identical to resold services provided by incumbents, but priced at cost under section 251(c)(3) rather than at section 251(c)(4)'s standard for wholesale services. Both incumbents and facilities-based competitors pointed out that the availability of cost-based network elements pursuant to section 251(c)(3) was intended

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[5] *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499 (1996) (Joint App. At 403).

to permit facilities-based competitors to "fill-in" portions of their networks, rather than to act as a lower-priced substitute for resold incumbent services. Pet. App. 235a-38a. Arguing that pricing resold services at the level intended for network elements would discourage competitive investments, these parties urged the FCC to adopt some means of preserving the statutory distinction between resale and network elements, such as a requirement that combinations resembling resold services be priced at the resale level rather than at cost.

Rejecting these views, the FCC adopted rules implementing section 251(c)(3), including Rule 51.315(b), under which new entrants could request any existing combination of unbundled elements, including combinations essentially identical to resold services.[6] Pet. App. 230a-33a.

The pricing standards which the Commission finally adopted to implement section 251(c)(3) were based upon forward-looking economic costing principles, and involved solely the pricing of bottleneck network elements from the incumbents.[7] Furthermore, the FCC declined to adopt specific rules as to several important cost determinations,

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[6] Rule 51.315(b) states: "Except upon request, an incumbent LEC shall not separate requested network elements that the incumbent currently combines."

[7] *See, e.g., Local Competition Order* at ¶ 679: "Congress recognized in the 1996 Act that access to the incumbent LECs' *bottleneck facilities* is critical to making meaningful competition possible;" and at ¶ 740: "The just and reasonable rate standard of TELRIC plus a reasonable allocation of the joint and common costs of providing network elements that we are adopting attempts to replicate, with respect to *bottleneck monopoly elements*, the rates that would be charged in a competitive market" (emphasis supplied).

such as cost of capital, allocations of overhead costs, and depreciation.

The Eighth Circuit's Vacation of Rule 51.315(b)

In the decision under review, the Eighth Circuit held that the FCC had exceeded its jurisdiction by promulgating rules to implement the pricing requirements of sections 251(c) and 252(d) of the 1996 Act, as well as rules related to many non-pricing requirements. As a result, the Eighth Circuit vacated the FCC's rules covering pricing requirements of sections 251(c) and 252(d), including Rule 51.315(c)-(f). The Court held that the FCC had jurisdiction to issue interpretive rules concerning some subsections of section 252. 120 F.3d at 794-95 n.10. Pet. App. at 12a.

In particular, the Eighth Circuit affirmed the FCC's decision to require the provisioning of network elements that could be combined by a new entrant to form a service similar to an incumbent's resold service. Pet. App. at 53a-58a. Having vacated the requirement in Rule 51.315(c)-(f) that incumbents must combine elements upon a new entrant's request, the court concluded that the burden of recombination was adequate to preserve the statutory distinction between sections 251(c)(3) and 251(c)(4): "With resale, a competing carrier can avoid expending valuable time and resources recombining unbundled network elements." Pet. App. at 815.

After issuance of the Eighth Circuit's decision on July 18, 1997, a petition for rehearing was filed asking the court to specifically address Rule 51.315(b). On October 14, 1997, the Eighth Circuit granted the petition because: "To permit such an acquisition of already combined elements at cost based rates for unbundled access would obliterate the careful distinctions Congress has drawn in subsections 251(c)(3) and (4) between access to unbundled network elements on the one

hand and the purchase at wholesale rates of an incumbent's telecommunications retail services for resale on the other." Pet. App. at 71a.

The FCC's *Third Order on Reconsideration* in Its *Local Competition* Proceeding

While ALTS and its members joined other competitive carriers in a broad defense of the FCC's *Local Competition* rules at the Eighth Circuit, subsequent actions by the FCC altered ALTS' understanding of Rule 51.315(b), resulting in this challenge. A short explanation of how the developments informing ALTS' present position came about will assist the Court in its review.

Almost all new entrants have to obtain the bottleneck unbundled network elements needed to provision competitive local services from the incumbent local exchange carriers. However, ALTS' members also purchase and install a substantial portion of their own *non-bottleneck* facilities, such as local switches and certain transport facilities. In this regard they differ from many of the long distance companies, which have not invested to the same degree in local competitive facilities.

Congress clearly intended that the competitive local investments being made by ALTS' members would be furthered by the Commission's implementation of the 1996 Act.[8] First, because these new investments are based on

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[8] The Joint Explanatory Statement of the Committee of Conference describes the 1996 Act as creating: "a national policy framework designed to accelerate rapidly *private sector deployment* of advanced telecommunications and information technologies and service to all Americans . . . ." H. Rep. No. 104-204, 104th

(continued...)

state-of-the-art technology, they deliver advanced telecommunications services in a more efficient manner than existing facilities. Second, by creating alternative sources of supply, the existence of competitive facilities force the incumbents themselves to be more innovative and efficient.

The goal of inducing investment in competitive facilities is clearly reflected in Congress' creation of separate pricing standards for unbundled network elements under section 251(c)(3), as compared to resold incumbent services under section 251(c)(4). Had Congress intended that resold services be made available at "cost" pursuant to section 251(c)(3), it need not have created a separate statutory mechanism. Furthermore, the availability of resold services at the lower prices usually generated by section 251(c)(3)'s pricing standard would lessen the incentive for new entrants to build their own facilities.

Despite the FCC's rejection of requests to limit the use and pricing of combinations of network elements which are functionally equivalent to resold services (Pet. App. 242a-249a), ALTS and its members believed the Commission had not issued its final word on the important policy issue of the pricing of such elements because the FCC had left open several significant costing issues (cost of capital, depreciation, overhead allocations, etc.) for subsequent determination in individual cases.

This understanding proved unfounded on August 19, 1997, when the FCC issued its *Third Order on Reconsideration* in the *Local Competition* proceeding (the *Shared Transport Order)*, in which the Commission deliberately set the price of two important non-bottleneck UNEs -- local switching and

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[8](...continued)
Cong., 2d Sess. at 1 (1996)(emphasis supplied).

shared transport -- at levels that automatically flowed through all the incumbents' economies of scope and scale.[9]

The refusal by the FCC to recognize the fundamentally distinct policy concerns between the pricing of bottleneck and non-bottleneck facilities substantially altered ALTS and its members' understanding of Rule 51.315(b). Once the FCC's *Shared Transport Order* demonstrated that the FCC's pricing paradigm for bottleneck facilities would be applied indiscriminately to non-bottleneck network elements, Rule 51.315(b) became a requirement that incumbents provision certain existing combinations (those that resemble resold incumbent services) at prices that conflict with Congress' pricing standard for resold services, and which fail to provide appropriate incentives for competitive investment.

Accordingly, ALTS and its members now ask that Rule 51.315(b) be vacated and remanded to the FCC with instructions that: (1) the Commission remains free to adopt rules involving combinations which do not replicate resold services; and (2) any new rules should fully accommodate the need for the continued encouragement of investment in competitive facilities.

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[9] *In the Matter of Local Competition Provisions in the Telecommunications Act of 1996, Third Report and Order Upon Reconsideration*, CC Docket No. 96-98 (1997) ("*Shared Transport Order*"): "We note that incumbent LECs have significant economies of scope, scale, and density in providing transport facilities. *Requiring transport facilities to be made available on a shared basis will assure that such economies are passed on to competitive carriers*" (¶ 35; emphasis supplied).

SUMMARY

This Court should start its independent review of Rule 51.315(b) with a focused understanding of the Eighth Circuit's reversal. AT&T, MCI, and the government ("Petitioners"), as well as the incumbents, share an important assumption concerning the Eighth Circuit's logic. They each contend the order on rehearing prevents the FCC from requiring incumbents to provision *any* existing combination of network elements, including those combinations that are not functionally equivalent to services available from the incumbents via resale. Employing this broad reading, Petitioners attack the reversal of Rule 51.315(b) for "confusing" the physical unbundling of network elements with the unbundling of separate prices for those elements. The incumbents happily adopt this expansive interpretation of the decision, and vigorously defend it in the hope of being able to refuse new entrants' requests for any existing combination of network elements.

But this sweeping view incorrectly confuses the court's original determination that incumbents cannot be required to combine network elements (Pet. App. at 52a-53a) with the distinct issue presented in the October 14th Order -- the provision of combinations of elements that are currently combined (Pet. App. at 71a). Concerning the latter, the court's focus was not on the obligation "to recombine network elements that are purchased by the requesting carriers," but rather the manner in which Rule 51.315(b) destroyed the distinction between sections 251(c)(3) and 251(c)(4). Pet. App. at 71a.

Rule 51.315(b) indeed applies to all combinations: " ... an incumbent LEC shall not separate requested network elements that the incumbent LEC currently combines," but, correctly read, the Eighth Circuit's reversal of the rule in no way

implicates all the existing combinations of unbundled elements, only those combinations that so closely resemble resold services that the distinct pricing regimes imposed on each by the statute would be eliminated. As the Eighth Circuit explained: "The combined elements would be equivalent to resale under section 251(c)(3), yet priced at cost pursuant to section 251(c)(4)," a result that would "obliterate the careful distinctions Congress has drawn in subsections 251(c)(3) and (4) between access to unbundled network elements on the one hand and the purchase at wholesale rates of an incumbent's telecommunications retail services for resale on the other." Pet. App. at 71a.

Nothing in the Eighth Circuit's language dealing with Rule 51.315(b) suggests the court was attempting to parse the meaning of "unbundled" as the long distance companies contend. While the Eighth Circuit pointed out that this "obliterat[ion]" would not be permissible even for combinations involving only two network elements, the logic of the court's opinion applies solely to combinations that effectively replicate resold incumbent services, and not to any of the many other existing combinations of network elements.

In addition to being the more natural and narrow reading of the holding below, this interpretation appreciably mitigates the practical concerns of the long distance companies and the government because it would permit the FCC upon remand from this Court to require the provisioning of all existing combinations of elements that do not replicate resold services.

In the event this Court does adopt the decision below on the broad interpretation offered by petitioners and the incumbents, ALTS and its members ask the Court to clarify that its action does not compromise other sources of statutory authority by which the FCC could order incumbents to provision specific combinations of network elements which do

not replicate resold services, including sections 251(c)(6), 214, and 271 of Title II of the Telecommunications Act.

ARGUMENT

I. Reversal of Rule 51.315(b) Implicates Only the Existing Combinations of Network Elements that Resemble Resold Services of the Incumbent Providers.

The many pages of argument in Petitioners' briefs devoted to the Eighth Circuit's reversal of Rule 51.315(b) obscure the short and simple ruling below (Pet. App. at 71a):

> "Section 251(c)(3) requires an incumbent LEC to provide access to the elements of its network only on an unbundled (as opposed to a combined) basis. Stated another way, § 251(c)(3) does not permit a new entrant to purchase the incumbent LEC's assembled platform(s) of combined network elements (or any lesser existing combination of two or more elements) in order to offer competitive telecommunications services. To permit such an acquisition of already combined elements at cost based rates for unbundled access would obliterate the careful distinctions Congress has drawn in subsections 251(c)(3) and (4) between access to unbundled network elements on the one hand and the purchase at wholesale rates of an incumbent's telecommunications retail services for resale on the other. Accordingly, the Commission's rule, 47 C.F.R. §51.315(b), which prohibits an incumbent LEC from separating network elements that it may currently combine, is contrary to § 251(c)(3) because the rule would permit the new entrant access to the incumbent LEC's network elements on a bundled rather than an unbundled basis."

Petitioners locate the Eighth Circuit's core holding in the first sentence above -- "Section 251(c)(3) requires an incumbent LEC to provide access to the elements of its network only on an unbundled (as opposed to a combined) basis." They conclude from this sentence that the court's ruling is grounded on the belief that section 251(c)(3)'s reference to "unbundled" requires only the provisioning of physically separate elements, and does not require the provisioning of existing combinations of elements.[10] Having set up their target, they roll in their dictionaries and launch numerous salvos at the Eighth Circuit's asserted failure to understand that the word "unbundled" can also mean "separately priced."

But this effort to convert the October 14th decision into a misguided parsing of statutory language is totally unfounded. When the first sentence is read in context, it is clear the court was not grounding its reversal of Rule 51.315(b) on any particular meaning of "unbundled" as used in section 251(c)(3). Indeed, the word is never quoted, nor is there even a hint of textual analysis in this portion of the decision. Instead, the court's focus is upon the Rule's "obliterat[ion]" of the pricing distinctions mandated by Congress in situations where incumbents are required to provide existing combinations that resemble resold incumbent services.

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[10] For example, AT&T sees a confusion of the phase "unbundled" with "separated" or "uncombined" (AT&T Brief at 37). MCI claims the decision means that "any requirement that incumbents provide elements in combination violate[s] the statute" (MCI Brief at 15). *See also* Federal Petitioners' Brief at 44: "The Eighth Circuit invalidated Rule 315(b) principally on the ground that the language of Section 251(c)(3) 'requires an incumbent LEC to provide access to the elements of its network only on an unbundled (as opposed to a combined) basis.'"

Nothing in the decision impairs the FCC's ability to issue rules concerning existing combinations that do *not* resemble resold services, and nothing suggests that section 251(c)(3) is not fully applicable to these combinations.

From start to finish, the Eighth Circuit's sole concern in rejecting Rule 51.315(b) is for the confusion it would produce between resale and unbundled network elements -- a concern that only applies to the existing combinations of elements that resemble resold services.

Beyond the fact that only a narrow view of the reversal of Rule 51.315(b) can be found in the Eighth Circuit's language, ordinary maxims requiring that appellate opinions be interpreted narrowly are underscored in the present context where a complex regulatory scheme is under review. A necessary consequence of the deference to administrative interpretations required under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984), is that appellate reversals of agency action should be confined to the particular error identified.

Rule 51.315(b) is a broad rule that requires incumbents to provide requesting new entrants with any and all existing combinations of elements, including combinations which resemble the resold services of the incumbents. The Eighth Circuit upheld a facial challenge to this rule based on the need to preserve the statutory distinctions between resold services and those existing combinations which resemble them. But nothing in the Eighth Circuit's reversal can -- or should -- be interpreted as prohibiting the FCC from revisiting its rule, and requiring the incumbents to provide any and all existing combinations that are *not* similar to resold services. This Court should adopt the Eighth Circuit's understanding of Rule 51.315(b), and reverse and remand the Rule to the Commission for consideration of a new rule that would

exclude combinations resembling resold services.

II. The Eighth Circuit Is Correct that Rule 51.315(b) Would "Obliterate" the Statutory Distinction Between Resold Services and Network Elements.

Once the strawman characterization of the decision below has been cleared away, it is evident the Eighth Circuit was not required to show the "judicial deference to reasonable interpretations by an agency of a statute that it administers" (*National R.R. Passenger Corp.* v. *Boston & Maine Corp.* 503 U.S. 407, 417 (1992)), in light of the Commission's disregard in Rule 51.315(b) for the express statutory distinctions Congress created between the pricing of resold services and network elements. In particular, petitioners' extended discussion of the "discrimination" that allegedly results if existing combinations of elements are not made available at cost pursuant to Rule 51.315(b) is unpersuasive given Congress' express determination in section 251(c)(4) of the pricing standard for resold services. *See, e.g.*, AT&T Brief at 44-46; MCI Brief at 16-19. Furthermore, the few arguments raised by Petitioners that do relate to the Eighth Circuit's actual decision below concerning Rule 51.315(b) are unavailing.

First, Petitioners accuse the court of requiring "artificial" increases in "the cost of using network elements so that leasing network elements would not become a less costly way to enter local markets than resale" (MCI Brief at 22).

But nowhere in the decision below does the court order the FCC or the states to protect the statutory distinction between resold services and network elements solely through price increases on the latter. Indeed, the absence of any such requirement is underscored by the recent action of the New York Public Service Commission, which preserves this

distinction by imposing geographic, market segment, and sunset provisions on network elements that resemble resold services -- and not by imposing price increases on the underlying network elements.[11]

Second, Petitioners attack " ... the court's assumption that there would be an 'inherent' economic advantage in competing via combinations of elements rather than resale . . ." (MCI Brief at 23-24). But the word "inherent" never appears in the court's reversal of Rule 51.315(b), nor is there any assumption -- express or implicit -- that unbundled elements enjoy an economic advantage over resold services. Petitioners' lengthy discussion of how resold services can fully compete with unbundled elements might be apposite if the reviewing court were trying to handicap the different entry vehicle of resale and network elements. But the plain basis for the court's action was the need to preserve the separate statutory identity of each entry mode -- not to tweak the likelihood of success of either.

Third, Petitioners claim there are sufficient non-price distinctions between the resale and network element entry strategies to preserve their separate identity even if Rule 51.315(b) has the effect of destroying Congress distinct pricing scheme for each (AT&T Brief at 46-48; MCI Brief at 23; each citing the *Local Competition Order* at ¶¶ 332-34).[12]

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[11] *In the Matter of Petition of New York Telephone Company for Approval of its Statement of Generally Available Terms and Conditions Pursuant to Section 252 of the Telecommunications Act of 1996 and Draft Filing of Petition for InterLATA Entry Pursuant to Section 271 of the Telecommunications Act of 1996*, Case No. 97-C-0271 (NYPSC issued April 6, 1998).

[12] "We believe that sections 251(c)(3) and 251(c)(4) present

(continued...)

The FCC paragraphs cited by Petitioners speak only to the non-pricing distinctions that would exist between "carriers using *solely* unbundled elements, compared with carriers purchasing services for resale" (¶ 332; Pet. App. at 244a emphasis supplied).[13] This observation might be entitled to deference if new entrants were actually divided between pure examples of resale entry as opposed to entry through network elements. However, the real world is very different from Commission's hypothetical. New entrants do not make a commitment between either resale or facilities-based entry on a company-wide basis, but rather they determine their entry strategies on a case-by-case basis according to their individual business strategies and the particular economic facts surrounding their entry decisions for specific markets, and sometimes even for specific customers. Thus, because almost all new entrants have the back office systems and financial

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[12](...continued)
different opportunities, risks, and costs in connection with entry into local telephone markets, and that these differences will influence the entry strategies of potential competitors. We therefor find that it is unnecessary to impose a limitation on the ability of carriers to enter local markets under the terms of section 251(c)(3) in order to ensure that section 251(c)(4) retains functional validity ...." Pet. App. at 244a. In reaching this conclusion, the FCC identified the ability of competitors using "solely unbundled elements" to offer services that are different that those offered by incumbents as the "principal" distinction that preserved the statutory structure. *Id.*

[13] *See also* ¶ 333 (Pet. App. at 244a): "In contrast, a carrier offering services *solely* by recombining unbundled elements can offer services that differ from those offered by an incumbent" (emphasis supplied).

resources to employ either approach in a particular situation, their individual choices between combinations of network elements and resold services are indeed driven by price. The hypothetical model employed by the Commission might be pertinent if competitors were actually forced to choose entry strategies on an "either all this or all that" basis. However, because they actually make their decisions on a far more disaggregated basis, the FCC's attempt to save the statutory structure is not entitled to any deference.

In sum, the FCC's effort to repair its evisceration of section 251(c)(4) is not entitled to deference under *Chevron,* nor could it survive deferential review even if that standard were applicable.

III. Other Statutory Authorities Empower the FCC to Order the Provisioning of Combinations That Do Not Resemble Resold Services.

Even if this Court were to agree with Petitioners and the incumbents that the Eighth Circuit's reversal of Rule 51.315(b) encompassed all combinations of network elements, and not just those combinations that are interchangeable with resold incumbent services, ALTS and its members respectfully ask that the Court take care not to inadvertently cordon off other sources of Commission authority which enable it to order the provisioning of combinations of network elements which do not replicate resold services.

A. The FCC Plainly Has the Authority to Order the Provisioning of Combinations of Network Elements Pursuant to Section 251(c)(6).

Section 251(c)(6) was drafted by the House of Representatives and adopted by the Conference Committee to give the FCC jurisdiction over certain physical collocation

requirements that were called into question in *Bell Atlantic v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994).[14] The *Expanded Interconnection* proceedings that gave rise to *Bell Atlantic* had plainly encompassed the provisioning of what was then the central office equivalent of unbundled network elements -- co-location space, emergency power, cross-connects, etc.[15] Even if this Court were to uphold the Eighth Circuit on the jurisdictional issue and also were to affirm the Eighth Circuit's reversal of Rule 51.315(b) on the broad reading offered by the other parties, this Court should be careful not to compromise the FCC's plenary power to order the provisioning of combinations of network elements pursuant to section 251(c)(6).

B. The FCC Has the Authority to Order Combinations Of Network Elements Under Section 214.

The federal courts have long recognized the FCC's broad authority to condition the issuance of a certificate of convenience and necessity pursuant to section 214. As the incumbents request authority to add to their interstate

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[14] H.R. Rep. No. 104-104 at 73 (1995)("Finally, this provision [which became section 251(c)(6)] is necessary to promote local competition because a recent court decision indicates that the Commission lacks the authority under the Communications Act to order physical collocation. (See *Bell Atlantic Tel. Co. v. Federal Communications Commission*, No. 92-1619 (D.C. Cir. June 10, (1994))").

[15] *In the Matter of Expanded Interconnection with Local Telephone Co. Faciliities*, 8 FCC Rcd 7369, 7390 (1992)(requiring incumbents to provide central office space and facilities upon an interconnector's request).

investments, the Commission clearly retains the power to require the incumbents to provision those combinations of existing elements that do not replicate resold incumbent services. *See, e.g., MCI v. AT&T*, 462 F. Supp. 1072, 1087 n.14 (N.D. Ill. 1978)("Thus, the FCC may prescribe competitive conditions in the exercise of its authority under Section 214 to grant construction permits for telecommunications facilities").

C. The FCC Has the Authority to Order Combinations of Network Elements Under Section 271.

Section 271 targets a core policy concern of the 1996 Act, the ability of the Bell Operating Companies to exploit their market control over local telecommunications. In order to protect long distance markets from any intrusion of this market power, and to insure that local markets are expeditiously opened to competition, section 271 and its related sections contain detailed provisions about the manner in which the Bell companies can enter long distance.[16]

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[16] *See, e.g., Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA Services in Louisiana*, CC Docket No. 97-231 (released February 4, 1998); *Application by BellSouth Corp., BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA Services in South Carolina*, CC Docket No. 97-208 (released Sept. 30, 1997); *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan*, CC Docket No. 97-137, Memorandum Opinion and Order, FCC 97-298 (released Aug. 19, 1997); *Application by SBC*

(continued...)

Among the checklist requirements contained in section 271(c)(2)(B)(i) is the requirement that the Bell operating companies provide interconnection in the manner specified by sections 251(c)(2) and 252(d)(1). If this Court agrees that the Commission does have the authority to implement these stautory provisions, then this delegation of authority clearly encompasses the power to order the provisioning of existing combinations of network elements that do not replicate resold services.

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[16](...continued)
Communications Inc. Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In Oklahoma, CC Docket No. 97-121, Memorandum Opinion and Order, 12 FCC Rcd 8685 (1997).

CONCLUSION

For the foregoing reasons, the Court should reverse Rule 51.315(b) and remand the rule to the FCC with instructions that: (1) the Commission remains free to adopt rules involving combinations which do not resemble resold services; and (2) any new rules should fully accommodate the need for continued investment in competitive facilities.

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In the Supreme Court of the United States

OCTOBER TERM, 1997

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA, PETITIONERS

v.

IOWA UTILITIES BOARD, ET AL.

AND RELATED CASES

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

The questions presented in these cases are those set forth in our opening brief (at (I)), as well as the following:

4. Whether the Federal Communications Commission reasonably implemented 47 U.S.C. 251(c)(3)—which entitles "any requesting telecommunications carrier" to obtain access to the incumbent carrier's network elements—in determining that requesting carriers may obtain access to such elements as a means of providing telecommunications services whether or not they have constructed some facilities of their own.

5. Whether the Commission reasonably implemented 47 U.S.C. 251(d)(2), which directs the Commission to "consider" certain factors when determining "what network elements should be made available."

6. Whether the Commission reasonably implemented 47 U.S.C. 153(29) and 251(c)(3) in determining that new entrants may have nondiscriminatory access to operational support systems, operator services, and similar network facilities and functionalities.

7. Whether the Commission reasonably implemented 47 U.S.C. 153(29) and 251(c)(3) in determining that new entrants that have obtained access to the switching element also have access to the "vertical features" of that element.

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In the Supreme Court of the United States

OCTOBER TERM, 1997

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA, PETITIONERS

v.

IOWA UTILITIES BOARD, ET AL.

AND RELATED CASES

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE FEDERAL PETITIONERS AND BRIEF FOR THE FEDERAL CROSS-RESPONDENTS

ARGUMENT[1]

I. THE COMMISSION'S PLENARY RULEMAKING AUTHORITY EXTENDS TO THE LOCAL COMPETITION PROVISIONS OF THE 1996 ACT

A. Respondents' View Of The Commission's Jurisdiction Has No Coherent Textual Basis

1. A proper understanding of this jurisdictional dispute begins with the provision that respondents usher off to the back pages of their discussion (*e.g.*, Bell Atl. Br. 43). Without qualification, Section 201(b) provides: "The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act." It is undisputed that Congress incorpo-

[1] We refer the Court to the Statement in our opening brief (at 2-15) and to the summary (pp. 19-22, *infra*) introducing Point II below, which addresses the questions presented in cross-petitioners' briefs. "1996 Act" refers to the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, to be codified in the 1996 Supplement to the United States Code. "Pet. App." refers to the appendix to the petition in No. 97-826.

rated Sections 251 and 252 into "this Act." Together with the Commission's specific obligation to issue expedited regulations "to implement *the requirements*" of Section 251 (47 U.S.C. 251(d)(1) (emphasis added)), Section 201(b) provides the simple and correct answer to every jurisdictional question presented here: In telecommunications regulation, federal rulemaking authority remains coextensive with the substantive scope of federal law, which *once* was confined to interstate matters, but now (as all agree) is not. See pp. 10-11, *infra*.

The easiest way to understand why *respondents'* answer to the jurisdictional question must be *wrong* is to consider a jarring anomaly deep within their exposition of this case. The parties have briefed two basic sets of disputes: disputes about the FCC's statutory jurisdiction to issue rules addressing certain provisions of the 1996 Act, and disputes on the merits about the substantive validity of FCC rules addressing other provisions that undeniably *do* fall within the Commission's jurisdiction. Most of the disputes in the latter category concern the Commission's implementation of the centerpiece of the local competition provisions: Section 251(c)(3), which entitles new entrants to lease network elements of an incumbent telephone company's network at "*rates, terms, and conditions* that are just, reasonable, and nondiscriminatory." 47 U.S.C. 251(c)(3) (emphasis added).

That provision does not itself mention the Commission, much less its jurisdiction to issue the rules challenged here only on the merits. Nonetheless, the premise of half this case, which respondents very much affirm, is that the Commission does have jurisdiction to issue precisely such rules: rules ensuring, in a broad variety of ways, that the "terms and conditions" of access to network elements are "just, reasonable, and nondiscriminatory." The Commission's jurisdiction to issue such rules, however, must come from somewhere, or else this statutory scheme would lapse into incoherence.

The problem for respondents is that any source of *that* jurisdiction necessarily also authorizes the Commission to issue rules addressing the other critical guarantee appearing *in the same statutory phrase*: the guarantee that a new entrant's access to network elements will be provided not just on non-pricing "terms and conditions," but also at "*rates*," that "are just, reasonable, and nondiscriminatory." 47 U.S.C. 251(c)(3) (emphasis added). That is so whether the Commission's jurisdiction to address network elements arises from the Commission's general rulemaking authority under Section 201(b), or from its more specific obligation "to establish regulations to implement *the requirements* of [Section 251]" on a six-month timetable (47 U.S.C. 251(d)(1) (emphasis added)). Under either or both of those sources of authority, the Commission's jurisdiction encompasses each of the words of Section 251(c)(3); it does not stop in mid-sentence.[2]

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[2] One reason that respondents must and do acknowledge the Commission's authority to address some aspects of Section 251(c)(3) is that a separate provision, Section 251(d)(2), presupposes that authority in addressing the substance of a subcategory of nonpricing network-element issues. Section 251(d)(2) provides: "In determining what network elements should be made available for purposes of subsection (c)(3), *the Commission* shall consider" certain proprietary and other issues (emphasis added). To prop up its argument about pricing jurisdiction, Bell Atlantic is driven to argue (Br. 39) that Section 251(d)(2) alone "necessarily authorizes" the Commission to issue rules implementing Section 251(c)(3). That remarkable contention is unsound on three levels. First, it is countertextual: the subordinate clause at the beginning of Section 251(d)(2) *alludes to* the Commission's jurisdiction but obviously is not an affirmative *grant* of jurisdiction. Second, the contention is self-defeating: if that subordinate clause *were* a jurisdictional grant, the parallel construction in the very next subsection—"In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude" certain state policies (Section 251(d)(3))—would itself be an affirmative grant of jurisdiction to the Commission "to implement the requirements" of Section 251 *in their entirety*. See also 47 U.S.C. 251(d)(1). Last but not least, Section 251(d)(2) addresses only a subcategory of nonpricing network-element issues: "*what* network elements should be made available" (emphasis added). Bell Atlantic

Put another way, respondents' jurisdictional argument fails not simply because their countertextual interpretation of Sections 201(b) and 251(d)(1) is wrong for the reasons discussed below. It also fails because their interpretation of those provisions *must be* wrong for this Court to make sense of the Commission's undisputed jurisdiction to address the many substantive issues in this case involving access to network elements. And respondents' argument fails not just as a matter of textual compulsion, but also as a matter of common sense: there is no reason why Congress would have intended to centralize national authority in the Commission to make basic regulatory choices concerning only an arbitrary subset of the inextricably interrelated pricing and nonpricing guarantees appearing in the same sentence of Section 251(c)(3). See p. 36, *infra*.

2. Whether the source of the Commission's undisputed jurisdiction to address access to network elements is identified as Section 251(d)(1) or Section 201(b) or both, that jurisdiction is not limited to Section 251(c)(3) (in its pricing and nonpricing aspects) but necessarily also extends—at a bare minimum, under Section 251(d)(1)—to the other substantive provisions of Section 251. Those include the other pricing provisions of Section 251(c), such as the obligation of incumbent LECs to provide interconnection at "*rates* * * * that are just, reasonable, and nondiscriminatory" and to offer services for resale "*at wholesale rates*." 47 U.S.C. 251(c)(2) and (4) (emphasis added); accord 47 U.S.C. 251(b)(5); see also pp. 17-18, *infra* (discussing Sections 251(b)(3) and 251(f)).

Respondents seek to deny the Commission any rulemaking authority to address those pricing standards. They try in two different ways to square that position

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does not even try to explain how that provision could account for the Commission's unquestioned authority to address the many *other* network-element issues disputed on the merits in this case, see pp. 22-41, *infra*, or, more fundamentally, why the line should be drawn between pricing and nonpricing issues.

with the inconvenient proximity of Section 251's pricing standards to the nonpricing network-element provisions that the Commission has undisputed authority to address. The first strategy, favored by Bell Atlantic, is to assert that no pricing standards appear in Section 251 and to conclude that Section 251 "can have nothing to do with pricing." Br. 24; accord Br. 34-35. That contradicts the statutory text: Section 251(c)(3) addresses, all in the same phrase, the "rates, terms, and conditions" for access to network elements, and Sections 251(c)(2) and 251(c)(4) address, respectively, the "rates" for interconnection and resale. Other respondents acknowledge the rate standards of Section 251(c), but dismiss them as mere "passing reference[s]" (GTE Br. 32) to "just, reasonable, and nondiscriminatory" rates. In fact, however, statutory provisions mandating "just and reasonable" rates have been central to American regulatory law for much of this century, and Congress has commonly employed that very standard in delegating broad pricing authority to federal agencies, including the FCC.[3] That is just what Congress has done here.

Respondents' jurisdictional challenge ultimately boils down, then, to the following proposition: that the inclusion of *additional* pricing standards among the procedural provisions of Section 252 somehow eclipses the pricing standards in Section 251(c) as well as the Commission's authority to address them. That proposition fails not just because Sections 251(c)(2) and 251(c)(3) in fact incorporate "the requirements * * * of section 252" by reference, but also because Section 201(b) *directly authorizes* the Commission to prescribe "regulations * * * to carry out the provisions of this [Communications] Act," which now includes both Sections 251 *and* 252.

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[3] See, *e.g.*, 47 U.S.C. 205(a) (common carrier rates), 254(b)(1) (universal service); *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591, 600-603 (1944) (FPC authority over natural gas rates); *Baltimore & Ohio R.R.* v. *Aberdeen & Rockfish R.R.*, 393 U.S. 87 (1968) (ICC au'hority over joint rates).

And even if respondents' reliance on Section 252 did not fail on its own terms, it would still be wrong. As discussed above, under any coherent interpretation of this statutory scheme, the Commission has—at a minimum—jurisdiction to issue rules that implement the pricing standards of Section 251(c), just as it has undisputed jurisdiction to issue rules that implement the nonpricing terms of Section 251(c)(3). The question is how to reconcile that grant of *rulemaking* authority—and each state commission's duty to follow "the regulations prescribed by the Commission" when arbitrating "any open issues" between carriers (47 U.S.C. 252(c)(1))—with Section 252's separate grant of authority to the state commissions to set specific carrier-to-carrier rates in individual *adjudicatory* proceedings. Respondents do not try to conduct that inquiry: they seek to have all pricing authority conferred on the state commissions and to deprive the Commission of any role at all. But "[s]tatutes must be interpreted, if possible, to give each word some operative effect." *Walters* v. *Metropolitan Educ. Enters.*, 117 S. Ct. 660, 664 (1997). The Commission's view of its statutory obligations recognizes the complementary rulemaking and adjudicatory roles of federal and state authorities in implementing the 1996 Act and, unlike respondents' approach, fits the provisions of the Act together to form a coherent whole. See Opening Fed. Br. 28 & n.10; Pet. App. 190a-195a (¶¶ 83-92).[4]

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[4] Respondents contend (*e.g.*, Bell Atl. Br. 23) that a state commission's duty to adhere to Section 252(d) when arbitrating open *rate* issues, see 47 U.S.C. 252(c)(2), somehow nullifies its primary and quite consistent duty, when arbitrating "*any* open issues," to follow "the requirements of section 251, including the *regulations prescribed by the Commission* pursuant to section 251," 47 U.S.C. 252(c)(1) (emphasis added). As we explain in our opening brief (at 27-28), that contention is illogical: rate issues are "issues." Nor would our position, which avoids that illogic, render Section 252(c)(2) "superfluous" (Bell Atl. Br. 24). To the contrary, that provision directs the state commissions to adhere both to the Commission's rules, which may not be comprehensive, and also to the standards of Section 252(d), which Sections 251(c)(2) and

Drifting from the question presented, respondents also claim that the Commission's actual rules are so specific that they would deprive the States of an important role in implementing the 1996 Act. *E.g.*, GTE Br. 38-39. As an initial matter, the claim is incorrect, as our opening brief explains (at 26-27). To take just one example, while the Commission's methodology for network element rates is based on economic and not historical costs, the state commissions, in applying that methodology, would retain the critical and complex task of determining the economic costs of an efficient telephone network.[5] In any event, respondents' claim is immaterial to the disposition of this jurisdictional dispute. The question before this Court is not whether individual Commission pricing rules are either substantively invalid or sufficiently specific that they cross a hypothetical line between federal rulemaking authority and state adjudicatory authority. The question is whether the Commission may play *any* role at all in giving nationally consistent meaning to these core federal guarantees, a task that would otherwise fall entirely to the federal courts (see pp. 15-17, *infra*). The answer is yes.

(c)(3) incorporate by reference. See also 47 U.S.C. 252(e)(2)(B). Section 252(c)(2) also ensures that the state commissions will apply Section 252(d)(1)'s pricing standards during periods in which, for any reason, the Commission has not issued applicable pricing regulations that have taken effect and been upheld on the merits. But Section 252(c)(2) obviously does not foreclose the Commission from issuing regulations substantively consistent with Sections 251(c) and 252(d). Finally, there is no merit to respondents' use of legislative history (*e.g.*, State Comm'n Br. 25) to argue that the inclusion of some of the Act's pricing terms among the procedural provisions of Section 252 suggests, for reasons not evident on the face of the Act, that the Commission lacks all pricing authority. As petitioner MCI demonstrates (see Opening Br. 32-33), the legislative history points in quite the opposite direction.

[5] As respondents are aware (GTE Br. 15), the Commission's temporary and optional "default proxies" (see J.A. 134 (¶ 623)) were designed for a past period in which no cost studies could have been made available to the state commissions. They have no relevance to this case.

B. The Traditional Principles Of The Communications Act Confirm The Commission's Jurisdiction

Respondents' extensive reliance on Section 2(b) of the Communications Act of 1934, 47 U.S.C. 152(b), is no more persuasive than their account of the 1996 Act.

1. Section 2(b) was designed for a telecommunications world with sharp divisions between the *subjects* of state and federal regulation, a world in which substantive federal law governed the "interstate" component of telecommunications and substantive state law governed the "intrastate" component. To enforce that distinction, Congress provided, in 1934, that "nothing in this Act shall be construed to apply or to give the Commission jurisdiction with respect to * * * intrastate communication service." 47 U.S.C. 152(b).

Respondents attribute extraordinary significance to that provision as a basis for understanding the new telecommunications world created by the 1996 Act. One basic problem with their argument is that, as they concede, the 1996 Act displaces the traditional jurisdictional divide in many critical respects. In particular, although it preserves the state commissions' authority to regulate intrastate retail rates, the 1996 Act pervasively "appl[ies]" to, and repeatedly "give[s] the Commission jurisdiction with respect to," local competition matters, which defy characterization as either "interstate" or "intrastate."

We note some conspicuous examples. Section 253 invalidates every "State or local legal requirement" that "ha[s] the effect of prohibiting the ability of any entity to provide any interstate *or intrastate* telecommunications service," and it directs "the Commission" to "preempt the enforcement of such * * * legal requirement." 47 U.S.C. 253(a), (d) (emphasis added). Sections 251 and 252 themselves displace state law—and impose mandatory *federal* standards —on virtually every regulatory issue associated with opening local markets to competition. Moreover, as all agree, the FCC must issue rules to implement many of those substantive federal standards, and, in arbitrating

disputes between competing carriers, state commissions must "ensure that [their] resolution" of "any open issues * * * meet[s] the requirements" of the Commission's rules. 47 U.S.C. 252(c)(1). Indeed, the Commission's obligation to issue such preemptive federal rules is not even discretionary. Section 251(d)(1) compels the Commission to issue expedited rules implementing "the requirements" of Section 251, and the new "forbearance" provision further provides that "the Commission may not forbear from applying the requirements of section 251(c) * * * until it determines that those requirements have been *fully implemented*." 47 U.S.C. 160(d) (emphasis added); see Opening Fed. Br. 24-25.[6]

In sum, in local competition matters, Congress has now displaced the traditional jurisdictional divide, even though it saw no need to amend Section 2(b) to reflect the many respects, most of them undisputed, in which that is true. The 1996 Act adopts a new jurisdictional approach that simultaneously extends federal authority into the intrastate sphere *and* extends state authority into the interstate sphere—an approach under which federal and state authorities work together in complementary rulemaking and adjudicatory capacities in applying federal law to the same subjects. See Opening Fed. Br. 26-27, 37. Respondents cannot seriously dispute that fact: to restate an obvious example, the premise of five of the seven questions presented in this Court is that, despite Section 2(b), the Commission has jurisdiction to issue rules, which the state commissions must apply in arbitration, concerning a new entrant's access to network elements. That new jurisdictional model can and should be understood on its own terms, not by reference to the jurisdictional divide that it displaces.

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[6] Contrary to the suggestion of some respondents (*e.g.*, Bell Atl. Br. 41 n.22), petitioners did not somehow waive reliance on the "forbearance" provision below, and the Eighth Circuit in fact addressed the provision on the merits. See Pet. App. 86a.

2. Moreover, respondents' reliance on Section 2(b) would be unsound even if the appropriate point of reference were that traditional jurisdictional divide. First, respondents' approach would improperly place Section 2(b) in unnecessary conflict with Section 201(b). Second, as discussed below (see pp. 11-15), the matters at issue here defy characterization as "intrastate" in any event.

Section 201(b) provides: "The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act." It is undisputed that "this Act" includes all relevant portions of the 1996 Act, including Sections 251 and 252. See Opening Fed. Br. 19-20 & n.5 (discussing codification); see also 47 U.S.C. 251(i) ("savings provision" preserving "Commission's authority under Section 201"). To resist the logical conclusion—that Section 201(b) authorizes the Commission to issue rules addressing Sections 251 and 252—respondents observe only that the original substantive scope of the Communications Act was confined to "interstate" matters, as indicated by Section 201*(a)*. *E.g.*, Bell Atl. Br. 43. But of course it does not follow that the Commission's rulemaking authority is forever confined to what the Act's substantive scope used to be. Instead, Section 201(b) makes that rulemaking authority coextensive with whatever substantive boundaries Congress has fixed for the Act. Under Section 201(b), as Congress has extended the scope of the Act to local competition matters, it has extended the scope of the Commission's rulemaking authority to those matters as well.

Here, federal law indisputably *applies* to the regulatory matters at issue, despite Section 2(b)'s primary prohibition against "construe[ing]" the Act "to apply" to intrastate matters. 47 U.S.C. 152(b). Wherever federal law applies, Section 201(b) "straightforward[ly]" gives the Commission coextensive rulemaking authority: and that is the end of the inquiry. See *Louisiana Pub. Serv. Comm'n* v. *FCC*, 476 U.S. 355, 377 (1986). Respondents nonetheless retreat to Section 2(b)'s disjunction—"nothing in this Act

shall be construed to apply *or* to give the Commission jurisdiction with respect to" intrastate matters (emphasis added)—and argue that the second half of that phrase survives the displacement of the first half in the many matters now governed by federal law. In their view, the second half must survive, and must cancel out much of Section 201(b), if the word "or" is to have "effect" (GTE Br. 45).

It is not so. To give "effect" to Section 2(b)'s disjunction, it is unnecessary to violate Section 201(b) by detaching the Commission's rulemaking authority from the scope of federal telecommunications law. Instead, the disjunction's intended effect, which is consistent with Section 201(b), is to prohibit the Commission from exercising regulatory jurisdiction over intrastate matters arguably related to, but *not* expressly covered by, substantive federal law. The extent to which Section 2(b) limits the Commission's exercise of jurisdiction in *those* circumstances was the sole subject of this Court's analysis in *Louisiana*, despite respondents' efforts to wring greater significance out of that case. Indeed, as the Eighth Circuit recognized, the question posed here is the exact "opposite" (Pet. App. 19a) of the question decided in *Louisiana*: here, the substantive applicability of federal law is clear, and the question is what role the Commission may play in implementing it. *Louisiana* nowhere suggests that, despite the plain language of Section 201(b), the Commission's rulemaking authority is narrower than the explicit substantive reach of the Communications Act.

3. Finally, respondents' reliance on Section 2(b) is misdirected because the crucial matters at issue here defy characterization as "intrastate."

Respondents' objective in this litigation is far broader than the objective they profess. They claim to seek only the preservation of traditional state control over intrastate communications. *E.g.*, GTE Br. 11. That characterization is wrong for several reasons: to begin with, introducing competition into local markets is not a tradi-

tional subject of state concern—that is one reason why monopolists still enjoy 98% of local revenues (see Opening Fed. Br. 41)—and the jurisdictional dispute in this case is not about the preservation of substantive state law in any event. But respondents have mischaracterized their objective on a still deeper level. The central regulatory areas in which they seek to deny the FCC any rulemaking role are no more accurately characterized as "intrastate" than as "interstate," and, in extending their logic to the implementation of Section 271's long-distance provisions, they have waged an offensive against the core of the Commission's interstate authority. See pp. 14-15, *infra*.

Consider, first, the subject of the parties' substantive disputes about Section 251(c)(3)'s guarantee of nondiscriminatory access to network elements, the centerpiece not just of this litigation but of the local competition provisions themselves. Those disputes concern a new entrant's right to lease network elements (such as the loop) to provide each of its customers with a variety of telecommunications services, including both local and long-distance service. That guarantee cannot be classified as either "intrastate" or "interstate," because the same leased facilities used for local calls will also be used for interstate calls. See Opening Fed. Br. 35-36. For that reason, the rates, terms, and conditions on which new entrants may exercise their new rights will have profound consequences for competition not just in local markets, but also in the long-distance and other interstate markets.[7]

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[7] The same is true of decisions under Section 251(f) about whether to relieve rural LECs from full compliance with Section 251(c)(3): The question there is also whether, and on what terms, new entrants will be able to use an incumbent's facilities to provide customers with both intrastate and interstate services. Cf. USTA/Rural Carrier Br. 26. California's separate reliance on Section 2(b) to limit the Commission's authority to address Section 251(b)(3)'s dialing parity obligation is unsound for the still more basic reason that Section 2(b)'s distinction is not even the distinction that California invokes Section 2(b) to support. Like the court of appeals (Pet. App. 87a-88a & n.5), California does *not*

In a passage that some respondents ignore (*e.g.*, GTE Br. 47), the Commission found that it would violate congressional intent to try to "separate" the carrier-to-carrier prices for (*e.g.*) network elements into distinct "intrastate" and "interstate" components governed under distinct state and federal regulatory schemes. See Opening Fed. Br. 36-37. Respondents did not propose such a "separations" regime at the time. Indeed, they do not seek it now. They seek instead to deny the Commission *any* role in this regulatory area, even though the area defies classification as either "interstate" or "intrastate." That gets the law exactly backwards. Where it is "not possible" to fulfill congressional intent by "separat[ing] the interstate and the intrastate components" of telephone regulation, jurisdictional conflicts must be resolved in favor of a continued federal role. *Louisiana*, 476 U.S. at 375 n.4.[8]

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challenge the Commission's authority to address dialing parity as to an enormous class of intrastate calls: those that cross the lines of the more than 160 exchange areas—known as "local access and transport areas" or LATAs—created at the time of the AT&T divestiture. See California Br. 20-21; 47 U.S.C. 251(g). Section 2(b) cannot plausibly be read to divide up authority *between subcategories* of intrastate calls: *i.e.*, between "*intra*LATA" intrastate and "*inter*LATA" intrastate calls.

[8] The Bell Companies argue that our position on this point must be wrong because, they say, it suggests that the Commission always had authority to take regulatory measures ensuring competition in local markets. Bell Atl. Br. 32. In fact, the Commission had begun taking such measures, with judicial approval, in a variety of regulatory settings before 1996, and the Commission had set unitary rates for "private lines" and other facilities with both interstate and intrastate uses. See AT&T Opening Br. 4-9; Opening Fed. Br. 37-38; see also 47 U.S.C. 251(g). As AT&T observes in its opening brief (at 6, 9, 12), Section 253, added by the 1996 Act, answers the principal questions about the scope of that authority. Moreover, by creating new substantive federal standards addressing local competition, Sections 251 and 252 confirm that, when implementing those standards, the Commission acts within its express authority to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act." 47 U.S.C. 201(b); see pp. 10-11, *supra*. Bell Atlantic makes no attempt to address those points.

But respondents do not stop there. Like the Eighth Circuit in its mandamus order, respondents contend (*e.g.*, State Comm'n Br. 29) that Sections 251 and 252 operate to impair the Commission's jurisdiction over an additional subject that has always been a matter of uniquely federal concern: Bell Company entry into the interstate long-distance market, now governed by Section 271. Section 271 provides that "[t]he Commission shall not approve" a Bell Company's long-distance application "unless *it finds*," among other things, that the Bell Company has provided interconnection, network elements, and resale "in accordance with the requirements"—pricing and otherwise—of Sections 251(c)(2)-(4) and 252(d)(1) and (3). 47 U.S.C. 271(c)(2)(B)(i), (ii), (xiv) and (d)(3) (emphasis added); see Opening Fed. Br. 29.

Respondents would ban the Commission from playing any role in determining what it means to meet those requirements *as a prerequisite to long-distance entry*. *E.g.*, State Comm'n Br. 29. Instead, as respondents acknowledge, they would compel the Commission to abdicate core aspects of that long-distance inquiry to each of the 50 state commissions, with potentially radical state-by-state differences in both methodology and result. *Ibid.*[9] As the

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[9] The Bell Companies acknowledge the same point but contend that, under their position, the FCC would retain an undefined residual role in determining "whether a Bell company is in *compliance*" with the States' pricing requirements. Bell Atl. Br. 42. That claim is both irrelevant and (in the Bells' own view, expressed elsewhere) untrue. First, the subject of any "compliance" inquiry would of course be compliance *with* the States' disparate methodological choices, to which respondents would bind the Commission, despite Section 271's contrary mandate. (Under the Bells' approach, the Commission would be bound until after the lengthy process of federal court review under Section 252(e)(6) has run its course, at which point the Commission would need to reconsider, and perhaps revoke, any earlier order approving an application based on an invalidated state methodology. See 97-1519 Pet. 22 n.7.) Second, the Bells themselves have elsewhere argued that the logic of the Eighth Circuit's decision—under which each state commission arbitrates all compliance disputes between carriers (Pet. App. 32a-34a)—precludes *any* role for the FCC in addressing pricing

D.C. Circuit has confirmed, that approach flatly contradicts the Commission's statutory obligation, before granting a Bell Company long-distance application, to "conclude[] *to its own satisfaction*" that the applicant has in fact met Section 271's requirements. *SBC Communications Inc.* v. *FCC*, 138 F.3d 410, 416 (1998) (emphasis added). Indeed, respondents' approach to Section 271 exemplifies what they hope to achieve in this litigation, and what the text of the Act forecloses: a dramatic shift in interstate regulatory authority from the federal government to the States.[10]

C. Respondents' Approach Would Impose Immense Burdens On Potential Competitors And The Federal Courts

Respondents' jurisdictional analysis is unsound for one final reason: They cannot keep the federal courts from giving nationally consistent content to the 1996 Act's central guarantees, but they can delay the process of federal interpretation of federal law and, in so doing, impose enormous interim burdens on potential competitors and the federal courts.

Congress is presumed to intend that the meaning of the laws it enacts will be consistent throughout the country. The federal guarantees of Sections 251 and 252 have highly consequential content, which the state commissions are not free to interpret however they please. The job of the federal courts, in reviewing state arbitration decisions

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issues under Section 271. See 97-1519 Reply Br. in Supp. of Pet. 4-5 n.3 (quoting Bell briefs); see also J.A. 292 (mandamus order) (to perform its "quite simple" role under Section 271, FCC should, *inter alia*, "simply ask[] the state commission whether the applicant BOC has complied with the state commission's pricing rules").

[10] Resolution of the FCC's authority to implement Sections 251 and 252 must accommodate, but cannot change, the plain meaning of Section 271. We have separately challenged the Eighth Circuit's mandamus order because, even if respondents were to prevail here as to Sections 251 and 252, the Eighth Circuit's view of Section 271 would still be invalid and should still be reversed. See 97-1519 Pet. 27-28.

under Section 252(e)(6), is to ensure that those new federal guarantees are consistently observed. The dispute here is not, as respondents seek to portray it (*e.g.*, Bell Atl. Br. 45), whether the federal courts may accommodate the expertise of state commissions in resolving the distinctive factual issues that arise in particular regions and involve particular carriers. They may do that. What the federal courts assuredly may *not* do is to "defer" to 50 potentially inconsistent legal interpretations of the 1996 Act's core substantive guarantees.[11]

For example, Congress provided that the rates charged for access to an incumbent's network elements must be "based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing [such elements]" and "may include a reasonable profit." 47 U.S.C. 252(d)(1). Congress did not intend for 50 state commissions to diverge on such basic federal issues as whether "cost" means forward-looking economic costs or historical costs. The "cost" standard has a determinate content, although the parties of course disagree about what that content is. Indeed, the respondent LECs themselves have urged the federal courts to overturn many state commission determinations that the Act calls for network-element rates to be based on forward-looking rather than historical costs (as the FCC had also determined in its now-vacated rules).

That and many other substantive disagreements about the 1996 Act must ultimately be decided by the federal courts. The question is whether the federal courts will decide the parties' core substantive disagreements on the

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[11] See, *e.g.*, *AT&T Communications of Cal., Inc.* v. *Pacific Bell*, No. C 97-0080, 1998 WL 246652, at *3 (N.D. Cal. May 11, 1998) (conducting de novo review of state interpretations of 1996 Act because "'[s]tate commissions, while having experience in regulating local exchange carriers in intrastate matters, have little or no experience in implementing federal laws and policies and do not have the nationwide perspective characteristic of a federal agency'") (quoting *U.S. West Communications, Inc.* v. *Hix*, 986 F. Supp. 13, 17 (D. Colo. 1997)).

merits in a single proceeding on direct review of the FCC's rules or, as the respondent LECs would prefer, in piecemeal review proceedings under Section 252(e)(6) stretching well into the next century. The latter approach would inflict anticompetitive uncertainties and severe transaction costs on potential competitors, to the ultimate detriment of consumers. It would also greatly burden the federal courts, which, without applicable Commission rules, would have to interpret many of the 1996 Act's guarantees from scratch. But, sooner or later, the federal courts will give content to this federal law. See Opening Fed. Br. 39-41.

The principal question, then, is whether the incumbent monopolists, which still control 98% of local revenues (see Opening Fed. Br. 41), will succeed in placing logistical obstacles in the way of the "federal deregulatory power needed to complete American telephony's transition from command-and-control regulation to open competition." Jim Chen, *TELRIC In Turmoil, Telecommunications in Transition*, 33 Wake Forest L. Rev. 51, 54 (1998). Congress gave the Commission the rulemaking powers at issue here precisely because it wanted a smooth and expeditious transition to open competition, not a chaotic and dilatory one. And if Congress had left any doubt about the degree of federal regulatory authority necessary to make this federal statute work, the Commission's considered answer would be entitled to substantial deference. See Opening Fed. Br. 41-42.

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The Commission's authority to adopt rules addressing the 1996 Act's pricing provisions is by far the most important jurisdictional issue in this case, and that is why the parties have focused on it. Several respondents suggest that, even if the Commission's rulemaking jurisdiction extends to many of the provisions of Section 251, including the rate provisions, it does not extend to certain others: *e.g.*, the "dialing parity" provision of Section 251(b)(3) (see California Br. 40-48) or the "rural exemp-

tions" provision of Section 251(f) (see USTA/Rural Carrier Br. 17-20).

That is incorrect. The same provisions that give the Commission its undisputed authority to implement the nonpricing network-element provisions of Section 251(c)(3) also authorize the Commission to issue general rules addressing, at a minimum, the other provisions of Section 251. See p. 4, *supra*. Moreover, the Eighth Circuit based its disposition of Sections 251(b)(3) and 251(f) on the same general grounds that underlay its primary decision denying the Commission any role in addressing the 1996 Act's pricing provisions.[12] If this Court resolves the pricing issues in the Commission's favor, the Eighth Circuit's rationale for denying the Commission authority to address Sections 251(b)(3) and 251(f) would collapse, and those portions of the decision below should be reversed. Alternatively, if this Court were to have any doubt about the proper disposition of these secondary jurisdictional issues after resolving the parties' principal dispute, it should remand those aspects of the case to the court of appeals for further consideration.[13]

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[12] Those were, *first*, an unwillingness to recognize Section 251(d)(1) as an explicit declaration of the Commission's obligation to "implement the requirements of this section"; *second*, a belief that the Commission's general regulatory authority under Section 201(b) is confined to exclusively interstate matters, even though that provision imposes no such limitation; *third*, an expansive interpretation of Section 2(b); and *fourth*, a nearly irrebuttable presumption that, wherever the 1996 Act contemplates *some* role for the state commissions, the Commission may play *no* role at all (even though the state commissions and the FCC indisputably play overlapping roles in many areas, such as access to network elements). See Pet. App. 10a-24a, 27a-30a, 34a-36a, 83a-86a. As we have discussed, each of those grounds is invalid. See also note 7, *supra*; Opening Fed. Br. 26 n.9; Opening AT&T Br. 30-31 (discussing 47 U.S.C. 208).

[13] The Rural and Mid-Sized Carriers rely heavily on 47 U.S.C. 261(b), which the Eighth Circuit cited only in passing (Pet. App. 39a), and to which the state commission respondents devote no discussion. Entitled "[e]xisting [s]tate [r]egulations," Section 261(b) preserves state regulations that "fulfill[] the requirements of this part" and are

II. THE COMMISSION'S RULES REASONABLY IMPLEMENT THE 1996 ACT'S GUARANTEE OF NONDISCRIMINATORY ACCESS TO NETWORK ELEMENTS

A. Introduction And Summary Of Argument

The 1996 Act is a comprehensive legislative package that is designed to open all telecommunications markets to competition. In many respects, the Act greatly benefits the incumbent monopolists that challenge the Commission's rules governing access to network elements.[14] For example, the Act "as a whole *relieves* the [Bell Companies] of several of the burdens imposed by [the 1982 AT&T consent decree], particularly by prescribing in § 271 a method whereby the [Bell Companies] can achieve a long-sought-after presence in the long-distance market." *BellSouth*

"not inconsistent with the provisions of this part." The "provisions" with which such regulations must be "consistent" include, of course, any provisions recognizing the Commission's rulemaking role, *e.g.*, 47 U.S.C. 251(d)(1), 252(c)(1); see also 47 U.S.C. 261(c), and respondents' reliance on Section 261(b) is therefore circular. Moreover, the scope of Section 261(b) is confined to state regulations "fulfilling the requirements of this part," and the 1996 Act elsewhere indicates that the scope of its "requirements * * * includ[es] the regulations prescribed by the Commission." 47 U.S.C. 252(c)(1); see also 47 U.S.C. 261(c). For that reason, as well as the others discussed in our opening brief (at 23 & n.7), there is also no merit to the Rural and Mid-Sized Carriers' argument that the anti-field-preemption provision of Section 251(d)(3) somehow limits the legal effect of validly issued Commission rules. And, in part because Section 251(d)(3) "was designed" for "state statutes or regulations that are independent from the Telecommunications Act of 1996," the Eighth Circuit squarely held that, *despite Section 251(d)(3)*, state commissions must "ensure that arbitrated agreements comply with the Commission's regulations" whenever those commissions "are fulfilling their roles as arbitrators of agreements pursuant to the [1996 Act]." Pet. App. 38a-39a; see 47 U.S.C. 252(c)(1). *No* party has challenged that aspect of the Eighth Circuit's holding.

[14] The state commissions do not challenge any of the network-element rules disputed here on the merits, even though they are bound by those rules when arbitrating disputes under Sections 251 and 252. See 47 U.S.C. 252(c)(1); Pet. App. 38a.

Corp. v. *FCC*, No. 97-1113, 1998 WL 242244, at *7 (D.C. Cir. May 15, 1998); see also 1996 Act, Pub. L. No. 104-104, Tit. VI, § 601(a)(2), 110 Stat. 143 (superseding GTE consent decree). And the Act enables all incumbent LECs to offer competitive services in the traditional markets of other incumbents.

The incumbents have little appetite, however, for any interpretation of the local competition provisions that would bring competition to their home markets.[15] Instead, they seek to engraft various limitations onto Section 251(c)(3)'s core guarantee of "nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory." Through such limitations, they seek to impede the 1996 Act's basic objectives: an infusion of competition into traditional monopoly markets "as quickly as possible," H.R. Rep. No. 204, 104th Cong., 1st Sess. 89 (1995) (House Rep.); and (what is the same) the rapid conversion of those markets, with their webs of hidden and inefficient cross-subsidies, into rational markets in which the price of services reflects the cost of providing them.

The limitations that the incumbents seek, however, do not appear either in Section 251(c)(3) or anywhere else in the 1996 Act. In fact, the incumbents cannot point to any actual *restrictions* that Section 251(c)(3) places on a new entrant's rights of access to network elements; instead, they principally contend that various provisions either

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[15] See generally *Alarm Bells: Is This Really What Congress Had in Mind with the Telecom Act?*, Wall St. J., May 12, 1998, at A1 ("Two years ago, the federal government enacted a law designed to crack local telephone monopolies and bring consumers the benefits of competition. By sweeping away decades of regulation, Washington thought it was paving the way for a free-for-all among the Baby Bells, long-distance carriers, cable operators and other telecommunications providers. Instead, the urge to merge has overwhelmed the compulsion to compete."); *A Bid Too Far?*, The Economist, May 16, 1998, at 63 ("Like it or not, there is precious little competition in America's $100 billion local telephone market[.]").

enhancing those rights in specific respects or creating *other* rights (such as resale) should be construed, by negative inference, to have imposed implicit limitations on the basic guarantees of Section 251(c)(3). As we discuss below, those textual arguments would be unpersuasive even if this Court were reviewing this statutory scheme *de novo*: Congress wrote Section 251(c)(3) broadly because it recognized that nondiscriminatory access to network elements would be the only effective means of creating robust local competition in the foreseeable future. The incumbents' textual arguments are particularly unsound, moreover, as arguments for overcoming the deference that the Commission is due in effectuating this many-dimensioned statutory scheme. And the incumbents' other textual arguments fare no better. The Commission reasonably implemented Section 251(d)(2), which instructs it to "consider" certain factors when determining "what network elements should be made available"; and it reasonably implemented the 1996 Act's definitional and other provisions in directing incumbents to provide new entrants with nondiscriminatory access to certain specific elements disputed here.

The incumbents thus fall back on a variety of policy contentions. We discuss those contentions in more detail below, but three points warrant mention at the outset. First, the "arbitrage" that the incumbents resist is another name for the rational, cost-based competition that, under *any* interpretation, Section 251(c)(3) is designed to create. Because such competition is both intended and inevitable, the incumbents' essential submission is that this Court should read *permanent*, countertextual limitations into the 1996 Act to accommodate *interim* concerns, properly addressed in a separate proceeding, about the pace of universal-service reform under Section 254. This statute, however, is designed to last well into the next century; the incumbents' approach would lock it firmly in the past.

Second, there is no dispute here about whether the construction of new facilities is often desirable; the question is *who* should decide *what* new facilities it would be *efficient* to construct. The Commission's approach would generally leave those decisions to market forces, which (when rates for access to an incumbent's network elements are set properly) will give new entrants incentives to construct facilities when, and only when, it is efficient to do so. The incumbents' contrary approach would necessitate the very "edict[s] of central planning" (GTE Br. 17) that they profess to dislike, and it would warp the course of competition.

Finally, Congress created resale of an incumbent's existing services as an entry *option*, one among several, and it left the choice of those options to private market actors. Nothing in the 1996 Act requires new entrants to pick the resale option when, by its terms, Section 251(c)(3) also gives them the option of leasing network elements, with its very different mix of advantages and disadvantages. The incumbents' argument for creating such a requirement has no textual foundation; instead, it is derivative of, and no sounder than, their other policy contentions.[16]

B. The Commission Reasonably Rejected The Incumbents' General Proposals For Limiting The Competitive Effects Of Section 251(c)(3)

The incumbents' most ambitious challenges, which they present together (*e.g.*, Bell Atl. Br. 53-63), are the two that the Eighth Circuit viewed as related: related in the sense that either, if accepted, would effectively remove network elements as an entry option for many carriers. See Pet. App. 56a-57a. The first challenge, which the Eighth

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[16] This brief addresses the major contentions in the numerous briefs (three by the Bell Companies alone) filed on behalf of the cross-petitioners. To the extent that we have not addressed other contentions, that is attributable to the page limitation, not to any substantive agreement with cross-petitioners.

Circuit did accept (*id.* at 69a-72a), concerns Rule 315(b)'s ban on an incumbent's infliction of discriminatory costs on new entrants. The second challenge, which the Eighth Circuit rejected (*id.* at 53a-60a), concerns the Commission's decision not to impose a "facilities ownership" requirement on new entrants invoking Section 251(c)(3).

1. Rule 315(b) Is A Reasonable Implementation Of Section 251(c)(3)

Rule 315(b), 47 C.F.R. 51.315(b), forbids an anticompetitive practice that we describe in our opening brief (at 43-48), and which the incumbents nowhere disavow as their objective: They want to disconnect previously connected elements, over the objection of the requesting carrier, not for any productive reason, but just to impose wasteful reconnection costs on new entrants. Put another way, the incumbents want to drain value out of their facilities to ensure that their competitors either spend money unnecessarily to replace the lost value or stay out of the market altogether. The result: an unnecessary expenditure of resources, no net increase in value, and thwarted prospects for competition.

That anticompetitive exercise in economic waste is so plainly discriminatory that, even in the absence of a Commission rule, it would violate an incumbent's statutory obligation to provide "*nondiscriminatory* access to network elements * * * on rates, terms and conditions that are just, reasonable, and nondiscriminatory." 47 U.S.C. 251(c)(3) (emphasis added). But because the Commission *has* interpreted Section 251(c)(3) to forbid this practice, see Opening Fed. Br. 43-46; note 17, *infra*, the incumbents must show that the statute somehow forecloses that interpretation. See *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984). They cannot.

The incumbents rely principally on the second sentence of Section 251(c)(3), which supplements the nondiscrimination rights of the first sentence, and further bars incumbent LECs from frustrating a new entrant's right "to

combine [requested] elements" where (for example) the elements were not previously combined as the new entrant wishes to combine them or where the new entrant wishes to combine them with its own elements. The incumbents argue that "it cannot be * * * 'discriminatory' for an incumbent to do just what section 251(c)(3) expressly requires of it—provide network elements in a manner that allows a new entrant to combine them" Bell Atl. Br. 56. That is illogical. The inclusion of specific obligations in the second sentence of Section 251(c)(3) does not give incumbent LECs a free pass through the nondiscrimination mandate of the first sentence. An incumbent's duty to "allow" new entrants to combine elements that they wish to combine does not somehow entitle the incumbent to disconnect elements, against the new entrants' wishes, simply to impose anticompetitive costs on them.[17]

The incumbents also claim that imposing such costs cannot be discriminatory because, after all, "it was the incumbent that did the work and spent the money to design a network and combine the individual elements that comprise it." U.S. West Br. 52. The argument reduces to this: "because we are the regulated monopolists who put value into this network, we have the right to take much of that value away, and force new entrants to waste money in putting it back, before we let them share in our economies of scale." Few propositions could be more antithetical to the 1996 Act. To create local competition, Congress wished to preserve, not waste, the accumulated value of existing facilities. See Pet. App. 137a (¶ 11). And, al-

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[17] As the Commission explained, the discriminatory and wasteful character of the conduct prohibited in Rule 315(b) justifies that rule quite apart from a separate issue on which we have not sought this Court's review: whether an incumbent must itself *combine* previously *uncombined* elements before making them available to new entrants. *Third Order on Reconsideration*, FCC No. 97-295, ¶ 44 (Aug. 18, 1997) (J.A. 247-248), petitions for review pending *sub nom. Southwestern Bell Tel. Co.* v. *FCC*, Nos. 97-3389, *et al.* (8th Cir., argued Jan. 15, 1998); see generally Pet. App. 230a-231a (¶¶ 289-293).

though the incumbents wrongly suggest otherwise (*e.g.*, Bell Atl. Br. 56), a new entrant must of course compensate incumbents for access to precombined elements at cost-based rates: rates that take the costs of combination into account and "may include a reasonable profit" for the incumbent. 47 U.S.C. 252(d)(1)(B).

The incumbents also renew their argument (*e.g.*, Bell Atl. Br. 53-55) that the term "unbundled" means "disconnected" and that compliance with Section 251(c)(3) thus entitles them to disconnect requested elements whenever they wish, no matter what the anticompetitive harm. As we observe in our opening brief (at 44-45), however, the prevailing definition of "unbundled" during the 15 years leading up to the 1996 Act was "offered at separate prices"; indeed, in some contexts, it would have been nonsensical for "unbundled" to have meant "disconnected." See Opening MCI Br. 19-20.[18] Here, recognizing that many new entrants would enter local markets incrementally, Congress entitled those entrants to elements on an "unbundled" basis to ensure that an incumbent would not charge them for more elements than they want. But, by protecting new

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[18] As noted in our opening brief (at 45), the incumbents' approach to "unbundled elements" ignores the technical reality of the telephone network, including, in particular, the signaling system. The incumbents respond only that "the FCC's rules consider signaling and switching to be part of the *same* element" when new entrants seek access to both. Bell Atl. Br. 57. That is incorrect. The Commission's rules define switching (47 C.F.R. 51.319(c)) and signaling (47 C.F.R. 51.319(e)) as separate elements, and that separate definition of the signaling system element continues to apply "[w]hen a requesting telecommunications carrier purchases unbundled switching capability from an incumbent LEC." 47 C.F.R. 51.319(e)(1)(ii). The incumbents (*e.g.*, Bell Atl. Br. 54) separately argue that, in paragraph 44 of the Third Order on Reconsideration (J.A. 247-248), the Commission departed from its preferred usage and employed the term "unbundled" to mean "physically severable." The passage in question, however, addressed the precedential effect of the Eighth Circuit's initial opinion in this case. It is of course that Eighth Circuit opinion (along with the subsequent order invalidating Rule 315(b)) whose misapplication of the term is at issue here.

entrants in that respect, Congress did not entitle incumbents to make the elements that new entrants *do* want less valuable than they are when the incumbents use them. Indeed, the incumbents cannot point to any context in which the term "unbundled" has been used that way: to compel someone, against that person's will, to accept requested items on a disconnected basis. In the end, even the incumbents recede from that construction and appeal to "context." *E.g.*, Bell Atl. Br. 54. But, as discussed, "context" defeats them; and, even if it did not, it surely accommodates the Commission's construction of Section 251(c)(3)'s nondiscrimination mandate.

One final point: The incumbents' textual arguments (*e.g.*, Bell Atl. Br. 53-56) for invalidating Rule 315(b) are detached from, and much broader than, their general policy arguments for limiting the competitive effects of Section 251(c)(3). Whereas their policy arguments purport to favor facilities-based competitors (*e.g.*, *id.* at 64), their textual arguments for challenging Rule 315(b) would disadvantage *all* new entrants alike. If Section 251(c)(3) meant what they say, incumbents could disconnect any two previously combined network elements whenever they wished to disadvantage the requesting carrier—whether or not the requested elements could by themselves be used to provide finished services, and whether or not the requesting carrier had facilities of its own. The incumbents' construction of this statute would thus undermine all element-based competition equally, with no conceivable public benefit.[19]

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[19] Respondent Association for Local Telecommunications Services (ALTS), which represents niche-market carriers with some local facilities of their own, seeks to defend *both* the Eighth Circuit's judgment concerning Rule 315(b) *and* the Commission's authority to "requir[e] the incumbents to provide any and all existing combinations that are *not* similar to resold services." ALTS Opposing Br. 14. ALTS can accomplish that feat only by rejecting the incumbent LECs' textual position and by arguing instead that, "to save the statutory structure" (*id.* at 18), Section 251(c)(3) should be construed not to give new entrants efficient access to all elements needed to provide services

2. The Commission Reasonably Interpreted Section 251(c)(3) Not To Include An Implicit "Facilities Ownership" Requirement

The incumbents next challenge the Commission's decision *not* to issue rules imposing a "facilities ownership" limitation on Section 251(c)(3). In their view, a new entrant should be able to obtain elements under that provision only if it already has "at least some network facilities of its own." Bell Atl. Br. 57. The argument has no textual or policy basis.

a. As the Commission found (Pet. App. 242a (¶ 328)), and as the Eighth Circuit reaffirmed (*id.* at 55a), neither Section 251(c)(3) nor any other provision of the 1996 Act requires a new entrant to build its own facilities before obtaining access to the elements of an incumbent's network. To the contrary, Section 251(c)(3) compels incumbents to provide access "to *any* requesting telecommunications carrier for the provision of a telecommunications service" (emphasis added), which the Act elsewhere defines as "the offering of telecommunications for a fee directly to the public * * * *regardless* of the facilities used," 47 U.S.C. 153(46) (emphasis added). In marked contrast, the immediately preceding subsection, Section 251(c)(2), obligates incumbents to "interconnect" with "the facilities and equipment" of other carriers, language that does not appear in Section 251(c)(3).

An incumbent's simple obligation to provide access "to any requesting * * * carrier" disposes of this issue. But the incumbents' textual problems do not stop there. The incumbents contend that new entrants must have "at least some" facilities of their own (Bell Atl. Br. 57) before invoking Section 251(c)(3). What does "some" mean? As the Commission observed, the incumbents presumably seek a rule that is not "so easy to meet it would ultimately be

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independently available under Section 251(c)(4). But that argument, which we separately address below (at pp. 36-41), is unhinged from any textual basis for challenging Rule 315(b) itself.

meaningless." Pet. App. 248a (¶ 339). A meaningful rule would require extensive federal regulations governing the number and kinds of facilities that a new entrant must own before invoking rights under Section 251(c)(3). Apart from the dubious policy merits of distorting the market with such regulations, see p. 34, *infra*, Congress's failure even to suggest statutory standards for such regulations confirms what the statutory text already makes clear: that Congress did not intend to limit Section 251(c)(3) so as to necessitate such regulations in the first place.

b. With no textual basis for their proposed rule, the incumbents turn to a phrase that *protects* new entrants' rights in particular respects and mischaracterize that phrase as an implicit *restriction* of new entrants' rights in more general respects. They argue that, because Section 251(c)(3) entitles new entrants to gain access to an incumbent's elements "at any technically feasible point," Congress must have "contemplate[d] a physical interconnection of networks" (Bell Atl. Br. 57); and because Congress "contemplate[d]" that particular circumstance, Congress must also have intended to *limit* Section 251(c)(3) to that circumstance, and thus to carriers that wish "to make a physical connection" (*id.* at 58) with the incumbent.

That argument is unsound and, in any event, irrelevant. It is unsound because, as the Commission observed, the guarantee of network access "at any technically feasible point" addresses the points of the network at which new entrants *may* obtain access to elements; it does not *require* new entrants to connect their own facilities to the incumbent's elements at those points. See Pet. App. 242a-243a (¶ 329) ("If we were to conclude otherwise, then new entrants would be prohibited from requesting two network elements that are connected to each other because the new

entrant would be required to connect a single network element to a facility of its own.").[20]

And the argument could not help the incumbents in any event. To manipulate particular facilities used in providing service under Section 251(c)(3), a new entrant must typically establish a "physical connection" (Bell Atl. Br. 58) between its own operational support systems (OSS) and the OSS of the incumbent LEC. See *In re Application of Ameritech Mich. Pursuant to Section 271*, FCC No. 97-298, ¶¶ 134-143 (Aug. 19, 1997) (*Ameritech Michigan Order*) (lodged with this Court in No. 97-1519); see also J.A. 118 (¶ 518). That is so whether or not OSS is itself considered a "network element." See pp. 46-47, *infra*. For that reason, if Congress had meant to base a "facilities ownership" requirement on a phrase *protecting* a new entrant's rights (a dubious proposition by itself), it could not have chosen more inapt language than the phrase it used here, which guarantees access "at *any* technically feasible point." Congress's choice of language was not inapt, however, because Congress made Section 251(c)(3) applicable to "any requesting * * * carrier" and did not intend to impose any "facilities ownership" requirement at all.

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[20] There is similarly no merit to the incumbents' efforts (*e.g.*, Bell Atl. Br. 58-59) to infer a "facilities ownership" requirement from Section 251(c)(6), which gives new entrants a right to "physical collocation" with an incumbent's facilities. Again on the false premise that whenever Congress creates one competitive option it implicitly withdraws another, the incumbents argue that "Congress would have had no need to require physical collocation for this purpose if, as the FCC asserts, entrants would never actually be required to enter onto the incumbent's premises to connect equipment." *Ibid.* That does not follow. The fact that Section 251(c)(6) specifically entitles a new entrant to physical collocation if that is what it seeks does not mean that Section 251(c)(3) compels every new entrant to construct facilities of its own before gaining access to network elements.

3. The Incumbents' Policy Arguments Lack Merit

In sum, the text of the 1996 Act itself forecloses the incumbents' principal efforts to limit Section 251(c)(3), and even if it did not, the Commission's resolution of any ambiguities would be at least reasonable. See *Chevron*, 467 U.S. at 842-843. The incumbents nonetheless challenge the Commission's decision on several discrete policy grounds. Each is invalid.

a. *Universal service.* Under the traditional system of hidden cross-subsidies for universal service, many customers have paid above-cost telephone rates so that other customers may pay what the incumbent LECs have long characterized as below-cost rates. (The extent to which the above-cost rates truly fund universal service, rather than pad monopoly profits, has always been a subject of debate.) The incumbents contend that, because the price of access to network elements is based on cost, such access would allow new entrants to undersell incumbents in providing service to end users who pay the above-cost prices that currently subsidize universal service.

Here it is crucial to focus on what the incumbents do and do not argue. They do not deny that, under *any* interpretation of Section 251(c)(3), the availability of elements at cost-based rates will ultimately have the effect, which Congress very much intended, of driving prices to cost by permitting new entrants to attract customers who would otherwise pay supracompetitive prices. That market-oriented, efficiency-inducing process is what the incumbents call "arbitrage" and "gamesmanship." *E.g.*, Bell Atl. Br. 50. Congress called it "competition."

Congress also recognized, no less than the incumbents, that driving prices to cost will require replacement of the traditional universal service regime. Congress chose a solution that accommodates, rather than distorts, rational and cost-based competition in local markets. In a provision that the incumbents rarely discuss, Congress called for the creation of a new universal service regime funded not

by covertly above-cost rates exacted from urban and business customers, but by explicit and competitively neutral contributions from "*[a]ll* providers of telecommunications services," *including* new entrants that provide service under Section 251(c)(3). 47 U.S.C. 254(b)(4) (emphasis added). In a May 1997 order, the Commission, following the general recommendations of a Federal-State Joint Board, see 47 U.S.C. 254(a), began implementing the transition to the new regime.[21]

Because the incumbents cannot indefinitely keep competition from driving prices to cost, their complaint, at bottom, is about the details of the transition from the old telecommunications world into the new. In particular, they ask this Court to find some way to impede the competitive effects of Section 251(c)(3) to accommodate what they contend will be a "potentially lengthy period" (Bell Atl. Br. 50) of universal service reform. That argument is unsound on two levels.

First, it is misdirected. As the Commission found, the proper way to reconcile universal service concerns with the emergence of robust local competition is not to erect arbitrary new barriers to competition, as the incumbents would like, but to ensure timely implementation of the universal service reforms ordered in Section 254. See Pet. App. 132a-136a (¶¶ 3-9). In whatever respects the incumbents dispute the implementation plan designed by the Commission and the Federal-State Joint Board, they should pursue those disputes in their Fifth Circuit challenge to that plan. See *Texas Office of Pub. Util. Counsel*,

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[21] See *In re Federal-State Joint Board on Universal Serv.*, 12 FCC Rcd. 8776 (May 8, 1997) (*Univ. Serv. Order*), petitions for review pending *sub nom. Texas Office of Pub. Util. Counsel* v. *FCC*, Nos. 97-60421 *et al.* (5th Cir. filed June 25, 1997). The Commission contemporaneously indicated that competition was not developing in a way that would require instantaneous reforms. See *In re Access Charge Reform*, 12 FCC Rcd. 10,175, 10,184 (June 18, 1997), petitions for review pending *sub nom. Southwestern Bell Tel. Co.* v. *FCC*, Nos. 97-2618, *et al.* (8th Cir., argued Jan. 15, 1998).

supra. But those disputes are no basis for thwarting the local competition guarantees. Congress intended to move both competition and universal service into a dynamic and rational future; the incumbents' essential proposal is to stop the clock on competition because, they suggest, Congress enacted Section 254 largely in vain.[22]

That suggests the second problem with their argument. To address *interim* concerns about the timing of universal service reform, the incumbents would read *permanent* limitations into the guarantees of Section 251(c)(3). But Congress wrote those guarantees to last well into the next century, long after the process of reforming universal service has run its course, and long after any conceivable objection to widespread cost-based competition has vanished. Congress enacted Section 254 precisely to ensure that universal service concerns would not warp the process of bringing competition to local markets. By assuming away the efficacy of Section 254, however, the incumbents would permanently impair competition to accommodate a hidden-subsidy system that the 1996 Act itself has made obsolescent.

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[22] Some incumbents suggest (*e.g.*, Bell Atl. Br. 49-50; U.S. West. Br. 47) that Section 254 may be ineffectual in reforming intrastate universal service subsidies. Congress thought otherwise. Section 254(f) provides that, under state regulatory direction "not inconsistent with the Commission's rules," "[e]very telecommunications carrier that provides intrastate telecommunications services shall contribute, on an equitable and nondiscriminatory basis," to universal service funding mechanisms. See also 47 U.S.C. 253(b). The Commission adds:

> [A]s competition develops, the marketplace itself will identify intrastate implicit universal service support, and * * * states will be compelled by those marketplace forces to move that support to explicit, sustainable mechanisms consistent with section 254(f). As states do so, we will be able to assess whether additional *federal* universal service support is necessary to ensure that quality services remain "available at just, reasonable, and affordable rates."

Univ. Serv. Order, 12 FCC Rcd. at 8785-8786 (emphasis added) (quoting 47 U.S.C. 254(b)(1)).

In the end, the incumbents' real quarrel is with Congress's carefully considered decision to reform universal service *and* promote robust local competition "as quickly as possible." House Rep. 89; compare 47 U.S.C. 251(d)(1) with 47 U.S.C. 254(a)(2). But this is no place to second-guess that decision. And, with their 98% market shares holding fast more than two years after the Act's passage (see Opening Fed. Br. 41), the incumbents are particularly ill-positioned to do any second-guessing.

b. *Facilities-based competition.* The incumbents also propose to engraft atextual limitations onto Section 251(c)(3) to give new entrants greater incentives to build new facilities. *E.g.*, Bell Atl. Br. 63-64. That argument is also unsound. The issue here is not, as the incumbents portray it, *whether* the construction of new facilities is desirable. The issue, instead, is *who* should decide *which* facilities it would be *efficient* to build, and *when*. As a general matter, the Commission's approach would leave those decisions to market forces, which best reflect what is efficient. The incumbents would assign those decisions to government regulators and, specifically, to the Commission. The Commission reasonably declined the invitation.

Congress recognized, and the incumbents do not deny, that it would make little social or economic sense to try to induce new entrants to duplicate *all* of the telecommunications facilities they might need to provide service, including, for example, the multitude of wires, buried cables, switches, and transport trunks that are part of the existing infrastructure. Absent radical technological change, *some* of those facilities will indefinitely embody such immense economies that the social costs of duplicating them would far outweigh the benefits: important resources would be spent, and streets would be dug up, with no commensurate increase in the value or diversity of telecommunications services. In other circumstances, however, the benefits of building new facilities would outweigh the costs: where, for example, new facilities would

enable a new entrant to offer more, better, or less costly services.

The question is how to distinguish between efficient and inefficient construction of new facilities and who should draw the distinction. The Commission rejected the incumbents' proposal for a government-imposed "facilities ownership" limitation on Section 251(c)(3) because "it would not be possible to identify the elements carriers must own [to make such a limitation meaningful] without creating incentives to build inefficient network architectures that respond not to marketplace factors, but to regulation"; that result, the Commission observed, would frustrate "the 1996 Act's goals of promoting competition." Pet. App. 248a (¶ 339). The incumbents do not answer that concern. Instead, they simply argue that the absence of a facilities-ownership rule would impose *greater* harms because, they say, it would "undermine" any incentive for new entrants to build their own facilities. *E.g.*, Bell Atl. Br. 64.

That is simply incorrect. New entrants invoking rights under Section 251(c)(3) may obtain access to an incumbent's facilities only at cost-based rates that "may include a reasonable profit" for the incumbent. 47 U.S.C. 252(d)(1)(B). If those rates are set at the proper levels (see pp. 35-36, *infra*), new entrants will rationally choose to construct facilities of their own whenever that is the efficient choice: for example, where customer demand exceeds the capacity of existing facilities, or where the new entrant needs new facilities to offer different or more efficient services. See, *e.g.*, J.A. 132-133, 140, 172 (¶¶ 620, 685, 743); see also G. Stigler, *The Theory of Price* (4th ed. 1987). Those incentives are as applicable to new entrants that start out with no local facilities of their own—those who initially seek access to the "platform"—as to new entrants that have already constructed some facilities. Moreover, the incentive to build new facilities will often be enhanced because new entrants will wish to reduce the burdens of negotiating with, and relying on, their chief

competitors—the incumbent LECs—in order to do business. See, *e.g.*, D. Carlton & J. Perloff, *Modern Industrial Organization* 501 (2d ed. 1994).

Ultimately, it is the incumbents' approach, not the Commission's rules, that would suppress efficient facilities development, because their approach would deter many potential competitors from entering local markets at all. See pp. 40-41, *infra*. Moreover, the incumbents' calls for more regulation would force new entrants that *do* enter local markets to construct new facilities inefficiently. Whether through a "facilities ownership" requirement or through an "essential facilities" theory that the statutory language rejects, see p. 43, *infra*, the incumbents would have the government tell private market actors to build new facilities even where they would rather pay a hostile incumbent for the use of its facilities at cost-based rates that "may include a reasonable profit." The Commission reasonably determined that private actors are in a better position to know when such construction makes economic sense. See, *e.g.*, J.A. 63-64, 132-133 (¶¶ 339-340, 620); see also J.A. 54-55 (¶ 287).[23]

Of course, those private actors will have the correct incentives to construct efficient (and not inefficient) facilities only if the prices for access to an incumbent's facilities are set at levels that promote such construction. The Commission's vacated pricing rules do call for prices set at those levels. See, *e.g.*, J.A. 140 (¶ 685). And many state commissions have voluntarily followed the Commission's approach, as the incumbents pointed out in opposing certiorari. *E.g.*, 97-826 Regional Bell Br. in Opp. 19-20; 97-826 GTE Br. in Opp. 24. The incumbents say little about the obvious interrelationship between pricing and nonpricing rules in this context. That reticence is revealing. At bottom, the incumbents' mistaken suggestion that the Commission's nonpricing rules will "undermine" new

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[23] As discussed above (p. 26), the incumbents' challenge to Rule 315(b) is not even arguably calculated to induce facilities-based competition; it is designed to suppress competition generally.

facilities construction (Bell Atl. Br. 64) can amount to nothing more than a prediction that prices for network elements will be set too low and that new entrants will thus have the wrong incentives.[24] See J.A. 131 (¶ 618) ("The price levels set by state commissions will determine whether the 1996 Act is implemented in a manner that is *pro-competitor* * * * or, as we believe Congress intended, *pro-competition*."). Their argument here is therefore misdirected: their real quarrel is with particular pricing policies, not with the Commission's underlying refusal to inject itself unnecessarily into the determination of which new facilities are efficiently constructed.

Finally, under *any* approach to this statute, there must of course be close coordination between the pricing and nonpricing determinations needed to give effect to Section 251(c)(3). The need for such coordination illustrates why, as discussed in Point I above, it is illogical to suppose that Congress gave the Commission *no* methodological role in addressing the pricing issues that are inextricably bound up in the nonpricing issues that, as all insist, the Commission does have authority to decide. See p. 4, *supra*; see also *American Tel. & Tel. Co.* v. *Central Office Tel., Inc.*, 118 S. Ct. 1956, 1963 (1998) ("Rates * * * do not exist in isolation.").

c. *The distinction between resale and network elements.* The incumbents propose one final justification both for restricting Section 251(c)(3)'s guarantees to new entrants with "facilities of [their] own" and for compelling all new entrants to perform the "additional work" of recombining elements that an incumbent has disconnected solely to burden competition. Bell Atl. Br. 47. They argue

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[24] That concern is the flip side of a wish: some incumbents (see GTE Br. 41) seek to inflate network element rates to cover universal service costs and to recover the historical costs of their investments, even though the 1996 Act provides that those rates shall be based on "the *cost* (determined *without* reference to a rate-of-return or other rate-based proceeding) of providing the * * * network element." 47 U.S.C. 252(d)(1)(A)(i) (emphasis added).

that reading such limitations into Section 251(c)(3) is required to avoid "utterly obliterat[ing] the statutory distinction between resale and the use of unbundled elements." *Ibid.* That is incorrect for several independent reasons.

i. Section 251 contains several entry options designed collectively to infuse local markets with competition. Congress included several options because it did not know exactly how competition would develop, and it left those decisions to private market actors. It enacted Section 251(c)(4) because it knew that resale would be particularly important in the very near term and that, even thereafter, new entrants would still prefer resale over network elements in certain contexts. See pp. 38-40, *infra*. It enacted Section 251(c)(3) because it recognized that, unlike resale, access to network elements is the only option that can promote full entry into, and dynamic competition in, local telephone markets. *Ibid.* But nothing in Section 251 compels new entrants to pick one entry option over another when either, by its terms, is available. Nor should the Commission, much less the federal courts, create artificial limitations on one option to encourage greater use of another.

What the incumbents seek, though, is a rule confining new entrants to one option (resale) when the statutory text makes another option (network elements) available as well. Unable to find any textual hook for that rule, the incumbents argue that such a rule must be created to avoid "inconsisten[cy] with the scheme" of the 1996 Act. Bell Atl. Br. 61. But the incumbents cannot be speaking about any inconsistency between the Commission's approach and *the text of the Act*. It is natural and common for Congress to create a set of options for private actors and to leave the choice of those options to the private actors, as it has done here. And even the incumbents concede that the Commission's approach will preserve resale as an attractive entry option in many circumstances. Bell Atl. Br. 62-63; see also pp. 38-40, *infra*.

Instead, when the incumbents speak of "inconsisten[cy] with the scheme," they mean that the Commission's approach is inconsistent *with their policy concerns*, which they wrongly attribute to Congress. They claim, in particular, that the Commission's approach is inconsistent with the obsolescent system of universal service cross-subsidies that Section 254 seeks to abolish, and with their own invalid theories about the degree of regulatory intervention needed to spur facilities construction. *E.g.*, Bell Atl. Br. 16. Just as those policy concerns are unsound for the reasons found by the Commission and set forth above, so too is the incumbents' wholly derivative rationale for dictating a new entrant's choice between two equally available statutory options.

ii. Moreover, the incumbents' argument is independently invalid because it rests on a false factual premise. They assert that, under the Commission's plain-language approach, new entrants providing service under Section 251(c)(3) without first building local facilities of their own —those seeking access to the "platform"—would obtain "the exact equivalent of resale" (Bell Atl. Br. 60), "the same thing using different words" (*id.* at 52). That is incorrect, as the Commission has found.

Section 251(c)(4) restricts a new entrant to repackaging the incumbent's *existing retail* services under its own brand name. By contrast, a new entrant that invokes Section 251(c)(3) does not "resell" anything: it leases an incumbent's underlying elements. With those elements, it can provide retail services that the LEC does *not* provide its customers (see Pet. App. 244a-245a (¶ 333) (discussing Centrex)), and, just as important, it can provide crucial *non*-retail services that are necessarily unavailable under Section 251(c)(4). For example, one responsibility that new entrants would typically assume when providing service through Section 251(c)(3), but *cannot* assume when they resell retail services under Section 251(c)(4), is "exchange access": the task of originating and terminating telephone traffic between their customers and the

various long-distance networks. See Pet. App. 245a (¶ 333); see also J.A. 65-71 (¶¶ 356-365). For those reasons, only Section 251(c)(3), and not Section 251(c)(4), enables new entrants to make full, flexible, and truly competitive entry into local markets.

With that greater flexibility come greater risks and operational costs. Because a reseller pays an incumbent only for the retail services it actually resells, the wholesale rates applicable to resale guarantee a predictable margin between the new entrant's resale revenues and what it owes the incumbent for the resold services (although the new entrant's additional costs may deny it any actual profit). See 47 U.S.C. 251(c)(4), 252(d)(3). In contrast, the profitability of using *cost*-based network elements to compete against incumbents depends on several variables, including whether, after agreeing to serve particular customers, the new entrant can recover enough revenues from particular services (including exchange access) to recover its flat-rated charges for loops and all other network elements needed to provide service. See Pet. App. 245a-246a (¶ 334).[25]

The elements option also poses greater operational burdens: unlike resale, with its relatively simple back-office requirements, the elements approach requires new en-

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[25] Indeed, the loop cost *alone*, which is charged at a flat rate, commonly exceeds the wholesale price of residential telephone service in both urban and non-urban areas. The flat-rated cost of that and other elements needed for service illustrates one reason why, as the Commission has determined, access to network elements poses greater risks for new entrants than resale whether or not "shared transport" is a network element, a discrete issue now pending in the Eighth Circuit. See *Third Order on Reconsideration*, ¶ 47 (J.A. 248-249); cf. Bell Atl. Br. 62. More generally, the incumbents mischaracterize the cost differences between network elements and resale. *E.g.*, Bell Atl. Br. 52 (discussing "discount"). When access to network elements is more profitable to a new entrant than resale, that is often largely attributable not to the difference in what the new entrant pays the incumbent, but to a new entrant's additional *receipt* of (for example) fees for exchange access, a service that new entrants can provide only under Section 251(c)(3).

trants to deploy additional systems to keep track of element-specific usage data and to bill interexchange carriers for originating and terminating exchange access. The reduced risks and transaction costs of resale thus permit more immediate and more narrowly focused entry into telecommunications markets, which is why resale is a particularly important entry option in the very near term.[26] For those reasons, as the Commission found, it is unnecessary to carve exceptions out of the plain language of Section 251(c)(3) to preserve "distinctions" between these two very different entry options. See Pet. App. 243a-246a (¶¶ 331-334); *Third Order on Reconsideration* ¶ 47 (J.A. 248-249).[27]

iii. The incumbents' arguments about "gaming the regulatory system" (Bell Atl. Br. 63) through access to the "platform" are illogical for one final, independent reason. The incumbents simply assume that, once a new entrant gains such access, it will not thereafter build local

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[26] The relative ease of, and absence of risk in, using resale for immediate entry into local markets is also one reason why the 1996 Act briefly restricts the ability of certain long-distance carriers to market long-distance services jointly with resold local services in some areas, a restriction that will terminate at the latest in February 1999. 47 U.S.C. 271(e)(2); see Pet. App. 246a-247a (¶¶ 336-337). At the same time, Congress expected that local competition resulting from a proper construction of Section 251(c)(3) would help satisfy an important condition (as resale alone could not) for Bell Company entry into the long-distance market. See 47 U.S.C. 271(c)(1); *Ameritech Michigan Order*, ¶¶ 92-101. Such entry would itself terminate the joint-marketing restriction if it occurred before the February 1999 sunset. 47 U.S.C. 271(e)(2).

[27] As the incumbents acknowledge (Bell Atl. Br. 62-63), the different pricing regimes for these two entry options ensure that resale will be a more attractive entry option than network elements for new entrants seeking to recruit customers who (according to the incumbents) are currently served below cost, based on hidden subsidies that are available only to the incumbent. The Act squarely authorizes such resale, which places the incumbents at no competitive disadvantage, no matter what the mechanics of the incumbent's universal service subsidies. See, *e.g.*, *Univ. Serv. Order*, 12 FCC Rcd. at 8866.

facilities of its own: facilities that would satisfy the incumbents' proposed "facilities ownership" rule and would entitle the new entrant, *under the incumbents' own analysis*, to exercise rights under *either* Section 251(c)(3) *or* Section 251(c)(4). But, under a proper pricing regime, all new entrants, including those with access to the platform, will have powerful incentives to develop their own facilities whenever that would contribute to efficiency and consumer welfare. See pp. 34-36, *supra*. And, unlike a reseller, a new entrant that leases elements becomes directly familiar with those elements' costs and usage patterns and can judge when it would be efficient to build new elements. What the incumbents seek, then, is a rule that nips in the bud the very facilities-based competition that would moot their policy arguments: a rule that discourages the initial entry, and the development of a customer base, that would make subsequent facilities investments attractive.

C. The Commission Reasonably Applied The Statutory Definition Of "Network Element" And Reasonably Determined Which Elements Must Be Made Available

Moving from the general to the more specific, the incumbents challenge the Commission's determinations of the "elements that incumbents must provide." Bell Atl. Br. 65. There are two discrete subjects of that challenge (see *id.* at 65-72): the Commission's application of the "necessary" and "impair" standards of Section 251(d)(2), and its specific determinations that Section 251(c)(3) entitles new entrants to gain access to an incumbent's "operational support systems," "vertical switching features," and operator services.

1. The Commission Reasonably Applied Section 251(d)(2)

Section 251(d)(2) instructs the Commission, when "determining what network elements should be made available," to "consider, at a minimum," whether access to *proprietary* elements is "necessary," and whether failure to

provide access to *other* elements "would impair the ability of the * * * carrier seeking access to provide the services that it seeks to offer." The Commission defined "necessary" to mean "that an element is a prerequisite for competition," J.A. 50 (¶ 282), and it defined "impair" to mean " 'to make or cause to become worse; diminish in value,' " J.A. 53 (¶ 285) (quoting *Random House College Dictionary* 665 (rev. ed. 1984)). The Commission further observed that Section 251(d)(2) sets forth "minimum *considerations* that the Commission shall take into account," but that it does not require the Commission, after considering those factors along with various others, to assign them dispositive weight. J.A. 54 (¶ 286) (emphasis added). The Commission explained that, in the same order, it had expressly taken these considerations into account when formulating its limited initial set of network elements that must be unbundled. J.A. 48-49 (¶ 277).[28] It added that the state commissions should also follow those considerations "to the extent [those commissions] impose additional unbundling requirements." *Ibid.* The Eighth Circuit upheld the Commission's approach. See Pet. App. 47a-50a.

The nature of the incumbents' challenge here is difficult to discern. If they are contending that Section 251(d)(2) itself should have compelled a different outcome in the Commission's initial categorization of "what network elements" must be made available, they do not clearly say so or even specify the "elements" that (in their view) Section 251(d)(2) somehow removes from the scope of a new entrant's access rights. If they are contending that Section 251(d)(2) requires a further case-by-case inquiry into a *particular* new entrant's need for a *particular*

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[28] See, *e.g.*, First Report and Order ¶¶ 388-389 (loops), 393 (network interface device), 410-411, 419-420 (switching), 425 (tandem switching), 482 (signaling), 491, 497 (call-related databases), 521-522 (OSS), 539-540 (operator and directory assistance systems); compare *id.* at ¶ 414 (determining that additional unbundling of switching element to create independent vertical feature elements is *not* "necessary to promote local competition").

facility or functionality that falls within one of the Commission's categories, their frequent use of the passive voice—"*some* inquiry into actual market conditions should be made" (Bell Atl. Br. 66)—leaves unanswered *who* would be conducting that inquiry. The incumbents would presumably foist most of that proposed chore on the state commissions in individual arbitration proceedings, even though Section 251(d)(2) does not, by its terms, even speak to their role.

The incumbents theorize that Section 251(d)(2) somehow confines a new entrant's access rights to an incumbent's "essential facilities." But the antitrust term "essential facilities" does not appear anywhere in this statute. Instead, Congress chose other words with quite different meanings. As to most network elements, what the Commission must "consider" is *not* whether the element is "essential," but whether deprivation of the element "would impair the ability" of a requesting carrier "to provide the services that it seeks to offer." 47 U.S.C. 251(d)(2)(B). The Commission reasonably determined that a new entrant's ability to offer service is "impaired" ("diminished in value") if "the quality of the service the entrant can offer, absent access to the requested element, declines" or if "the cost of providing the service rises." J.A. 53 (¶ 285). That is the plain meaning of the term. And, as to "proprietary" elements, Congress directed the Commission to "consider" whether access to the element is "necessary," a term that, as the Eighth Circuit observed, this Court itself has broadly defined to mean "convenient, or useful," rather than "essential." Pet. App. 48a (quoting *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 413 (1819)); accord *Armour & Co.* v. *Wantock*, 323 U.S. 126, 129-130 (1944) (rejecting claim that "necessary" means "essential").

Moreover, Section 251(d)(2) does not even direct the Commission (as the incumbents suggest) to give the "necessary" and "impair" standards dispositive weight. See J.A. 54 (¶ 286). Instead, it directs the Commission to

"consider" those factors, "at a minimum," "[i]n determining what network elements should be made available." And that is what the Commission did. It considered those factors together with the competitive goals of the 1996 Act; it then created an initial categorization of network elements that must be unbundled; and it further concluded that, in most (but not all) circumstances,[29] new entrants may decide, without case-by-case regulatory second-guessing, when the use of existing elements would avoid costly inefficiencies in providing service. See J.A. 50-55 (¶¶ 282-288); p. 42 and note 28, *supra*. No more was required. When a "statute by its terms merely requires the Commission to consider" certain factors, "[t]hat means only that it must reach an express and considered conclusion about the bearing of a factor, but is not required to give any specific weight to it." *Time Warner Entertainment Co.* v. *FCC*, 56 F.3d 151, 175 (D.C. Cir. 1995) (internal quotation marks omitted), cert. denied, 516 U.S. 1112 (1996); see also *United States* v. *RCA*, 358 U.S. 334, 351-352 (1959).

Finally, there is no merit to the incumbents' unelaborated proposal for greater regulatory intervention "to

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[29] As the Eighth Circuit observed, the Commission's application of Section 251(d)(2) "is not toothless." Pet. App. 49a; see, *e.g.*, J.A. 52-53 (¶ 284) (describing circumstances in which a "new entrant should not have access to proprietary information * * * where it is not necessary to provide service"). The incumbents nonetheless claim that, as to proprietary elements, restrictive regulations are required to preserve an incumbent's incentive to offer innovative services. *E.g.*, Bell Atl. Br. 67-68. In a passage they ignore, however, the Commission determined that its approach "will stimulate innovation in the market, offsetting any hypothetical reduction in innovation by the incumbent LEC," and that "the threat to competition" from the incumbents' restrictive alternative "would far exceed any costs to consumers resulting from reduced innovation by the incumbent LEC." J.A. 51 (¶ 282). That predictive judgment is entitled to particular deference, as the Eighth Circuit observed. Pet. App. 49a-50a. Finally, it bears repeating that, when incumbents make any of their facilities available to new entrants under Section 251(c)(3), they are entitled to compensation at cost-based rates that "may include a reasonable profit." 47 U.S.C. 252(d)(1)(B).

promote facilities-based competition." Bell Atl. Br. 66. As discussed, when rates for an incumbent's elements are set properly, new entrants will have incentives to build new facilities when, and only when, it is efficient to do so. See pp. 34-36, *supra*. "As a practical matter, if it is more efficient and less costly for new entrants to obtain network elements from a source other than an incumbent LEC, new entrants will likely pursue the more efficient and less costly approach." J.A. 54 (¶ 287). In effect, the incumbents want a rule restricting new entrants to more expensive or less efficient means of obtaining the elements they seek. Such a rule, the Commission reasonably found, would "inhibit new entry," "restrict the potential for meaningful competition," and thus "undermine the procompetitive goals of the 1996 Act." *Ibid.*; see also Pet. App. 48a (agreeing with Commission).

2. The Commission's Determinations Concerning OSS, Vertical Switching Features, And Operator Services Were Reasonable

a. Because an incumbent retains ultimate physical control over its network elements even when new entrants lease them under Section 251(c)(3) (see J.A. 38 (¶ 258)), it keeps detailed information in various databases about the underlying facilities serving all customers, including customers who have chosen other local carriers. Those databases and their associated programs—which handle maintenance, repair, ordering, provisioning, billing, and other functions—are the incumbent's "operational support systems," or OSS. The question here is whether a new entrant may gain access to the incumbent's OSS as an efficient means of obtaining needed network and service information and of manipulating network elements to provide services to its new customers.[30] Without an efficient electronic interface between the incumbent's OSS and the

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[30] The question is thus *not* whether new entrants may appropriate an incumbent's general "business skills" (Bell Atl. Br. 69). See J.A. 118 (¶ 518); 47 C.F.R. 51.319(f)(1).

new entrant's own systems, a new entrant would have to resort, at best, to slower and more cumbersome means of obtaining essential network information, processing customer requests, and securing maintenance and repair functions. The new entrant might find it impossible, for example, to conduct basic customer transactions (such as providing an installation date) in a single call. As the Commission found, that disparity in responsiveness would preclude a competitor from making efficient, competitive use of the incumbent's network elements. See J.A. 116-122 (¶¶ 516-522).

The Commission directed incumbents to provide nondiscriminatory access to their OSS on alternative grounds: (1) OSS falls within the statutory definition of "network element" (in two different respects), and (2) "nondiscriminatory access to the functions of operations support systems, which would include access to the information they contain, could be viewed as a 'term or condition' of unbundling *other* network elements under section 251(c)(3), or resale under section 251(c)(4)." J.A. 117-118 (¶ 517) (emphasis added). The latter ground is independent of, and as important as, the first: a new entrant's access to elements used in providing service cannot be "nondiscriminatory," as required by Section 251(c)(3), if the incumbent, by denying access to its OSS, can prevent the new entrant from using those elements as efficiently as the incumbent could use them. See also 47 C.F.R. 51.311(b). Significantly, as in the court of appeals, and as in their cross-petitions for certiorari, the incumbents *do not challenge this nondiscrimination ground*. See 97-1087 Fed. Br. in Opp. 14-15 (noting waiver of claim). That waiver is fatal to their challenge: the Commission emphasized that this was an independent basis for its decision. See J.A. 117-118 (¶ 517) ("under *any* of these interpretations, operations support systems functions are subject to the nondiscriminatory access duty imposed by section 251(c)(3)") (emphasis added). For that reason alone, this

Court should affirm the portion of the judgment below addressing OSS.

In any event, the Commission reasonably *also* found that OSS falls within Section 3(29)'s two-part definition of "network element." See 47 U.S.C. 153(29). First, operational support systems readily qualify as "facilit[ies] * * * used in the provision of a telecommunications service," and their functions are "features, functions, and capabilities that are provided by means of such facilit[ies]." *Ibid.*; see J.A. 117 (¶ 517)); Pet. App. 42a-43a (agreeing with Commission).[31] Moreover, the second sentence of Section 3(29) includes what is largely an express *itemization* of OSS: "databases * * * and information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service." 47 U.S.C. 153(29); J.A. 117 (¶ 517); Pet. App. 43a. The incumbents' approach would exclude several *enumerated* items—such as "databases" and "billing and collection" information—from the scope of the network elements to which new entrants may gain efficient, nondiscriminatory access, and that alone confirms that their approach is wrong.[32] See Pet. App. 43a-44a.

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[31] See *Random House Dictionary of the English Language* 690 (2d ed. 1987) (defining "facility" as "something designed, built, installed, etc., to serve a specific function affording a convenience or service" or "something that permits the easier performance of an action, course of conduct, etc."); 47 U.S.C. 153(46) (defining "telecommunications service" as "the *offering* of telecommunications for a *fee* directly to the public") (emphasis added).

[32] The incumbents suggest (*e.g.*, Bell Atl. Br. 69) that the definition of "network element" is restricted to "equipment used to route or transmit a call." That is plainly incorrect, as the statutory references to "billing," "collection," and "databases" make clear. Moreover, as the Commission and the Eighth Circuit observed, the incumbents' view would read out much of Section 3(29), which embraces a range of items "used in the transmission, routing, *or other provision* of a telecommunications service" (emphasis added). See J.A. 40, 116-117 (¶¶ 261, 516); Pet. App. 42a-44a. In any event, OSS *is* used in the "ordering, provisioning, maintenance and repair" of network transmission facilities. J.A. 118 (¶ 518); see also 47 C.F.R. 51.5. Similarly, as discussed

Finally, if Sections 3(29) or 251(c)(3) were ambiguous on this or any other issue, the Commission's approach would be entitled to substantial deference. See *Chevron*, 467 U.S. at 843-844.

b. The incumbents next contend that the Commission improperly designated vertical switching features (*e.g.*, call forwarding, caller identification, and call waiting) as "network elements." Bell Atl. Br. 71-72. In fact, however, the Commission expressly declined to unbundle the switch "into a basic switching element and independent vertical feature elements." J.A. 88 (¶ 414). What the Commission *did* determine is that vertical features "are provided through operation of hardware and software comprising the 'facility' that is the switch"; that they are thus "'features' and 'functions' of the switch"; and that new entrants obtaining access to the switch are entitled to make use of those functions (just like other functions) of the element they have paid for. J.A. 87-88 (¶ 413) (quoting 47 U.S.C. 153(29)).

Without any textual basis, the incumbents would carve out of that switching element, and deny to new entrants, whatever functions the incumbents provide as retail services to their customers. See Bell Atl. Br. 72. That proposal flies in the face of Sections 3(29) and 251(c)(3), and the Commission reasonably rejected it. J.A. 87-88 (¶ 413). As the Eighth Circuit recognized, Section 251(c)(3) entitles new entrants to gain access to elements used in providing services whether or not the incumbent also offers those services to its customers and whether or not the new entrant could therefore resell them. Pet. App. 45a; see also pp. 36-41, *supra*. Indeed, the incumbents' approach would invite obvious abuse, as the Commission found: it would encourage them to evade their unbundled access duties altogether by recharacterizing elements as

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below, operator services and vertical switching features (*e.g.*, call forwarding) are also part of the call-routing network.

"services" and selling them as such to end users. J.A. 41 (¶ 263); see also Pet. App. 45a.

c. "Operator services" are the increasingly automated network "facilities and functionalities" (J.A. 125 (¶ 534)) that use hardware and software to route calls through the network and perform a variety of other call-related tasks, such as the disposition of calling-card (and other "0+") calls. See 47 C.F.R. 51.5. Similarly, "directory assistance" facilities enable callers to find, and complete calls to, the numbers they wish to call. The Commission found that "these facilities and functionalities are important to facilitate competition in the local exchange market," and that they fall within the two-part definition of "network element." J.A. 125-126 (¶ 534). The Eighth Circuit affirmed. Pet. App. 42a.

Because they are directly involved in call-routing, "operator services" fall within even the incumbents' cramped misdefinition of "network elements." See p. 47 and note 32, *supra*. The incumbents nonetheless conflate "operator services" with "live operators" and conclude that Congress could not have meant to include "people" within the scope of Section 251(c)(3). GTE Br. 57. "Operator services" and "directory assistance," however, describe complex network facilities and functionalities, not just the people who run them. Any element is controlled by people, and human involvement does not somehow remove an element from the scope of Section 3(29). Moreover, the incumbents' equation of "operator services" with "live operators" is anachronistic, as anyone with a calling card knows: such services, like directory assistance, are largely (and increasingly) automated. Finally, as with vertical features, nothing in the Act prohibits new entrants from obtaining access to network elements that an incumbent, characterizing such elements as "services," may provide to its customers. Pet. App. 42a, 44a-45a.[33]

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[33] We rest on the discussion in our opening brief (at 48-50) of the Commission's rules interpreting Section 252(i). We add two brief observations here. First, respondents' interpretation of that provision

CONCLUSION

The relevant portions of the judgments below invalidating the Commission's rules should be reversed, and the relevant portions upholding those rules should be affirmed.

Respectfully submitted.

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(*e.g.*, Bell Atl. Br. 73) reads "any * * * element" (of an agreement) to mean "all elements." That is not what Congress wrote or meant. Second, if this issue turns on a dispute about the extent to which the Commission's rules protect the incumbents against the plain language of this provision (see Bell Atl. Br. 74 n.43), the proper course is to remand to the Commission for clarification on that issue, not to impose respondents' own countertextual view of Section 252(i).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

AT&T CORP., *et al.*
Petitioners,

v.

IOWA UTILITIES BOARD, *et al.*,
Respondents.

AT&T CORP., *et al.*,
Petitioners,

v.

CALIFORNIA, *et al.*,
Respondents.

On Writs of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

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ARGUMENT

Respondents and cross-petitioners confirm that the FCC had jurisdiction to adopt its pricing and other rules and that each of the challenged local competition rules is substantively valid. In particular, when their briefs are stripped of their rhetoric, they are challenging the FCC's rules by (1) ignoring the nature of the facilities and services that the rules address, (2) misstating the express terms of the Communications Act, and (3) relying on "policies" that Congress did not enact and that respondents' positions would not advance.

I. THE FCC HAS JURISDICTION TO IMPLEMENT ALL THE ACT'S LOCAL COMPETITION PROVISIONS.

The respondents' briefs have defended the Eighth Circuit's jurisdictional holdings by misstating the bases of the FCC's authority and the terms of the Act. In particular, contrary to respondents' assertions, petitioners are not claiming that the FCC has jurisdiction because "Congress would *never* pass a communications statute without intending the FCC to superintend every aspect." Bell Atl. Br. 29.

Rather, the point is that, in contrast to other provisions enacted by the Telecommunications Act of 1996, Congress deliberately codified the new local competition provisions as §§ 251-76 of the Communications Act. See AT&T Br. 22 & n.12. By doing so, Congress gave the FCC authority to "execute and enforce" these new provisions (47 U.S.C. § 151), to "prescribe such rules and regulations as may be necessary to . . . carry out the provisions," (*id.* § 201(b)), and otherwise to enforce them. *Id.* §§ 154(i), 208, 303(r). Moreover, § 251(d)(1) mandated that the FCC adopt regulations implementing the requirements of § 251 within six months of its enactment and before the States conclude the arbitration

decisions that are reviewable only in federal district court and under federal law.

Further, it is simply not the case that the FCC's rules under §§ 251-252 intrude on the States' historic jurisdiction over "intrastate services." In particular, contrary to respondents' repeated assertions, the facilities and arrangements at issue will be used to provide not just retail "intrastate services," but also "exchange access" services that are overwhelmingly "interstate services" that the FCC has regulated for 60 years. Moreover, as no party disputes, the original Communications Act of 1934 gave the FCC jurisdiction over rates, terms, and conditions in which customers lease the same local loops and other associated facilities that will here be used for interstate as well as intrastate calls (AT&T Br. 5-6 & n.3). The FCC's rules thus exercise the jurisdiction over leased facilities that the FCC always had, while implementing new resale and transport arrangements that are provided in conjunction with the leased facilities.

For these reasons, respondents have primarily devoted their briefs to defending only the Eighth Circuit's holding that the FCC lacks jurisdiction over the pricing provisions of the Act, and to arguing only that § 252(c) expressly denies the FCC jurisdiction over the pricing requirements of §§ 251-52 that it otherwise would have. But the FCC would have jurisdiction over these pricing and other requirements of §§ 251 and 252 even if respondents' reading of § 252(c) were a possible one -- as it is not.

A. Section 201(b) Gives The FCC Jurisdiction Over All The Act's Requirements.

Because § 201(b) authorizes the FCC to adopt rules to carry out each provision of the Communications Act, its terms authorize the FCC to adopt rules to implement all the pricing and other requirements of the Act, including the provisions of

§ 252(c) that are claimed (erroneously) to require states to establish prices solely under the standards of § 252(d). That is why the LEC and state commission respondents are reduced to contending (in arguments buried in the backs of their briefs) that § 201(b) cannot or should not mean what it plainly says.

Respondents' principal argument, again, is based on their assertions that the substantive requirements of the first sentence of § 201(b) do not apply to the services and facilities that § 251(c) requires LECs to provide. But even if that claim were correct, § 201(b) expressly grants the FCC rulemaking authority to implement the "provisions of this Act," and there is no basis for the claim that this authority can somehow be "limited to [the] interstate communication" purportedly addressed in the first sentence of this "section." GTE Br. 33; Bell Atl. Br. 43; States Br. 26-27. That is particularly so because other sections of the Act direct the FCC to adopt regulations implementing only the requirements of "this section" (*e.g.*, §§ 251(d)(1), 317(e)) and not the entire "Act."

The LECs also claim that Congress could not have intended to give the FCC the same § 201(b) rulemaking power over §§ 251-76 that it had over the original provisions of the Act and that "the FCC cannot pluck such a generalized term out of the 1934 Act" and apply it to the "1996 Act's" local competition provisions. GTE Br. 34. The reason, they say, is that this would "give the FCC intrastate jurisdiction denied to the agency by section 2(b)" and would mean that Congress "wasted its breath" when it adopted § 2(b). Bell Atl. Br. 43-44.

However, §§ 2(b) and 201(b) are each "generalized term[s] out of the 1934 Act." If § 201(b) and the other general grants of jurisdiction over all the Act's requirements were somehow inapplicable to §§ 251-76, then so, too, would be § 2(b). But because Congress deliberately codified the new local competition provisions in the Communications Act (AT&T Br.

22 n.12), the jurisdictional grant of § 201(b) and § 2(b)'s rule of construction each are applicable to §§ 251-76.

Contrary to the LECs' claims, there is also no conflict between § 2(b) and § 201(b), for § 2(b) places no limitation on § 201(b)'s express grant of rulemaking authority over the provisions of the Act. Rather, § 2(b) merely provides that no provision of the Act may be "*construed* to apply *or* to give the [FCC] jurisdiction" over intrastate services. Because the substantive requirement of §§ 251 and 252 unambiguously "apply" to intrastate matters, § 201(b) and the Act's other general provisions expressly grant the FCC the same jurisdiction over those intrastate matters addressed in §§ 251-52 as it has over the interstate services to which other provisions of the Act apply. No "construc[tion]" of the Act is required to "give" the FCC jurisdiction over the requirements of §§ 251-52. Thus, the effect of § 2(b) here, as elsewhere, is to bar the FCC from asserting "protective" jurisdiction (as the ICC had done in the *Shreveport Rate Cases*, 234 U.S. 342 (1914)) over those aspects of intrastate services to which provisions of the Act do not unambiguously apply (*e.g.* the retail rates that LECs and new entrants charge their customers). See MCI Br. 45, AT&T Br. 12 n.9.

For the same reasons, the States' and the LECs' reliance on *Louisiana Public Service Comm'n* v. *FCC*, 476 U.S. 355 (1986) is misplaced. It held only that where it was unclear whether a statutory requirement (there, depreciation schedules established under § 220) applies to intrastate services, § 201(b) does not authorize the FCC to adopt regulations applying that provision to intrastate services. In this regard, §§ 251-52 no more apply to establishing the *retail* rates charged to end users than did the provisions of § 220 of the Act that were construed in *Louisiana*, so §§ 251-52 do not alter *Louisiana*'s holding that the FCC has no jurisdiction over intrastate exchange and exchange access rates.

By contrast, because all concede that §§ 251-53 apply to the intrastate as well as the interstate aspects of the new *wholesale* arrangements that will enable new entrants to offer competing exchange and exchange access services, § 201(b) authorizes the FCC to adopt regulations implementing all the requirements of §§ 251 and 252, including the requirements of § 252(c)(2) and § 252(d) insofar as they govern the arbitration proceedings that states conduct. Congress here followed this Court's holdings that there is no inconsistency between granting ratemaking authority to a state tribunal and authorizing a federal agency to adopt rules prescribing the specific standards that States are to apply in establishing rates. *Wilder* v. *Virginia Hospital Assoc.*, 496 U.S. 498, 516 (1990).

B. Section 251(d)(1) Independently Establishes The FCC's Authority To Adopt Pricing As Well As Non-Pricing Rules.

Further, even if § 201(b) and the Act's other general provisions did not give the FCC rulemaking authority over all the requirements of §§ 251-76, the FCC's authority to adopt all its pricing and other local interconnection rules would be established by § 251(d)'s requirement that the FCC "establish regulations to implement the requirements of this section" by August of 1996. As previously explained (AT&T Br. 24-25), there is no substance to respondents' various efforts to argue that the phrase "the requirements of this section" can be read to mean "only the areas in § 251 where Congress explicitly called for the FCC's involvement." States Br. 20.[1]

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[1] Remarkably, respondents also simultaneously argue that "[b]y stating that the FCC must consider certain factors 'in determining what network elements should be made available,' [section 251(d)(2)] *itself* necessarily authorizes the FCC to make such a 'determination' in the first place." Bell Atl. Br. at 39. However, if the terms of § 251(d)(2) constituted a sufficiently clear grant of authority, then the virtually identical phrase in section 251(d)(3) -- "in

(continued...)

Respondents thus now claim that even if § 251(d)(1) established the FCC's authority to adopt rules to implement "the requirements of" § 251, the FCC cannot adopt pricing rules because pricing is addressed in § 252, not in 251. Bell Atl. Br. 34; GTE Br. 31. This claim is simply wrong. Section 251 requires incumbent LECs to charge (1) prices for interconnection and network elements that are "just, reasonable, and nondiscriminatory" (2) "wholesale" rates for resale, and (3) "just and reasonable" rates for co-location. §§ 251(c)(2),(3),(4),(6). By contrast, all § 252(d) does is supply statutory standards that limit the discretion of the FCC and the state commissions and that govern the setting of prices for *some* of these arrangements in arbitration proceedings. The FCC's pricing rules thus implement "requirements" of § 251.

However, because §§ 251(c)(2) & (3) incorporate the "requirements . . . of Section 252" by reference, GTE argues that a LEC's sole duty under § 251(c) is to charge the rates that state commissions establish under the requirements of § 252 and include in interconnection agreements.[2] GTE Br. 32. But this claim, too, is foreclosed by § 251(c)'s terms. Sections 251(c)(2) & (3) require LECs to charge rates that are "just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement [established under § 252] and the requirements *of this section* [251] *and* section 252." 251(c)(2) (emphasis added). Thus, § 251(c) imposes duties on LECs to charge rates that are just and reasonable and consistent with the

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[1] (...continued)
prescribing and enforcing regulations to implement the requirements of this section" -- would itself authorize the FCC to "prescribe" and "enforce" the "requirements of" section 251. Respondents cannot have it both ways.

[2] This is also the premise of the BOCs' equally erroneous claim that § 271 of the Act does not require the FCC independently to determine whether a BOC is charging prices that satisfy §§ 251 and 252(d) in ruling on applications for long distance authority. *See* Bell Atl. Br. 41-42.

requirements of § 251 and § 252(d) as well as with the interconnection agreements that state commissions establish in arbitrations. Further, as Bell Atlantic (Br. 35) correctly states, the provisions of § 251(c)(4) and § 251(c)(6) do not even refer to § 252. In short, § 251 plainly imposes pricing requirements that are independent of both § 252(d)'s standards and the specific pricing determinations that States make in arbitration proceedings.

C. The FCC's Authority To Adopt Pricing Rules Is Not Impliedly Repealed By § 252(c), But Is Confirmed Both By Its Terms And Those Of §§ 160, 253, And 271.

Next, respondents argue that even if §§ 151, 201(b), or 251(d) granted the FCC rulemaking authority over all the Act's local competition requirements, § 252(c) of the Act takes away the FCC's jurisdiction over pricing. They contend that § 252(c) "express[ly]" grants any State that elects to conduct arbitration proceedings the "exclusive" authority to construe the Act's pricing requirements in the first instance and frees them from following FCC pricing regulations. GTE Br. 34. However, § 252(c) does no such thing. To the contrary, it expressly provides that "[i]n resolving by arbitration . . . *any* open issues . . . a State commission *shall* (1) ensure that such resolution and conditions meet the requirements of section 251 of this title, *including the regulations prescribed by the Commission*"; [*and*] (2) "establish any rates . . . according to subsection (d)." § 252(c) (emphasis added). Because pricing issues are clearly among the "open issues" that state commissions must arbitrate, § 252(c) requires States to comply with both any pricing regulations that the FCC adopts and the standards of § 252(d).

Respondents' contrary claims all rest on an attempt to give § 252(c)'s terms a meaning that they cannot bear and that is foreclosed by numerous other provisions of the Act. In

particular, they claim that § 252(c) created a "clear dichotomy between pricing and other matters." Bell Atl. Br. 23. They assert that § 252(c)(1) requires States to comply with FCC regulations in resolving any open non-pricing issues, but that pricing issues are addressed "as a separate matter" in § 252(c)(2) which, respondents claim, requires that the states "solely" follow the standards contained in § 252(d). GTE Br. 28-29. Because § 252(d) "makes no mention of the FCC" (GTE Br. 29, 32), respondents claim that the States that choose to conduct arbitrations were granted the "exclusive" authority initially to interpret the federal pricing standards. However, the Act's terms and structure foreclose any claim that there is such a "dichotomy."

Section 252(c). First, respondent's claims are foreclosed by § 252(c)'s terms. The phrase "any open issues" cannot be limited to "non-pricing issues," for the phrase does not appear in § 252(c)(1). Rather, this phrase is contained in the preamble to § 252(c), and the States' duties in resolving any "open issues" are thus defined in *each* of § 252(c)'s three subsections. Conversely, § 252(c)'s language and structure forecloses the respondents' argument that the phrase "any open issues" can be read to mean only "any non-pricing issues" and that the States' duty to follow FCC regulations applies only to non-pricing issues. Indeed, because the phrase "any open issue" applies to § 252(c)(2), respondents' claims would render it absurd. The section would then provide that "in resolving any *non-rate* issues . . . a State Commission shall . . . (2) establish [] *rates*." As a matter of simple grammar, the phrase "any open issues" must include rate issues.

Second, contrary to respondents' arguments, § 252(c)(2) does not say that States are to follow "solely" the standards contained in § 252(d) when they establish rates. The word "solely" appears only in the LECs' brief and not in § 252(c)(2)'s terms. Indeed, the other provisions of the Act -- and

respondents' own concessions -- establish that § 252(c)(2) could not permit a State to establish rates "solely" based on the standards of § 252(d). As both the States and the LECs have conceded, there are at least some FCC regulations that States must follow in setting rates. For example, respondents concede (Bell Atl. Br. 38; States Br. 33) that the FCC has the exclusive authority to determine how LECs recover costs for numbering administration and number portability. See § 251(e)(2). As the Eighth Circuit recognized, the state commissions will have to comply with the FCC's rules that govern whether or how those costs are included in rates for network elements, interconnection, or resale. Otherwise, LECs would not recover these costs, or would recover them twice. Pet App. 89a-91a. Similarly, while the Act requires LECs to provide collocation at "just" and "reasonable" rates, § 252(d) provides no standards for establishing collocation rates. These and other pricing issues can thus only be governed by the terms of § 251 and the FCC's regulations under them.

Third, rather than prescribe that rates be determined "solely" under § 252(d)'s standards, Congress linked the requirements of § 252(c)'s subsections by the conjunctive "and." That demonstrates that the FCC had it exactly right. State commissions must resolve all open issues, including pricing issues, in a manner (1) that is consistent with whatever pricing regulations the FCC chose to adopt (§ 252(c)(1)) and (2) in the case of rates, that also comply with § 252(d)'s pricing standards. That is not a "tortured reading." GTE Br. 29. That is exactly what the language Congress wrote says.[3]

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[3] Similarly, GTE's claim (p. 29) that § 252(d) "conspicuously omits any mention of the FCC" is wrong. Section 252(d)(2)(B)(ii) explicitly mentions the FCC and further confirms Congress' understanding that both the FCC and the state commissions would have a role in construing § 252(d)'s language.

Similarly, this language does not render § 252(c)(2) and the pricing standards of § 252(d) "wholly superfluous." Bell Atl. Br. 24. These sections control the resolution of all ratemaking issues that are not addressed in FCC regulations. In this regard, the FCC pricing rules before the Court in fact did not address two of the three major components of ratemaking (cost of capital and depreciation), but left those for the States to determine under only the general standards of § 252(d) and § 251(d). Sections 252(c)(2) and 252(d) apply to the resolution of all such pricing issues.

Finally, there is no basis for respondents' claim that the "drafting history" of the 1996 Act establishes that Congress nonetheless intended a "clear dichotomy" in which "pricing" was committed to the States under the standards of § 252(d) and FCC regulations governed only non-pricing issues. Bell Atl. Br. 24-25. In particular, they contend that the Senate Bill on which §§ 251 and 252 were based did not contain this "dichotomy," but would have required States to follow FCC regulations in setting rates (States Br. 25; Bell Atl. Br. 24; GTE Br. 30). But they assert the Conference Committee amended the bill to create a "clear dichotomy" between rate and non-rate issues. This contention, too, is baseless. Like § 252(c), the Senate Bill had one subsection (§ 251(d)(5)) requiring States to resolve all open issues in accord with FCC regulations[4] and a separate subsection (§ 251(d)(6)) that directed States to

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[4] Section 251(d)(5) of the Senate Bill, entitled "Action by State," provided that "In resolving any open issues and imposing conditions upon the parties to the agreement, a State shall ensure that [those requirements and conditions] are . . . consistent with the Commission's rules defining minimum standards." S. 652, 104th Cong. § 101 (1995), *reprinted in* S. Rep. No. 104-23, at 92.

establish rates also under the standards now codified in § 252(d).[5]

Sections 160, 253 and 271. That §§ 252(c)(2) and 252(d) do not repeal the FCC's authority over local pricing requirements is also vividly confirmed by other terms of the Act. First, § 160 expressly authorizes the FCC to forbear "from applying the requirements of section 251(c)" (§ 160(d)) only "if the Commission determines that (1) enforcement of [section 251(c)] is not necessary to ensure that the *charges* . . . for, or in connection with that . . . service are *just* and *reasonable*." § 160(a) (emphasis added). Section 160 thus presumes that the FCC will construe § 251(c)'s pricing requirements.

Contrary to respondents' claim (GTE Br. 36), petitioners made this argument below, and the Eighth Circuit rejected it by making the same claim that the state commissions and GTE now advance: that § 160(a) refers to "charges" "to ensure that the new regulatory forbearance measure would apply to all the charges for interstate service that the FCC has long controlled." *Compare* GTE Br. 37 & States Br. 27 *with* Pet. App. 86a. That argument, however, ignores that Congress expressly directed the FCC to apply § 160(a)'s standards in determining whether to forbear from enforcing "the requirements of § 251(c)." § 160(d). The only "charges" that would be relevant to that determination would be the charges for the facilities and services provided under § 251(c).

The BOCs thus try a different tack. They argue that § 160 authorizes the FCC to forbear from applying only the non-pricing requirements of § 251(c), and does not imply that the

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[5] Section 251(d)(6) of the Senate Bill, entitled "Charges," provided pricing standards virtually identical to those in 252(d)(1) that were to be applied whenever rates were "determined by arbitration," and made no reference to FCC regulations. *Id.*

FCC has "pricing jurisdiction." Bell Atl. Br. 41 n.22. But the BOCs, too, ignore that § 160(d) itself provides that the FCC may only forbear from enforcing § 251(c) if the FCC "determines" that the "charges" will be "just" and "reasonable." Congress could not have authorized the FCC to make that determination if it has no "role" to play in defining § 251(c)'s pricing requirements. Bell Atl. Br. 21.

Respondents likewise fail to reconcile their jurisdictional claims with § 271 and § 253. Section 271 expressly authorizes the FCC to determine the lawfulness of BOC prices in ruling on applications for long distance authority. See p. 6 n.2, *supra*. Section 253 further authorizes the FCC to "preempt" any state "order" or "requirement" whose "effect" is to create a "barrier[] to entry." § 253. Respondents do not deny that the FCC can exercise its § 253 authority to preempt state pricing requirements that have the effect of barring entry. Nor could they. A "barrier to entry" is classically defined as any condition which requires new entrants to bear costs greater than those borne by the incumbent (see R. Posner, *Economic Analysis of Law* 312 (1992)), and a State's pricing methodology that imposed excessive costs on new entrants would fall squarely within that definition. Indeed, the FCC's pricing rules rest on that very finding. J.A. 147-162 (¶ 704-723). Thus, respondents argue that § 253 authorizes the FCC to preempt state orders only through adjudication, and not rulemaking. Bell Atl. Br. 40-41; States Br. 28; GTE Br. 36. But that argument is wrong as a matter of administrative law. FCC Br. 24. More fundamentally, it misses the point. Once it is acknowledged that § 253 authorizes the FCC to preempt state pricing rules through either rulemaking *or* adjudication, the FCC cannot be denied pricing jurisdiction under §§ 251 and 252 in order to "leave[] the traditional federal-state division wholly intact." Bell Atl. Br. 28.

D. Section 2(b) Does Not Deprive the FCC of Jurisdiction Over The Pricing Requirements.

Finally, respondents alternatively argue that § 2(b) "prohibit[s] the FCC from adopting rules" implementing the Act's pricing standards. States Br. 30. However, respondents concede that § 2(b) is simply a rule of "construction" that is overcome by "straightforward" language that grants the FCC jurisdiction to regulate intrastate matters (States Br. 32, Bell Atl. Br. 28). The local competition provisions of §§ 251 and 252 concededly "apply" to "intrastate" matters, and the other terms of the Act (*e.g.*, §§ 201(b) & 251(d)(1)) are even more "straightforward" and unambiguous in "giving" the FCC "jurisdiction" over all the pricing and nonpricing requirements of these sections. *See* pp. 2-7, *supra*.

In addition, respondents are wrong in repeatedly asserting that LECs' provision of the network elements, interconnection, and other arrangements addressed in § 251(c) are "intrastate services." As petitioners' opening brief explained in detail and as no respondent denies, it was well-established prior to the 1996 Act's amendments to the Communications Act that the FCC has *exclusive* jurisdiction to set the rates and other terms by which customers obtained local loops -- and other dedicated facilities -- that the customer then used to complete both interstate and intrastate calls. AT&T Br. 5-6, 28. For example, while § 2(b) divides authority to regulate finished *services* along inter- and intrastate lines, a different rule applies when a customer leases local loops and capacity from a carrier to be used by the customer in creating a "private network." The rates for that equipment and capacity were set exclusively by the FCC whenever that network was used to complete even a single

interstate phone call.[6] Contrary to Bell Atlantic's statement (Br. 15, 30), it is not merely the case that "some" courts of appeals upheld this FCC jurisdiction. This jurisdiction was affirmed by every court of appeals decision that addressed the issue before the 1996 Act was passed, and this Court cited this line of authority with approval in *Louisiana*, 476 U.S. at 375-76 n.4.

The interconnection arrangements required by §§ 251-52 include precisely the same facilities whose rates and other terms the FCC has thus long regulated as "private lines." For example, purchasers of combinations of network elements, like the private line customers, lease local loops and associated switches and transmission capacity at a single price and use them to provide interstate as well as intrastate service. That does not mean the 1996 Act was not needed. Bell Atl. Br. 32. It means that the provision of the Act that alters the division of state and federal authority is § 253, which authorizes customers to use facilities leased under FCC regulations to provide retail services in competition with LECs. Further, while the LECs correctly state that other features of the interconnection arrangements required by § 251 (*e.g.*, wholesale services for resale and transport and termination) are generally now used only for intrastate services (Bell Atl. Br. 31), §§ 251-52 require that they be offered in conjunction with the network elements, interconnection, and co-location arrangements over which the FCC has always had exclusive pricing jurisdiction.

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[6] Like other federal agencies (*see Arkansas Elec. Coop. Corp.* v. *Arkansas PSC*, 461 U.S. 375, 383-84 (1983)), the FCC can choose to defer to state regulation. *See New York Telephone Co.* v. *FCC*, 631 F.2d 1059 (2d Cir. 1980); *Diamond Int'l Corp.* v. *FCC*, 627 F.2d 489 (D.C. Cir. 1980). Contrary to California's suggestions (Br. 44), that is what the FCC did when it followed the recommendation of the joint federal-state board and decided no longer to exercise its jurisdiction where fewer than 10% of the calls over a private line network were interstate. *MTS*, 4 FCC Rcd. 5660 (1989).

Respondents also make extended arguments that it is theoretically possible to "separate" the prices for access and interconnection into interstate and intrastate components -- with the FCC regulating them insofar as the facilities were used for interstate calls and the States setting the rates for the intrastate use of those facilities. Bell Atl. Br. 33. These claims are beside the point. Whatever alternative regime Congress might have theoretically been able to enact, §§ 251-52 provide that one set of rates would be established by one arbitrating body, and that those rates would apply to both the interstate and intrastate uses of the equipment and services at issue. That is why not a single commenter before the FCC, including the state commissions, could contend that "the FCC's role is to establish rules for only the interstate aspects of interconnection, and the states' role is to arbitrate and approve only the intrastate aspects of interconnection agreements." Pet. App. 194a-195a (¶ 92).

In sum, Congress enacted a statutory scheme over which the FCC had clear rulemaking authority under settled interpretations of § 201(b) and § 2(b). That is so both because all the Act's local competition requirements are codified in the provisions of the Communications Act over which the FCC has jurisdiction and because they apply to interstate as well as intrastate aspects of local loops and other facilities that customers obtain on an "unseparated" basis: that is, under a single set of rates applicable to the facilities as a whole. Indeed, Congress removed any doubt on the subject by providing that "[n]othing in this section shall be construed to limit or otherwise affect the Commission's authority under section 201 of this title." 47 U.S.C. § 251(i). Thus, the Eighth Circuit's judgment should be reversed both insofar as it vacated FCC rules on jurisdictional grounds and insofar as it vacated other rules on the false premise that the FCC had authority only to interpret six subsections of § 251 and not the authority under § 201(b) to

adopt whatever rules are reasonably necessary to "carry out" § 251's requirements.[7]

II. THE FCC RULES REQUIRING INCUMBENTS TO PROVIDE NONDISCRIMINATORY ACCESS TO COMBINATIONS OF NETWORK ELEMENTS ARE ALL VALID.

Section 251(c) establishes three potential modes of competitive entry: (1) constructing an alternative local network and interconnecting with the LEC under § 251(c)(2); (2) providing service through LEC network elements under § 251(c)(3); and (3) reselling LECs' retail services under § 251(c)(4). However, here, as in the Eighth Circuit, the LECs have focused virtually their entire litigation effort on challenging the FCC rules that govern the provision of combinations of network elements under § 251(c)(3). That is because these rules provide the only realistic near-term opportunity for broad-based competition to their monopolies and is essential to widespread future construction of alternative local networks that could create even greater benefits for consumers.

The reality is that any attempt now to construct alternative facilities of any significant scope would be prohibitively expensive and otherwise infeasible for even the largest new

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[7] Respondents do not dispute AT&T's showing (Br. 32-34) that the Eighth Circuit's jurisdictional holdings meant that it did not apply the standards of § 201(b) in reviewing FCC rules that were not adopted as interpretations of these six subsections. However, they claim that AT&T did not present this issue in its Petition for Certiorari. *E.g* Bell Atl. Br. 46 n.27. That is false. *See* Pet. Cert. i (Question Presented) ("Whether . . . the FCC's authority over the remaining non-pricing requirements is limited to adopting narrow interpretative rules?"); 9-10 (discussing the portions of the Eighth Circuit's opinion invalidating these rules on this basis); 13 (stating the Eighth Circuit's erroneous standard of review was one of two consequences of its erroneous jurisdictional holding).

entrants.[8] Nor does resale pose any serious competitive threat to the LECs' monopolies. The reseller may provide only the precise retail services the LEC already provides. It cannot provide the exchange access services that generate some 35% of local service revenue, and it cannot offer innovative new or other retail services that the LEC chooses not to provide. Further, resale has no effect on the LECs' monopoly profits, for the price the LEC will charge the reseller under the Act is equal to its retail price for the service minus whatever costs it avoids by acting as a wholesaler rather than a retailer. See § 252(d)(3). Resale thus protects the supracompetitive prices the LECs presently charge, precludes new entrants from providing the full range of services that LECs offer, and presents no meaningful opportunities for competitive innovation or differentiation.

Section 251(c)(3), by contrast, authorizes a new entrant to lease components of the LECs' networks at their full economic cost (including a full return on LEC investment) and to use those elements to provide any wholesale exchange services or other retail services the elements will support. This allows entry into the entire local service market, and creates genuine opportunities for competition on service quality, on innovation, and on price. Combinations of network elements have been referred to as "the platform" because they allow new entrants

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[8] *See Local Competition*, 11 F.C.C.R. 14171, 14175 (1996) (it would cost $29 billion to construct even the local facilities needed to reach only 20% of the 117 million access lines served by the BOCs). Thus, while the LECs repeatedly invoke the "facilities-based" local competitors who praised the Eighth Circuit's ruling (Bell Atl. Br. 60-61, 63-64; Ameritech Br. 38-39), these carriers have constructed only limited facilities and compete with the LECs only in the narrow high-volume niche markets where alternative facilities are economically feasible to provide exchange access and related services that are overwhelmingly used by large corporations. These carriers have no plans to engage in more broadbased competition, and it is neither surprising nor relevant that they would oppose the use of combinations of network elements that would lead to competition both in their niche markets and in other local services. *See also* ALTS Opposing Brief.

not only to provide alternatives to LECs' existing services, but also to provide new services by using the capabilities of the network elements in new ways or through facilities of their own that they connect to the network elements obtained from the LEC.

Further, while resellers obtain wholesale services at rates that reflect any subsidies (Bell Atl. Br. 8-9), § 254 requires users of network elements to make the same contributions to universal service as does the LEC or any carrier who has constructed an alternative network. Users of combinations of network elements thus will face the same costs or equivalent costs as the LEC with which they compete. They thus can have an adverse effect on the LEC only if it is charging monopoly prices for business services, exchange access, Caller ID, and other services that allegedly fund universal service -- *i.e.*, prices that exceed the sum of the costs LECs incur in providing the service and of any implicit or explicit subsidies necessary to support below-cost rates for rural or other customers.

The LECs have thus urged proposals whose sole purpose and effect would be to render network element competition economically or practically infeasible. Indeed, the LECs do not dispute that they are seeking authority to engage in discrimination by tearing apart existing combinations of network elements or by engaging in other conduct that would impose unnecessary costs solely on new entrants, degrade any services new entrants offer, allow LECs to "gate" the rate of competitive entry, and thereby protect LECs' monopoly rates. The LECs' two principal claims are that the Court should (1) uphold the Eighth Circuit's decision to invalidate Rule 51.315(b) on the ground that LECs are entitled to "unbundle" network elements by physically disconnecting them from one another, or (2) reverse the Eighth Circuit's holding that LECs may not limit the right to purchase network elements to those new entrants that have constructed some unspecified local exchange facilities of

their own. The LECs profess genuine indifference as to which extrastatutory mechanism the Court adopts to make § 251(c)(3) infeasible so long as it adopts at least one. See, *e.g.*, Ameritech Br. 22-41.

The LECs make no serious effort to argue that any of their proposed limitations is permitted, much less required, by the text of § 251(c)(3). Indeed, they urge the Court not to examine their textual and other legal arguments "in isolation" -- which GTE (pp. 51-52) calls applying *Chevron* "on an 'unbundled basis.'" Instead, the LECs argue that their crippling interpretations of § 251(c)(3) are necessary to achieve three supposed non-textual objectives of Congress: (1) preserving a separate role for the resale authorized by § 251(c)(4), (2) protecting universal service by barring firms from providing cost-based service to high-end customers and using resale to serve customers who receive subsidies, and (3) promoting facilities-based competition to the exclusion of all else. But none of these were objectives of Congress, and the LECs' proposals would not advance them even if they were.

Yet, these "policy" claims are the premise for each of the LECs' proposed interpretations of individual terms of § 251(c)(3) and other interrelated provisions of the Act. We will thus address them before discussing the LECs' individual statutory claims.

A. The Challenges To The Network Element Rules Rest On "Congressional Objectives" That Congress Did Not Have And That The LECs' Positions Would Not Advance.

The crippling interpretations of § 251(c)(3) cannot be justified by any of the three alleged statutory objectives that the LECs have hypothesized. Their specific claims not only are

unfounded when examined individually, but also contradict one another.

1. Combinations of Network Elements Are Not The Equivalent of Resale And The FCC's Rules Preserve Resale As A Meaningful Option.

The fundamental premise of the LECs' argument is that a competitor that purchases a combination of all network elements under § 251(c)(3) obtains the "identical product" as the competitor that purchases services for resale under § 251(c)(4). Bell Atl. Br. 60; see also Ameritech Br. 2, 26 (combination of network elements is "identical to what an entrant acquires when purchasing resale services"). The LECs therefore argue that, since different pricing and other rules apply to network elements and services purchased for resale, the FCC cannot have been correct in interpreting the Act to permit new entrants to purchase an "identical product" under either set of rules. The Eighth Circuit adopted this approach when it held that Congress permitted LECs to disconnect network elements in order to distinguish network elements from resale and thereby "preserve resale as a meaningful alternative." Pet. App. 56a.

But the LECs' premise is false. Because their rhetorical style is to assert disputed propositions as if they were accepted truth and not even to defend them, a reader of their briefs could not know that this precise issue was the subject of detailed findings by the FCC which rejected the LECs' assertion on the basis of a well-developed record. Pet. App. 234a-249a (¶¶ 317-341). The LECs do not acknowledge the FCC's findings or analysis, much less attempt to show that they were "arbitrary" or not based on "substantial evidence." 5 U.S.C. § 706.

As those findings make explicit, combinations of network elements are not remotely "the same" as wholesale services

obtained for resale. Carriers purchasing access to network elements obtain different things at different prices, provide different services, and assume different and greater burdens and business risks than resellers. Pet App. 244a (¶ 331) (purchasers of network elements face "different opportunities, risks, and costs in connection with entry into local telephone markets").

First, the statute itself establishes that purchasers of network element combinations under § 251(c)(3) obtain neither the "same retail services" (Ameritech Br. 16) nor the "same facilities" (*id.*) as purchasers of services for resale under § 251(c)(4). A LEC's obligation to make services available for resale is limited to the exchange or other services that the LEC in fact provides "at retail to subscribers who are not telecommunications carriers." § 251(c)(4). Network elements, by contrast, may be used -- either by themselves or in combination with the new entrant's "back office" or other facilities that it connects to them -- to provide any "telecommunications service." § 251(c)(3). In contrast to resellers of LEC retail services, users of network elements can thus provide any service within the capabilities of those facilities. They allow services that cannot be offered under § 251(c)(4) either because the LEC does not provide the services at all or because the LEC does not provide the services "to subscribers who are not telecommunications carriers."

Thus, for example, a new entrant purchasing network elements will compete in the entire local services market, including competing against the LEC's intrastate and interstate exchange access services -- the origination and termination of long distance calls -- that generate $35 billion in annual LEC revenues. A reseller cannot purchase such services for resale because they are provided to long-distance companies, not to "subscribers who are not telecommunications carriers." § 251(c)(4). Pet. App. 245a (¶ 333). And the provision of originating and terminating access requires capital investment

(by both the LEC and the new entrant) in facilities that bill and collect for exchange access services that resellers never need or pay for. Notably, these are investments that the new entrant must make before it begins providing service to its first retail customer, and that will not be recovered if the entrant is not successful in winning a sufficient number of customers with a sufficient volume of outgoing and incoming long distance usage.

In addition to exchange access services, a new entrant using network elements can use them to develop retail offerings that the LECs may have chosen not to offer, but that the network elements will support. Pet. App. 244a-245a (¶ 333); J.A. 108 (¶ 495). Resellers, by contrast, are confined to offering precisely the same services as the LEC. Although they can place competitive pressure on the LEC by, for example, being more solicitous to customers, they cannot differentiate the underlying service. Pet. App. 244a (¶ 332).

Moreover, because purchasers of network element combinations may use the LECs' network elements to create and provide advanced new services that the LECs do not themselves offer, they do not merely obtain use of the "same facilities" that the LECs use to provide services to resellers, but access additional LEC facilities as well. For example, network element competitors are entitled to access the hardware and software in a LEC's "service creation environment" (SCE) to "design, create, [and] test" such new services. J.A. 108-09 (¶ 495). The SCE is not used, however, when those new services are subsequently provided to customers -- other LEC systems fulfill that function (*id.*) -- so LECs do not employ the SCE when they provide services to resellers.

Given the substantial differences between network element competitors and resellers in what they obtain and how they use it, the Eighth Circuit engaged in a fundamentally misdirected "apples and oranges" analysis when it sought to determine, as

the LECs urged, whether the FCC's interpretation of the statute would leave network elements with sufficient "disadvantages [to] preserve resale as a meaningful alternative." Pet. App. 56a. Congress created different entry vehicles to give new entrants a range of opportunities. It could not and did not prejudge which mode of entry the market would find most attractive, and certainly did not seek to load down one vehicle with "disadvantages" in order to assure that another would be frequently used.

In all events, contrary to the LECs' main argument and the Eighth Circuit's holding, it is plain that granting new entrants access to combinations of some or all network elements would *not* lead the resale vehicle to fall into disuse -- as the FCC expressly found. Pet. App. 243a-244a (¶ 331). There are several contexts in which new entrants will find resale the most appropriate entry vehicle -- such as where particularly fast or easy entry into a market is desired, where a new entrant's business plan only involves providing a small range of services, where a new entrant can offer customers lower rates by aggregating multiple customer volumes onto a LEC volume discount plan, or where customers may be being served by the incumbent LEC at subsidized rates. Thus, even before the Eighth Circuit invalidated Rule 51.315(b), although the competitive exchange services that were being offered were small in scope (as they are now still), the overwhelming majority of them were offered through resale.

Indeed, the LECs' other arguments confirm that the resale vehicle will continue to be used, for they contend that competitors will engage in "arbitrage" by using resale to serve customers who today receive subsidies. Thus, while LECs are wrong that this conduct (mislabeled "arbitrage") would harm universal service (see *infra*), the LECs' own claims contradict the argument that the FCC's network element rules would eliminate the use of resale.

Further, as the FCC found (Pet. App. 245a-246a (¶ 334)), the greater competitive opportunities available to network element purchasers are accompanied by correspondingly greater risks. The purchaser of network elements runs the risk -- unlike a reseller -- that there will be insufficient customer demand for it to recoup its costs. A reseller purchases only the services actually used by its customer, and at a discounted rate structure that mirrors the rate structure that local services customers pay. Its profit margin, if any, is thus completely predictable in advance, and not dependent on the usage patterns of its customers.

An entrant that provides service through network elements, by contrast, has no predictable margin at all. First, the loop, the network interface device and portions of the switching network element are dedicated facilities for which LECs charge a flat rate that does not vary with the customer's usage. See, *e.g.*, 47 C.F.R. § 51.509 (a,b) (Pet. App. 312a-313a).[9] Recovery of that cost, and any profit, will depend on the new entrant's stimulating the customer's usage across the range of services the elements can provide -- which itself justifies the congressional decision to give network element purchasers (like firms who construct their own facilities) more latitude than resellers to engage in joint marketing of local and long distance service. See § 271(e)(1). In this regard, the LECs' assertion (Bell Atl. Br. 62) that these flat-rated elements need not actually be purchased by the new entrant until "a customer switches providers" is true but irrelevant. The costs -- like the costs of the additional internal systems that will have to be developed in order to provide exchange access services -- will still need to be recovered, and there is no guarantee they will be.

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[9] These FCC pricing rules were vacated by the Eighth Circuit on jurisdictional grounds, but the subsequent State rules do not differ from the FCC rules on this point.

The differences between the costs and risks of resale of LEC retail service and use of combinations of network elements is dramatically illustrated by the increasingly commonplace phenomenon of customers using on-line services (like America Online) or accessing the Internet. They do so by placing local telephone calls for which there is no additional usage or other charge, but which are included in the flat monthly service charge. If a new entrant provides service to heavy users of these services through resale of LEC services, the new entrant incurs no additional charge. By contrast, if a new entrant uses network elements, it incurs additional switching and other charges for each minute of usage -- and many customers spend scores of hours each month "surfing the Web."

Thus, in contrast to resellers of LECs' retail services, a network element purchaser can never avoid the fact that its profit or loss depends on customer usage volumes and usage patterns. Indeed, that was precisely the point made by AT&T's President in the remarks that the LEC briefs mischaracterize. See Bell Atl. Br. 52; GTE Br. 21; Ameritech Br. 24, 28. He did not say that network elements enable new entrants to obtain the "same services" at a higher "effective discount." Ameritech Br. 28. To the contrary, he stated that AT&T's "cost of goods sold" by purchasing network elements is "slightly above" the cost of purchasing services for resale, but that, *assuming* long distance usage by the customer of at least $25 a month, that added cost could be offset by revenues that AT&T could obtain by using the facilities to provide exchange access services. J.A. 257-58. In other words, he noted that by assuming a certain risk that resellers do not assume, and incurring additional cost, AT&T might reap greater rewards through purchasing network elements than through resale -- the very point made by the FCC that the LECs refuse to acknowledge.

Indeed, AT&T's President significantly understated the added costs and risks that AT&T would incur as a purchaser of

network elements, for he addressed only the payments to LECs. By contrast, he did not discuss the separate payments that purchasers of network elements will have to make to support universal service (which will be made not to LECs, but to administrators of the new funds that will collect and distribute the new explicit subsidies). In this regard, because the current wholesale rates for resale reflect all subsidies that now exist and because the cost-based rates for network elements do not, any comparisons between the two sets of rates and the resulting differences in risks would be meaningless even if it were the case -- as it is not -- that cost-based rates for combinations of network elements often or even always could somehow be said to be more favorable than those for resale.

In short, it is not the case that network element competitors obtain "guaranteed profits," avoid "incurring any of the ongoing costs associated with maintaining a real telecommunications network (costs related to such obligations as testing and repairing facilities and maintaining network records)," or avoid "undertaking any business risk." Bell Atl. Br. 52. To the contrary, the costs of maintaining, testing, and repairing facilities are part of the "cost . . . of providing" the network element that are reflected in the prices paid by new entrants (§ 252(d)(1)), and users of combinations of network elements (like owners of facilities) incur costs and risks that resellers of retail services do not.

2. Allowing New Entrants To Use Combinations of Network Elements On Nondiscriminatory Terms Poses No Threat To Universal Service.

The LECs also defend their efforts to make combinations of network elements too costly or infeasible to use on the ground that such measures are necessary to protect "universal service." The costs of providing telephone service to some customers,

particularly those in rural areas, are higher than the costs of providing service to others, and the LECs have long claimed that they need to charge supracompetitive rates to those other customers in order to subsidize the provision of service at affordable rates to the rural and other high-cost customers. This claim has played a role throughout the industry's history in every debate over regulatory efforts to foster competitive entry into monopoly markets, for the LECs have consistently opposed such efforts on the ground that any such entry would allegedly disrupt this putative subsidy system and thus threaten universal service -- a generic claim that has consistently been disproved each time entry has then occurred.[10]

Here, the claim is particularly meritless. The very purpose of the competition that the 1996 Act authorized is to assure that firms compete solely on the basis of the costs and value of their services, so § 254 of the Act eliminates the very subsidy system that the LECs are trying to invoke to prevent competition on the merits. In light of § 254, the downward pressure that new entrants will be able to place on LEC rates through competition cannot threaten universal service, and will instead bring about the very benefits for consumers the Act was enacted to produce.

Nonetheless, the LECs claim that permitting access to network element combinations on the same terms as the LECs enjoy will produce "regulatory arbitrage" that will harm universal service by allowing new entrants to "avoid contributing to the universal service subsidies." U S WEST Br. 17. In particular, the LECs claim that new entrants will then provide service at competitive and cost-based rates to the

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[10] For example, the former Bell System repeatedly contended that competition in the long distance industry would destroy the subsidies that support universal service (as it obviously has not). *See, e.g.*, "An Unusual Obligation," Address by John DeButts, Chairman of the Board of AT&T, to NARUC Annual Convention (Sept. 30, 1973), quoted in full in *Southern Pac. Com. Co.* v. *American Tel. & Tel. Co.*, 556 F. Supp. 825, 894-902 (D.D.C. 1983).

"subsidizing" customers -- *i.e.*, those customers whom the LECs currently charge supracompetitive rates -- and thereby strip the LECs of their source of subsidy for the "subsidized" customers. Accordingly, despite the statutory ban on discrimination, the LECs claim that Congress intended both to preclude new entrants from obtaining access to combinations of network elements at the same economic cost and other terms as the LECs enjoy and to authorize LECs to impose artificial costs and service disruptions only on users of network elements. For that would, the LECs reason, force entities to provide service solely as resellers of LEC services and to pay the wholesale rates that are based on supracompetitive retail rates that allegedly are needed to support universal service.

This claim is a sham. First, it is contradicted by the LECs' startling assertions that the Congress that passed the 1996 Act decreed that local telephone networks are no longer natural monopolies and expected broadbased competitors with their own networks to develop quickly. U S WEST Br. 2-3. That is implausible, to say the least.[11] If it were so, however, it would simply demonstrate that Congress did not craft § 251, or any other portion of the Act, to protect the LECs' alleged inter-service subsidy system. Under the LECs' view, the facilities-based competitors that Congress "expected" would present precisely the same alleged "threat" to universal service as network-element-based competitors, but there would be no means of imposing artificial costs on them that would force them to become resellers. Indeed, the hypothetical new facilities-based competitors would, if anything, have a greater ability than a user of network elements to offer rates based on

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[11] It would have been an extraordinary and ill-founded assumption, and the snippets from Committee reports and the floor statements the LECs cite for this proposition hardly reveal what Congress "expected" (U S WEST Br. 8 & n.4). The LECs are making the preposterous assertion that Congress could repeal the laws of economics.

the costs of providing service and to compete successfully with the LECs for the business of those customers the LECs presently overcharge. This underscores that the LECs' real quarrel is with the Act's requirements that network elements be available at their economic cost.

In all events, the LECs' claim is baseless with respect to either category of competitor. Section 254 invalidates the very system of inter-service subsidies that the LECs are purportedly seeking to protect. Specifically, § 254 requires that any implicit subsidies (*i.e.*, those embedded in the LECs' existing retail or other rates) are to be replaced by a new, explicit and separate government-administered "universal service fund." See Report and Order, *Federal-State Joint Board on Universal Service*, 12 F.C.C.R. 8776 (1997) ("*Universal Service Order*").

There are four separate aspects of this new regime that each refute the LECs' arguments. *First*, the LECs' repeated assertions that purchasers of network elements will "contribute nothing to universal service" are false. Compare GTE Br. 11, 21, 51; Bell Atl. Br. 51; U S WEST Br. 17. Network element purchasers will incur the same proportionate expenses of funding universal service as LECs (*Universal Service Order*, 12 F.C.C.R. at 9173-9179). They thus will contribute their "fair share" and have no unfair pricing advantage over the LECs. *Second*, when the LEC (and also any purchaser of network elements) provides service to rural or other customers at the "affordable" below-cost rates that are prescribed to protect universal service, the LEC or other carrier will be paid the full amount of the subsidy from the government administrated universal service fund. *See Universal Service Order*, 12 F.C.C.R. at 8861-70. Network element competition thus cannot threaten universal service by depriving LECs (or others) of sufficient source of subsidy.

Third, because the LECs' supracompetitive rates today far exceed what is necessary to recover their costs, to earn a reasonable profit, and to fund universal service, the competition from users of combinations of network elements will patently benefit consumers. Unlike resellers, users of network elements will not have their cost structure based on the LECs' rates and will be able to place substantial downward pressure on excessive rates. That cannot harm universal service, but that will help achieve the precise competitive benefits the Act was enacted to create: lower, competitive prices for consumers.[12] *Fourth*, if it were feasible, there would be nothing wrong with new entrants competing with the LECs by serving all customers whom LECs serve at below-cost rates through resale and serving all other customers through network elements. *Compare* Bell Atl. Br. 62-63. Because the new entrant would make universal service contributions to the fund when it used network elements and because the LEC would receive universal service subsidies from the fund when it served the below-cost customer, there would be no threat to universal service and also no advantage for the new entrant.

Ultimately, therefore, the LECs' entire argument is reduced to an alleged concern about the timing of § 254's implementation. While Congress sought to foster the most rapid possible implementation of interconnection arrangements under §§ 251-

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[12] The LECs incongruously rely on a statement in the House report that the resale rate "should reflect whether, and to what extent, the local dialtone service is subsidized by other services . . . or subsidized through explicit subsidies from a universal service fund." *See, e.g.*, Bell Atl. Br. 50 (citing H.R. Rep. No. 104-204, at 72 (1995)). However, the most this could establish is that, when a particular local service is subsidized, the resale rate for those customers must be based on the LECs' retail rate, for competition through resale would otherwise not be economically possible. By contrast, the House Report patently did not say or even imply that competitors should be able to compete for the business of the customers who do the *subsidizing* -- *i.e.*, those who presently pay rates that far exceed costs -- only through the resale under § 251(c)(4) that would protect the LECs' monopoly profits.

52, the Act did not require the FCC simultaneously to establish and implement all elements of the new universal service system, and the FCC maintained the existing support mechanisms for an interim period. In particular, some of those mechanisms will be maintained until January 1, 1999, at which time providers of interstate services will begin making the competitively neutral universal service payments. See *Universal Service Order*, 12 F.C.C.R. at 8889, 8927. Similarly, while States are permitted to require all carriers to make interim or permanent payments based on their revenues from intrastate services (*id.* at 8888-8889), neither the Act nor the FCC's current rules compel the States to establish any particular schedule. For this latter reason, the LECs claim that the absence of a fully implemented replacement universal service system could theoretically "persist indefinitely," and that § 251(c)(3) should be interpreted to preserve the pre-existing subsidy structure for funding universal service indefinitely. Bell Atl. Br. 49.

That is absurd. Congress evidently recognized what the FCC subsequently found, and what events have borne out: there is no prospect of the rapid and massive growth of local competition through network elements that would be required to place any pressure on universal service during that short interim period. See *Access Charge Reform*, 12 F.C.C.R. 10175, 10184 (1997). More fundamentally, even in the unlikely event that this finding proved incorrect, the FCC and the States could then provide adequate interim remedies. Yet the LECs' theory rests on the nonsensical assumption that the States who have historically protected universal service would then stand idle and permit "massive [upward] pressure on the rates of [rural and residential] customers" simply because States are not *mandated* to act by a particular time. Bell Atl. Br. 50.

Even the LECs do not take this possibility seriously, for they do not propose any transition plan to deal with this contingency. Instead, they seek to use a remote theoretical possibility of a

short-term problem permanently to distort the application of § 251(c)(3) and transform it into an indefinite barrier to the only form of competition that is now feasible on a widespread basis. Beyond that, the LECs' proposed "solution" is a classic blunderbuss, for the costs it would randomly add to a critical means of competitive entry are not remotely calculated to match any possible or imagined universal service shortfall. In short, the LECs' universal service claims provide no support for their proposed interpretation of § 251(c)(3). Rather, they could support, at most, the adoption of transitional measures under § 254 to protect against a highly improbable contingency.

3. If There Were A Congressional Objective To Promote Facilities-Based Competition, The FCC Rules Would Further It.

Finally, it is both misguided and ironic for the LECs to claim that artificial and discriminatory burdens must be imposed on users of combinations of network elements in order to further a claimed congressional objective of encouraging facilities-based competition. Congress plainly would have had no reason to seek to encourage the building of duplicate facilities that are not economic or that market forces and conditions otherwise would not permit. The Act evinces no such objective. Instead, it imposes separate requirements to facilitate three different modes of entry (§§ 251(c)(2-4)) while "neither explicitly nor implicitly express[ing] a preference" among them. Pet. App. 137-38a (¶ 12). The only way the LECs can argue otherwise is by stringing together trivial and out-of-context snippets of legislative history. See, *e.g.*, U S WEST Br. 8 n.4.

In all events, new entrants do not need incentives to choose their own facilities over the LECs'. No new entrant wants to be dependent on its dominant competitor, to have such diminished control over its own operations, and to assume all the litigation

and monitoring costs such a relationship entails. New entrants will therefore obtain their own network facilities wherever and to whatever extent they are economically and technologically feasible under actual market conditions -- and AT&T, MCI, and others are actively engaged in these very efforts.

Further, the LECs' position would not accelerate, but would undermine, the development of alternative networks, for allowing unrestricted use of combinations of network elements on the same terms as the LECs enjoy is an essential bridge to that outcome. In particular, it is only through purchasing and actually using network elements that the new entrant can determine the cost and usage volume of each component, obtain information (through its provision of originating and terminating access) concerning the volume of calls that are not only made by its customers but also received by them, and establish whether and when it is economical to substitute facilities of its own for the LEC's. The reseller, by contrast, obtains information only about the customer's outgoing long-distance calls, and virtually no information about its local usage or its incoming long-distance calls, and will have thus have much greater difficulty transitioning to using its own facilities. In short, whatever the sincerity of the LECs' new-found enthusiasm for facilities-based local competition, it affords no basis for their efforts to cripple § 251(c)(3).

B. The LECs' Specific Statutory Claims Are Meritless.

Against this background, it is scarcely surprising that the terms of the Act squarely authorized the FCC to adopt rules that allow firms to obtain and use combinations of network elements on the same terms as the LEC enjoys. There is simply no textual or other basis for any of the LECs' attempts to cripple this mode of competitive entry.

1. The LECs' Arguments For Invalidating Rule 51.315(b) Are Meritless.

First, there is no substance to the LECs' attempts to defend the Eighth Circuit's decision to invalidate Rule 51.315(b). As explained in our opening brief (p. 38), § 251(c)(3)'s requirement that LECs provide access to "network *elements*" (in the plural) at any "technically feasible *point*" (in the singular) clearly establishes that new entrants can obtain access to network elements in combination. The Eighth Circuit not only disregarded this language, but rested its decision on a definition of "unbundled" that is foreclosed by the uniform dictionary, regulatory, and judicial definitions of the term. *Id.* at 38-42.

None of the LECs makes any serious attempt to reconcile the Eighth Circuit's holding with § 251(c)(3)'s use of the singular and the plural.[13] Nor do they cite a single instance in which anyone has adopted the Eighth Circuit's definition of the term "unbundled." GTE states (p. 67) that "even in the antitrust and related contexts" which petitioners cited, "unbundling" meant "requiring a firm to provide goods on a separated basis." But that is true only in a sense that sharply distinguishes it from the result the LECs seek here: firms were required to "separate[]" goods only when the customer so requested. As the decisions cited in petitioners' opening briefs establish, "unbundling," there

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[13] The only LEC brief that even addresses this language is Bell Atlantic's, and it tries to brush it aside in a footnote (p. 58 n.31). It states that a new entrant could somehow receive access to all physically separated elements in a single collocation cage in the LEC's central office. That is both wrong and irrelevant. It is wrong because not all the elements are even located in the central office; the network interface device, for example, is located at the customer's premises. J.A. 72, 75-76 (¶ 380, 392). It is irrelevant because, even if all the elements could somehow be made available in one *place*, as long as they are separated from one another the new entrant will still obtain access to them at multiple *points* rather than at a single point.

as here, meant giving the customer that option, not ripping combinations apart against its will in order to raise its costs.[14]

The principal focus of the LECs' argument is the second sentence of § 251(c)(3). As we demonstrated in our opening brief, it was plainly reasonable for the FCC to conclude that a LEC would violate the first sentence's command that network elements be provided through "nondiscriminatory access" and on "nondiscriminatory" "terms" if the LEC separated elements that it accessed for itself in combined form -- because then the new entrant would incur costs to provide service "that incumbent LECs would not incur" to provide the same service. AT&T Br. 36 (citing *Local Competition*, 12 F.C.C.R. 12460, 12486, ¶ 44 (1997)). The duty imposed on LECs by the second sentence is an additional obligation that applies in those circumstances in which they may lawfully separate elements, either because they are requested to do so by the new entrant or because they separate the elements when they access the elements themselves. LECs are here obliged to provide the elements "in a manner that allows requesting carriers to combine [them]." *Id.*, at 43-46.

The LECs contend, however, that the second sentence establishes not an additional duty, but a limitation on the nondiscrimination duty imposed by the first sentence. *See* Bell Atl. Br. 55-56; GTE Br. 70. But the only way they can make that argument is by rewriting the statute. Bell Atlantic thus describes § 251(c)(3) as saying "in no uncertain terms" that

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[14] For the same reason, the LECs' citations (*e.g.*, U S WEST, Br. 51-52) to passages addressing how network elements could be separated if the customers so requested are obviously irrelevant to whether § 251(c)(3) permits such separation in the absence of such requests. And it is particularly odd that GTE would claim that the FCC has "repeatedly" used "unbundling" to mean "physically separate[d]," and then cite only a single FCC order that was issued after the Eighth Circuit's decision and that sought, as the FCC was then required, to apply that decision. *See* GTE Br. 68 & n.24.

LECs must provide access to network elements "*only* 'in a manner that allows requesting carriers'" to combine them (emphasis added). See also GTE Br. 66 (same). But the word "only" is Bell Atlantic's and GTE's contribution, not the statute's. And it is precisely because this word is absent from the second sentence of § 251(c)(3) that it can only naturally be read to impose an additional obligation and not to limit the duty imposed by the first sentence.

The LECs also claim that, even apart from the second sentence, the FCC misconstrued the nondiscrimination requirement of the first sentence when it concluded that a LEC engages in unlawful discrimination when it insists upon disconnecting elements for new entrants that the LEC accesses for itself on a combined basis. According to the LECs, because the LECs at some point in the past had to combine their elements to build their networks, requiring competitors to connect the network elements they purchase merely puts the LECs and their competitors on an equal footing -- with neither having an "inherent cost advantage" over the other. Bell Atl. Br. 56; U S WEST Br. 52.

This is nonsense, First, LECs are not placing their competitors on an equal footing, for any customer that signs up with a LEC competitor will experience a service outage during the period of time before elements are reconnected and thus virtually no customers will switch away from the LEC. Second, LECs are entitled to recover all the costs of furnishing network elements, so their prices for combinations of network elements can and should include the economic costs of combining them. There is thus no "cost advantage" for the new entrant when the LEC refrains from ripping the elements apart.

Third, by contrast, if the LEC disconnects the elements -- even if it were then to "back out" the costs of combining network elements from the network element price -- it creates

for itself an insurmountable and discriminatory cost advantage by imposing added costs on the new entrant that the LEC has never incurred. In this regard, it is no answer to say that the LEC at one point built its network and combined its elements so its competitor can too; that is like saying that the new entrant should build its own loops, switches, and other facilities because the LEC once did so. The whole theory of the Act is that the LECs' monopoly customer volumes create for them enormous economies of scale. Those economies are what previously made competition with the LECs impossible because the LECs' costs would always be lower than any new entrant's. Indeed, the LECs built their networks at a time when they had monopolies that were guaranteed by law, when all customers were theirs as a matter of right, and when any reasonable expenditure they made on their networks would be included in their rate base and recovered from their captive customers. Congress sought in § 251(c)(3) to overcome this otherwise dispositive obstacle to competition by requiring that those economies be "shared with entrants." Pet. App. 137a (¶ 11). But the LECs would now require new entrants, with initially only a fraction of the LECs' customers, to reproduce the LECs' prior network-building activities and to incur the labor and other costs to wire the LECs' facilities on a customer-by-customer basis in order to compete. That would impose discriminatory costs on the new entrants that would far exceed any per-customer costs the LECs either incur today to provide service to a new customer, or incurred in the past when their networks were constructed. It would further assure that no competition to their monopolies can arise.

2. The LECs' Arguments For Imposing a Facilities-Ownership Requirement Are Meritless.

Next, the LECs have cross-petitioned on a claim that the Eighth Circuit rejected: that only competitors with some local

exchange facilities of their own should be permitted to provide service through network elements under § 251(c)(3). But this claim rests only on the "policy" arguments that are refuted above. See *supra* pp. 19-33. Further, there are two additional reasons that this claim is meritless.

First, it is contrary to the statute's text. The Eighth Circuit was correct in concluding that "the plain language of Section 251(c)(3) indicates that a requesting carrier may achieve the capability to provide telecommunications services completely through access to the unbundled elements of an incumbent LEC's network." Pet. App. 55a. The Act's interconnection provision -- § 251(c)(2) -- *does* require that the competitor own or lease facilities, for it requires interconnection "for the facilities and equipment of any requesting telecommunications carrier." § 251(c)(2). By contrast, "[n]othing in [§ 251(c)(3)] requires a competing carrier to own or control some portion of a telecommunications network" (Pet. App. 55a) before being permitted to purchase network elements. Indeed, § 251(c)(3) affirmatively precludes such a requirement. In contrast to the Act's "interconnection" provision, § 251(c)(3) requires LECs to provide network elements to "*any* requesting telecommunications carrier," not just to carriers that have already obtained local exchange facilities. (emphasis added) Further, the Act defines "telecommunications carrier" as "any provider of telecommunications services" (§ 153(44)), and in turn defines "telecommunications services" as "the offering of telecommunications for a fee directly to the public . . . *regardless* of the facilities used." § 153(46) (emphasis added). The right to purchase network elements thus extends to all competitors irrespective of whether they provide service through their own facilities or the LEC's facilities.

The LECs ignore this language, and rely instead on § 251(c)(3)'s requirement that access to network elements be provided "at any technically feasible point." *See, e.g.*, Bell Atl.

Br. 58. Their argument is that if a competitor does not have some local exchange facilities of its own, there is no "point" at which it accesses the LEC's network elements.

That claim is baseless, for new entrants without routing and transmission facilities still use "technically feasible point[s]" of access to employ the LEC's network elements. In particular, such new entrants interconnect and obtain access through the LEC's operations support systems ("OSS"). These are the systems that control the ordering, provisioning, operations and maintenance of the other network elements, and all carriers that use LEC network elements, including carriers that provide service exclusively through LEC network elements, need to access the LEC's OSS in order to use its other network elements. J.A. 116-18 (¶ 516-518). The FCC has therefore directed that BOCs, and all LECs, must provide "a point of interface (or 'gateway') for the competing carrier's own internal operations support systems to interconnect with the BOC."[15]

Thus, for example, a new entrant that purchases access to the LEC's switching element to serve a customer uses that OSS interface between itself and the LEC to add or remove calling features -- such as Call Waiting or Caller ID -- to or from its customer's line by sending software instructions through electronic and physical connections to the switch. Similarly, a new entrant will use its OSS interface to perform direct electronic or automatic testing of the loop if the customer reports an outage. Indeed, because it is generally through these

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[15] See *Ameritech Michigan Order*, 12 F.C.C.R. 20543, 20615 (1997). The LECs challenge in this case the FCC's classification of OSS as a network element. While that challenge is meritless, *see infra* pp. 44-48, it is irrelevant to the issue presented here. OSS interfaces would be a point of access to other network elements even if the OSS were not itself a network element. J.A. 117-18 (¶ 517) ("nondiscriminatory access to the functions of operations support systems" is "a 'term or condition' of unbundling other network elements under section 251(c)(3)").

interfaces that the new entrant is able to direct the operations of the network elements it accesses, the FCC has devoted particular attention to specifying in great detail what LECs must do to assure that proper access through OSS is provided.[16]

Second, as the FCC found, the LECs' proposed restriction on the purchase of network elements could not rationally be administered. If the FCC simply required new entrants to own some facility, no matter how trivial in size or scope, the requirement would be "so easy to meet it would ultimately be meaningless." Pet. App. 248a (¶ 339). On the other hand, if the FCC required a specific level of investment in particular facilities, the statute would provide no guidance on what that level should be. And any such requirement, in addition to being inherently arbitrary, would have the additional adverse effect of "creating incentives to build inefficient network architectures that respond not to marketplace factors, but to regulation." *Id.* The LECs do not attempt to refute, much less acknowledge, this ground for the FCC's decision.

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[16] *See, e.g., Ameritech Michigan Order*, 12 F.C.C.R. at 20617-18:

> A BOC also is obligated to provide competing carriers with the specifications necessary to instruct competing carriers on how to modify or design their systems in a manner that will enable them to communicate with the BOC's legacy systems and any interfaces utilized by the BOC for such access. The BOC must provide competing carriers with all of the information necessary to format and process their electronic requests so that these requests flow through the interfaces, the transmission links, and into the legacy systems as quickly and efficiently as possible. In addition, the BOC must disclose to competing carriers any internal "business rules," including information concerning the ordering codes that a BOC uses that competing carriers need to place orders through the system efficiently. Finally, the BOC must ensure that its operations support systems are designed to accommodate both current demand and projected demand of competing carriers for access to OSS functions.

Indeed, the difficulties of administering the LECs' proposed extrastatutory restriction is illustrated by the LECs' own conduct. For example, contrary to the LECs' claims, AT&T's entry strategy does not involve purchasing from the LECs "*all* the network elements needed to replicate [the LEC's] service." Bell Atl. Br. 52. While AT&T's entry plans vary in different areas of the country depending on market and other conditions, at a minimum AT&T would use its own operator service facilities in combination with LEC network elements, rather than purchasing access to that element from the LECs, for AT&T believes it can thereby provide more competitive service at higher quality and efficiency. Such an entry strategy would comport with all the LECs' arguments here, for AT&T would be contributing network facilities of its own that would interconnect with the LECs' facilities at a "technically feasible point" even under the LECs' restrictive understanding of that term. Yet the LECs have claimed that operator service facilities should not be deemed a sufficient contribution of AT&T's own facilities -- because permitting their proposed restriction to be met in that way would not sufficiently inhibit its entry. This just underscores how manipulable, unmanageable, and arbitrary the LECs' proposed restriction would be.

Beyond that, AT&T will use its own switches to serve virtually all large business customers. It is also seeking to invest more than $10 billion to obtain other local switches and transmission facilities to serve business customers and multi-dwelling units in numerous cities. It will have to make substantial investments in backoffice and other facilities to use combinations of network elements to serve the residential or other customers that it intends initially to serve through combinations of LEC network elements (and its own operator systems), and will deploy other facilities to serve these customers whenever feasible. Apart from the "policy" arguments that are refuted above, there is no statutory or other basis for deeming *any* of the foregoing investments to be

insufficient to entitle a carrier to use combinations of network elements to serve any customers. This competition could only result in the imposition of some competitive pressure on LECs' monopoly prices in the time before additional facilities are deployed.

3. The FCC Properly Designated Network Elements.

The LECs further challenge the FCC's decisions defining several individual network elements, as well as one aspect of the standard it used in making those determinations. The Eighth Circuit properly rejected each of these claims.

a. The Section 251(d)(2) Factors. Section 251(d)(2) sets forth two factors that the FCC must, "at a minimum," "consider" in "determining what network elements should be made available": (A) if the element is "proprietary," whether access to it is "necessary," and (B) if the element is not proprietary, whether the failure to provide access will "impair" a requesting carrier's "ability . . . to provide the services that it seeks to offer." § 251(d)(2). However, the LECs contend that these terms codify the "essential facilities" doctrine of the antitrust laws (Bell Atl. Br. 67; U S WEST Br. 33-34), and that the FCC acted unreasonably when it held that its application of these factors would focus on determining whether a new entrant that is denied a network element can obtain the same functionality from another element within the LEC's network, rather than examining its availability from other sources.

The FCC's application of these factors was manifestly reasonable. First, § 251(d)(2) plainly does not codify the "essential facilities" doctrine. If Congress had wished to do so, it could easily have said so (or used equivalent terms and concepts): *e.g.*, by providing that "the claimed input must be essential to the plaintiff's survival in the market." 3A Phillip E.

Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 773b, at 202 (revised ed. 1996). Instead, it defined "network element" broadly to encompass any "facility or equipment used in the provision of a telecommunications service." § 153(29). It then imposed no limits on the elements that the FCC could define, but merely directed the FCC to "consider" (1) whether the unavailability of nonproprietary facilities would "impair" any competing carrier's ability to provide a service and (2) whether availability of a "proprietary" facility would be "necessary." The FCC reasonably defined "impair" to mean that the failure to declare a LEC facility to be a network element would lower the quality or increase the costs of any competitor's service, and it reasonably defined "necessary" to mean that the element is a prerequisite to competition. J.A. 50-55 (¶¶ 282-287). The Eighth Circuit upheld these definitions, and they represent accepted meanings of these terms.

Further, § 252(d)(2) had not "forbidden" anything (compare GTE Br. 62), and the FCC patently did not violate its provisions by declining to consider whether network elements could be independently built or obtained. The economic barriers that enabled LECs to maintain their monopolies arose not because duplication of their networks is physically impossible, but rather because no new entrant has the traffic volumes that would enable it economically to duplicate the facilities that the LEC controls. That is why the Act requires LECs to share those economies with new entrants. By the same token, if new entrants could generally obtain local loops, switches, or other functionalities more efficiently from sources other than the LEC -- and there is no serious claim that they

now could[17] -- the FCC reasonably concluded that the new entrant would do so.

b. Operations Support Systems ("OSS"). OSS are the databases and associated hardware and software that the LECs use, among other things, to input orders from customers, to assign telephone numbers, to track the facilities that provide customers with service, to test and coordinate maintenance of those facilities, and to convert the recorded customer usage information into bills. They are an essential part of providing telecommunications services, and are used by LECs in filling orders placed by new entrants for network elements as well as services to be resold.

When a customer moves into a new home and calls up the incumbent LEC to order phone service, the sales representative that answers the call can access the OSS immediately to obtain the necessary information, and to program the network to provide service, through a computer terminal on his or her desk. For example, the sales representative will use that terminal to (1) verify the customer's location on the telephone network, (2) assign the customer a telephone number, (3) assign the particular facilities that will be used to provide service to that customer, and (4) program the switch in the telephone network to provide whatever special features, such as Call Waiting, the customer requests. If the customer later calls to complain of a service outage, a different representative can access OSS to conduct an automated test of the customer's line, and, if necessary, to program into the maintenance schedule a visit to the customer's home. Many of these systems are thus connected electronically to the facilities that route calls within

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[17] For example, U S WEST states (p. 9) that switches can be easily built. But the FCC found -- and U S WEST's FCC comments did not dispute -- that the failure to provide the switch as a network element would erect a substantial "entry barrier." J.A. 85-86 (¶ 411).

the network, and allow the LEC representative to program or test those facilities with a few keystrokes. These LEC personnel can thereby confirm that service has been turned on, give the new customer a telephone number, or tell the customer when a service visit will be made, in the same telephone call in which the customer first contacts them.

When a new entrant is providing a customer with service through network elements or resale, the incumbent LEC still owns and controls access to the underlying facilities. Thus, a competitor cannot advise the customer of his or her new telephone number, commit to a schedule for providing or repairing a service, or even know which specific facilities are serving that customer until it first accesses the LEC system and obtains the necessary information. Nor can the customer receive service unless and until someone inputs the customer's order into the LEC's systems.

Before the FCC, the LECs did not deny that competitors must have access to this information and the ability to send orders and other instructions to the LEC. But they contended that they should be able to preclude competitors from connecting to the LEC systems electronically, as the LECs themselves do, and should be free to use far slower and more error-prone methods of transmission, such as facsimiles, mail, and hand-deliveries -- at which point the LECs themselves, at whatever schedule they chose, would key in the orders and requests for information to their systems. J.A. 113 (¶ 506). The FCC rejected this claim. It held that LECs must give competitors "nondiscriminatory" access to the critical information in those systems and to the ability to input instructions to the LEC facilities through those systems. If LEC sales representatives can access these systems electronically and provide immediate information to customers during the initial customer contact, competitors must have the same electronic access so that their sales representatives can provide the same information to their customers. *Id.*, ¶ 523.

If, by contrast, customers had to wait longer when dealing with competitive carriers than with LECs -- hours or days as opposed to minutes -- the LECs would have an insurmountable competitive advantage. The FCC thus concluded that the LECs' control over the essential ordering, provisioning and maintenance systems is as significant a "barrier to entry" as their control over the remainder of their networks (*id.*, ¶ 516); that nondiscriminatory access to these systems is "vital to creating opportunities for meaningful competition" (*id.*, ¶ 518); and that without such access "competing carriers will be severely disadvantaged, if not precluded altogether, from fairly competing" (*id.*). J.A. 116-18.

The FCC found that nondiscriminatory access to OSS was required on three independent grounds: (1) that the systems are within the definition of "network element" because they are "databases" or "facilit[ies] . . . used in the provision of a telecommunications service" (see § 153(29)); (2) that the systems are within the definition of "network element" because the information they contain is "information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service" (*id.*); and (3) that nondiscriminatory access to these systems is necessary to the statutory requirement that LECs provide nondiscriminatory access to *other* network elements or to services for resale. *Id.*, ¶ 517. J.A. 117-18.

The LECs contend that the FCC's interpretation of the statutory term "network element" to include OSS was unreasonable under *Chevron*. Even if that were so, they would have no valid claim, for that challenges only the first two grounds for the FCC's decision. The LECs do not address, much less refute, the third independent ground on which the FCC relied, which does not depend upon whether OSS are

classified as network elements.[18] Nor would it suffice if they address the issue for the first time in their reply brief, for the only claims they raised in the Eighth Circuit and the only questions presented and discussed in their cross-petitions was whether OSS was properly defined as a "network element."

Moreover, even if the LECs' claim were not foreclosed by this independent ground, their claim is meritless. Its basis is the LECs' assertion that network elements are limited to parts of the "call-routing network" (GTE Br. 58) that facilitate "the transmission of calls" (Bell Atl. Br. 70). That assertion is wrong, and would be irrelevant even if it were right. The statutory definition rejects the notion that "network elements" are limited to call delivery and transmission. To the contrary, they include all facilities and equipment "used in the *provision* of a telecommunications *service*" (§ 153(29) (emphasis added)), and the statute defines "telecommunications service" as not only transmission but also "the *offering* of telecommunications for a fee directly to the public." § 153(46) (emphasis added). The breadth of this definition was deliberate, for Congress limited other statutory terms to "transmission" and "routing" where that was its intent.[19] Further, if the matter were not already abundantly clear, the statutory definition also expressly includes among its examples "databases" and "information sufficient for

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[18] Indeed, that ground is irrefutable. The FCC has held, in a rule no party has ever challenged (47 C.F.R. § 51.311(b)), that "nondiscrimination" requires that the quality of access that the LEC provides to new entrants be at least equal to the quality of access the LEC provides to itself. If it takes longer for a LEC to supply access to a network element or a service to be resold, or to repair it, when it is supplied on behalf of a new entrant's customers than when it is supplied on behalf of its own customers -- as it will if the LEC does not provide nondiscriminatory access to its OSS -- then the LEC has not complied with the nondiscrimination requirement for that element or service.

[19] *E.g.*, § 153(43) (defining "telecommunications" as limited to "transmission"); § 251(c)(2) (duty to interconnect "for the transmission and routing of telephone exchange service").

billing and collection or used in the transmission, routing, or other provision of a telecommunications service." Finally, OSS would be a network element even under the LECs' proposed definition, for OSS controls the assignment, tracking, maintenance, and repair of call-routing facilities, and are certainly "part of the call-routing network." GTE Br. 58.

The LECs also assert that OSS are their "business skills" (GTE, p. 59) and are "backroom functions that any new competitor could reasonably perform for itself." US WEST, p. 37; *see id.*, p. 38 (competitors "can write or buy software as easily as the incumbent can"). But OSS are not software systems used to track marketing performance, administer pension benefits, or maintain personnel records. They are the systems used to order and repair the very facilities and services to which the LEC is required to grant access. Nothing in the FCC's *First Report and Order* relieves new entrants of the need to build their own internal hardware and software systems to serve their customers. The only issue is whether those systems and the LECs' systems will be able to converse efficiently when the new entrants need information that resides exclusively in LEC databases, and when the new entrants need to place orders or issue other instructions to the LECs.

c. Vertical Features. The LECs also challenge the FCC's holding that the "switching element includes all vertical features that the switch is capable of providing." J.A. 87 (¶ 412). That holding was likewise a straightforward application of the statute. Specifically, special calling features such as Caller ID and Call Waiting are provided to customers through the operation of hardware and software that reside within the LECs' switches, just as basic calling capabilities are provided through switch hardware and software.

No one disputes that the switch facility is a network element, and the statutory definition of network element expressly states

that an element "includes" all "features, functions and capabilities" of the pertinent facility. § 153(29). There is no material difference in this respect between the switch features, functions, and capabilities that are used to provide dialtone and call routing, for example, and the switch features, functions, and capabilities that are used to provide Caller ID and Call Waiting -- and certainly no legal basis to exclude either when the switch is provided as a "network element." All are "features," "functions," and "capabilities" of the same switch.

d. Operator Service Facilities. The LECs' next challenge Rule 51.319(g), which provides that "operator service facilities" are network elements. These facilities are clearly "network elements" under § 153(29), for they are "equipment used in the provision of a telecommunications service." Indeed, they are part of the very "call-routing network" that the LECs erroneously contend is the sole repository of network elements (*see supra* p. 47), for these facilities are used to route calls.

GTE focuses (p. 57) on the fact that, in a minority of instances (most operator services, such as calling card services, are wholly automated) these facilities will connect a caller to live operators who will use the facilities to route calls. They contend that it is an "absurdity" to make "people" part of a network element. But all network elements require live persons to operate them.

Finally, the LECs contend that these facilities, and the vertical features discussed *supra*, are a "service" and should be made available only through resale. But the Act does not remotely draw the sharp distinction between "facilities" and "services" that the LECs suggest: that is why it provides that network elements include not only "facilities" but all their "capabilities" (which includes the services they can provide) (§ 153(29)), and why the competitive checklist applicable to the BOCs requires that they offer, for example, local loop facilities "unbundled

from local switching or other *services*" (§ 271(c)(2)(B)(iv) (emphasis added); *see also* § 271(c)(2)(B)(v-vi)). And the Eighth Circuit was surely correct in upholding as reasonable the FCC's conclusion that the fact that a functionality can be labeled a "service" does not mean that it is exempt from the requirement that it be made available as a network element, for under such a holding the LECs could "entirely evade the unbundling requirement in section 251(c)(3)" by choosing to market network elements as "services" to end users. J.A. 41 (¶ 263).

III. THE FCC's "MOST FAVORED NATION" RULE IS VALID.

In their opening briefs, Petitioners demonstrated that the FCC's "Most Favored Nation" rule correctly interprets § 252(i), and is at the very least reasonable. Remarkably, not one of the Respondents so much as acknowledges, much less responds to, the textual basis for the FCC's rule -- that § 252(i) draws a clear distinction between elements "provided *under* an agreement," which must be made available to others, and the "agreement" itself. Respondents' inability to demonstrate that Congress' language unambiguously forecloses the FCC's interpretation shows that the Eighth Circuit erroneously invalidated this rule.

CONCLUSION

For the foregoing reasons, the judgments of the court of appeals (1) holding that the FCC lacks jurisdiction over pricing and other intrastate local competition matters; (2) vacating 47 C.F.R. § 51.315(b); and (3) vacating the FCC's interpretation of 47 U.S.C. § 252(i) should be reversed, and the portions of the Eighth Circuit's decision vacating various unbundling rules under the wrong standard of review (AT&T Br. 32-34) should be vacated and remanded for reconsideration. In all other respects, the judgment should be affirmed.

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IN THE

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Petitioners,

v.

IOWA UTILITIES BOARD, *et al.*,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF OF THE ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES, *et al.*

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ARGUMENT

While the FCC's *Local Competition Order* contains many determinations that were challenged on the merits by the incumbent telephone companies at the Eighth Circuit, only two portions of that order were singled out when the incumbents requested and obtained a stay: (1) the FCC's pricing rules, and (2) the FCC's interpretation of section 252(i), which provides "most favored nation" treatment for individual portions of interconnection agreements.[1]

[1] This reply brief addresses only the Respondents' arguments (continued...)

But the importance attributed to section 252(i) by the incumbents during the stay proceedings below has disappeared from their briefs on the merits. SBC, Bell Atlantic, and BellSouth, representing five of the seven original regional Bell Operating Companies, devote only three pages to this issue at the end of their seventy-five page brief, and the other incumbents are similarly silent.[2] The Association for Local Telecommunications Services and its members joining this brief respectfully suggest that the incumbents are attempting to hide what they cannot defend.[3] Section 252(i) remains a key portion of Congress' pro-competitive scheme, and this Court should take care to uphold the FCC's implementation of this provision.

Under the familiar two-phase test of *Chevron*, a reviewing court looks first to statutory language to support an agency's interpretation, and only in the absence of that language does it turn to "the structure and language of the statute as a whole." *Chevron, U.S.A. v. NRDC*, 467 U.S. 837, 842 (1984), quoting *National R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 417 (1992). The FCC's rule requiring that individual portions of interconnection

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[1](...continued)
concerning section 252(i). ALTS supports the arguments of other petitioners concerning: (1) the FCC's jurisdiction to adopt pricing rules; (2) the FCC's definition of network elements, including Operations Support Systems; and (3) the FCC's definition of "necessary" in regards to network elements.

[2] *See* SBC Brief at 72-75; U S WEST Brief at 53-57; GTE Brief at 71-73. The issue goes unmentioned by Ameritech.

[3] ALTS is a national trade association representing facilities-based providers of competitive local telecommunications services.

agreements be made available to requesting carriers is grounded in the specific language of section 252(i):

> "A local exchange carrier shall make available *any interconnection, service, or network element* provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement." (Emphasis supplied.)

Thus, the plain language of the statute demonstrates that requesting carriers are entitled to obtain any particular network element or service provided "under the agreement," and need not accept the agreement in its totality. The Eighth Circuit's opinion, by contrast, in effect rewrites the statute to read: "A local exchange carrier shall make available any agreement approved under this section to which it is a party to any other requesting telecommunications carrier." Congress, however, did not write section 252(i) this way, and the contrast between the Eighth Circuit's version and the language Congress actually chose fully establishes that the FCC's reading passes the first phase of *Chevron*.

Among all the incumbents, only GTE responds to this fact, claiming that "While the court cast its analysis under the second step of *Chevron*, it would also have properly fit under the first. Examination of the structure and purposes of a statute is one of the 'traditional tools of statutory construction,' *Regions Hospital* v. *Shalala*, 118 S. Ct. 909, 915 (1998)" (GTE Brief at 73 n.26). This is a profound misapplication of *Chevron*. Once the Eighth Circuit found support for the FCC's rules in "the language of subsection 252(i) in isolation ..." (Pet. App. 25a), its task was completed and the rules should have been affirmed. It would effectively destroy *Chevron's* first phase if reviewing courts could disregard black letter law supporting agency action, and turn

instead to an enactment's "structure and purposes."

Unable to counter the firm grounding of the FCC's rules in the statute, the incumbents focus instead on the second phase of *Chevron*.[4] While these claims are irrelevant given the vindication of the FCC's rules under the first phase of *Chevron*, they are also unsupported by the structure of the Act and unfounded for several reasons. *First*, the incumbents portray themselves as champions of the negotiation process, and attack the FCC rules for permitting requesting carriers to substitute terms from other agreements that are different from terms that were bilaterally negotiated earlier by the requesting carrier. According to the incumbents, this extends the negotiating process impermissibly because incumbents must negotiate knowing that individual items will have to be made available to other requesting carriers. U S WEST Brief at 56; GTE Brief at 73; SBC Brief at 74.

This is advice from foxes about how to build a henhouse. As the FCC correctly observed, it is the new entrants that are injured by any resultant delay in the negotiations process, not incumbents seeking to preserve their $100 billion a year monopoly. (Pet. App. at 263a.) Only the new entrants would have standing to complain about any delay produced by the FCC's rules.

Second, the incumbents claim the rules would render interconnection agreements "not binding" because new entrants could substitute individual portions from other new entrants' interconnection agreements for the portions of their own negotiated agreements dealing with the same topic. US WEST Brief at 56-57; SBC Brief at 73. But the interpretation

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[4] SBC never mentions *Chevron* in its section 252(i) discussion, and bases its defense of the Eighth Circuit solely upon policy arguments (SBC Brief at 72-75).

of section 252(i) being urged by the incumbents -- the substitution of an another new entrant's *entire* agreement instead of only selected portions -- would work an even greater change on existing contracts. Plainly, the incumbents cannot complain about the abrogating effect of the FCC's rules while supporting a position with even greater effect. More fundamentally, however, the incumbents' claim that negotiated contracts are rendered "not binding" by section 252(i) is simply wrong. "Most favored nations" clauses are commonly included in privately negotiated trade, procurement, and labor contracts without rendering any of these devices "not binding." Indeed, Congress has elsewhere employed statutory mechanisms for analogous purposes -- for example, the Robinson-Patman Act assures that smaller retailers obtain wholesale prices similar to those offered larger firms (15 U.S.C. § 13a). Whatever debate might exist about the wisdom of Congress' intervention in markets, such mechanisms have never been overturned on the ground that they render private contracts "not binding."[5]

Third, the requirement of the FCC's rules that individual items of interconnection agreements be provided to all requesting carriers so long as there are no appreciable differences in the underlying cost of provisioning, is neither so novel nor so dramatic as the incumbents suggest.[6] Rather,

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[5] *United States Trust Co. v. New Jersey*, 431 U.S. 1, 15 n.23 (1977), cited by incumbents in support of their claim, holds only that it would be an "absurdity" under ordinary contract law to conclude that sovereign entities had somehow implicitly reserved a right *not* to pay contractual obligations at the same time they issued express obligations to pay.

[6] *See* SBC Brief at 73: " ... this bizarre rule;" U S WEST Brief at

(continued...)

it is simply the general non-discrimination obligation that has been applied to the incumbents' regulated services for more than a century, now extended to the contractual interconnection arrangements whereby incumbents supply wholesale services to new entrants. 47 U.S.C. § 202(a). Because these contracts typically contain multiple services and network elements, the disaggregated "most favored nations" right created by section 252(i) is an appropriate and necessary mechanism to insure non-discrimination in the incumbents' provisioning of wholesale services.

CONCLUSION

For the foregoing reasons, the FCC's rules implementing section 252(i) of the Telecommunications Act of 1996 should be upheld.

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[6](...continued)
55: "It precludes meaningful negotiation of binding agreements ...;" GTE Brief at 73: "By artificially compartmentalizing every issue, the FCC's rule ignores the reality of bargaining ...."

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INTRODUCTION AND SUMMARY OF ARGUMENT

Respondents and cross-petitioners impermissibly ask this Court to recreate national telecommunications policy *de novo*. Avoiding any serious analysis of the statutory text and ignoring the compelling factual and policy findings of the Federal Communications Commission ("FCC"), the incumbent local carriers (joined by the state commissions only on the jurisdictional issue) demand a series of judicially imposed restrictions that appear nowhere in the Telecommunications Act of 1996 (the "1996 Act" or "Act"), and serve only to protect their entrenched interests. It is hardly surprising that the incumbent carriers would seek to derail efforts to end their longstanding monopolies, or that state utility commissions would be unhappy about Congress' decision to limit their prior authority to prescribe the substantive law governing competition in intrastate markets. But this case is not about whether Congress or the FCC made the best policy choices. The issue here is whether Congress foreclosed the FCC from implementing the 1996 Act in the way that the FCC has. *See Regions Hosp. v. Shalala*, 118 S. Ct. 909, 915-16 (1998). On that question, respondents and cross-petitioners are virtually silent.

The incumbent carriers' attempt to replace the statutory text and the FCC's expert policy judgments with their own policy preferences is most transparent in their attacks on the FCC rules implementing § 251(c)(3), the provision requiring incumbents to lease unbundled elements of the local network. Those attacks rest on the premise that entry into local markets through the use of unbundled elements should be discouraged because such entry would threaten the existing scheme of implicit universal service subsidies and create disincentives to pure facilities-based competition. For these reasons, the incumbents demand four specific restrictions: (i) no leasing of existing combinations of network elements; (ii) no leasing of *any* network elements unless a new entrant already has facilities of its own; (iii) no leasing of critical features, functions and capabilities of the network; and

(iv) no leasing of network elements that are theoretically "available" from a source other than the incumbent.

The Act, however, does not suggest, much less impose, the restrictions the incumbents demand. Had Congress wanted to impose them, it could easily have done so in plain English. There is no reason to think that Congress wanted to preserve the status quo of monopoly service and implicit subsidies until some distant future time when (or if) competing ubiquitous physical networks have been built. To the contrary, Congress wanted to ignite competition as "quickly as possible," [1] and (as even the incumbents' own lawyers have acknowledged) legislated an end to the insupportable scheme of hidden subsidies that was the sole remaining justification for shielding the incumbent carriers from competition. *See* P. Huber, M. Kellogg & J. Thorne, *The Telecommunications Act of 1996*, at 55 (1996) (praising the Act's "long overdue" reform of "the universal service guarantee [that] has evolved into a rat's nest of implicit subsidies and accounting sleight-of-hands utterly unsuited to a competitive marketplace"). Nor did Congress view the prospect of the immediate reduction of implicit subsidies as a threat requiring remedial statutory impediments. Instead, in § 254 of the Act, Congress mandated explicit, competitively neutral regulatory mechanisms that would fund universal service in ways that did not impede the rapid emergence of competition. Thus, there is simply no basis for concluding that Congress foreclosed the FCC from implementing the 1996 Act's unbundling requirements in a manner that would jumpstart local competition.

Respondents' efforts to deny the FCC any authority to implement the Act's pricing requirements are likewise an attempt to rewrite the statutory text in the service of policy preferences that Congress nowhere articulated. The statutory text unambiguously gives the FCC authority to implement all requirements of the 1996 Act. Section

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[1] H.R. Rep. No. 104-204 at 89 (1995) ("H. Rep.").

251(d)(1) of the 1996 Act authorizes the FCC to implement the requirements of § 251, including the substantive requirement that rates be "just, reasonable, and nondiscriminatory." Section 201(b) of the Communications Act grants the FCC authority to implement all provisions of the Act—including §§ 251 and 252. Thus, the FCC would lack authority to issue pricing regulations only if other statutory language clearly restricted these plenary grants of authority. None does.

Respondents' arguments ultimately rest on the incorrect theory that the 1996 Congress wanted to maintain the division of regulatory authority previously established by the 1934 Communications Act. That argument ignores reality. The 1996 Act dramatically changed the prior regulatory regime in which federal law governed interstate matters and state law governed intrastate matters. Congress expressly preempted state laws that restricted competitive entry into local markets (§ 253), and supplanted state laws governing intrastate carrier-to-carrier relations with federal requirements designed to foster local competition (§§ 251(c) and 252(d))—including, specifically, requirements governing the prices incumbents could charge new entrants for use of the existing network. Congress made clear that the FCC, in "implementing and enforcing" these new substantive requirements, could preempt state laws that were inconsistent with them or that hindered achievement of their purposes. § 251(d)(3). Congress also denied state courts any power to review state commission decisions under § 252 of the Act, and mandated federal court review of those decisions. § 252(e)(4), (6). Thus, it is simply not plausible to argue that the FCC was guilty of "breaching a 60-year old statutory barrier that Congress had purposely left in place" when it passed the 1996 Act. Brief of Bell Atlantic Corporation, et al. (hereinafter "BA") at 2. Congress—not the FCC—breached that barrier.

Respondents' reliance on § 2(b) of the 1934 Act does not advance their case. The issue here is quite different than the one they pose; it involves the respective roles of

the FCC and state utility commissions in implementing *federal* law. In particular, the issue is whether as a result of § 2(b), after Congress has already prescribed law governing intrastate matters and granted the FCC general implementing authority, Congress must go further and specify expressly that the FCC's rulemaking authority extends to all of the particular intrastate matters indisputably governed by federal substantive law. Section 2(b) does not impose such a requirement. Instead, the requirements of § 2(b) are met when Congress indicates its intent in a "straightforward" and "unambiguous" manner. *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 377 (1986). There is no basis for respondents' attempts to read § 2(b) as imposing an additional rule that Congress make its intent "express." Just as Congress made clear (though not express) that the local competition provisions *apply* to intrastate matters, Congress plainly intended the FCC to have jurisdiction to implement those provisions. Moreover, in *Louisiana*, the Court relied on § 2(b) to deny the FCC the authority to exercise *ancillary* jurisdiction to regulate beyond where Congress had legislated. The case does not hold that even where Congress has enacted federal requirements to govern intrastate matters, the FCC lacks authority to implement those federal requirements absent an additional, and express, grant of specific authority to regulate.

ARGUMENT

I. THE INCUMBENTS' CHALLENGES TO THE FCC'S "UNBUNDLING" REGULATIONS ARE WITHOUT MERIT.

The incumbents devote most of their briefs to arguments designed to disable § 251(c)(3). The gist of their case is that the statutory language Congress employed in § 251(c)(3) (which sets forth the leasing obligation) and § 153(29) (which defines "network elements"), if given its ordinary meaning, would make it too easy for new entrants immediately to begin offering competitive service—and compete away monopoly profits—by leasing unbundled elements. They argue that Congress instead

intended to establish only two avenues to enter the local market—either undertaking the staggeringly expensive task of building a duplicative local network (which might bring about real competition in the distant future), or following the far easier route of reselling the incumbents' existing services (which does not threaten incumbents in any serious way). The right to lease unbundled elements was, in their view, merely a means by which new entrants could temporarily obtain discrete pieces to fill in gaps as they struggled through the long, slow process of building their own networks. The FCC's decision to give the text of § 251(c)(3) its ordinary meaning, thereby making leasing unbundled elements a robust entry strategy, the incumbents argue, was a grave error because it allowed for *real* competition—which would drive retail rates to cost—in the short term. According to the incumbents, the 1996 Act contemplates a much slower transition to competition, thus preserving for the indefinite future the current system of rate averages and implicit subsidies. Until new entrants have their own networks, the incumbents contend that they should be able to compete only by using the Act's resale option, which does not threaten the existing rate structure.

This central theme animates each of the incumbents' challenges to the FCC rules implementing § 251(c)(3). First, the incumbents defend the Eighth Circuit's invalidation of Rule 315(b) on the ground that new entrants must be made to bear the senseless and discriminatory cost of reconnecting the elements needlessly ripped apart by the incumbents, because otherwise leasing network elements might become an economically feasible means of competing away the incumbents' supracompetitive profits. Second, the incumbents attack the Eighth Circuit's affirmance of the FCC's decision that new entrants may lease network elements even if they do not yet have any of their own facilities, again arguing that new entrants will be able to erode too quickly the incumbents' monopoly profits. Third, the incumbents argue that the FCC made too much of the network avaliable for lease.

Finally, the incumbents assert that the FCC made it too easy for new entrants by allowing them to lease particular unbundled elements of the existing network even when those elements might be available (at a higher price) from another source. These particular complaints form the substance of incumbents' rhetorical claims that the FCC has authorized "sham unbundling" and read resale out of the Act.

Although the incumbents colorfully describe the FCC's rules as a "wrecking ball" demolishing carefully crafted statutory restrictions on the Act's leasing provisions, the truth is that the statutory text contains no such restrictions. That is critical, for (though the incumbents never mention it) the FCC's interpretation of § 251(c)(3) and § 153(29) is subject to judicial invalidation only if (i) Congress has spoken to " 'the precise question at issue' " and foreclosed the agency's interpretation, or (ii) that interpretation is arbitrary and capricious or otherwise unreasonable. *Regions Hosp.*, 118 S. Ct. at 915 (quoting *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984)). In evaluating the FCC's unbundling rules, judicial deference is particularly warranted, both because Congress directly delegated to the FCC the task of implementing the Act's unbundling requirements, *see United States v. O'Hagan*, 117 S. Ct. 2199, 2217 (1997), and because these issues involve a "complex and highly technical regulatory program" and "necessarily require significant expertise and entail the exercise of judgment grounded in policy concerns." *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (quotation omitted). Indeed, deference should be at its zenith because (as will be shown) the incumbents' unbundling arguments ultimately rest on disagreements with the FCC's findings and predictive judgment about how market participants will behave. *See FCC v. National Citizens Comm. for Broad.*, 436 U.S. 775, 813 (1978) (deference especially appropriate for findings "of a judgmental or predictive nature").

With respect to each of the incumbents' challenges to the FCC's unbundling rules, there is no plausible argument that the statutory text unambiguously forecloses the FCC's interpretation. Nor have the incumbents shown that the FCC's rules are arbitrary or capricious, or otherwise unreasonable. In the rulemaking process, the incumbents vigorously pressed their demands for delaying local competition, preserving implicit subsidies, and creating artificial incentives for competitors to construct competing networks by burdening other possible entry strategies. But the FCC chose to implement the Act's unbundling requirements so as to jumpstart local competition. The FCC did so only after making appropriately detailed findings that its rules would not "read resale out of the Act" or otherwise threaten the legitimate interests of the incumbents. The FCC was not insensitive to the incumbents' policy pleas. But it made clear that the preservation of universal service would be accomplished as Congress intended—through the explicit, competitively neutral mechanisms mandated by § 254 of the Act—and not by subverting the goal of immediate competition in local markets. The 1996 Act did not deny the FCC that policy choice, and reviewing courts are not in a position to second-guess it.

A. The Incumbents Have Not Demonstrated That the Text of § 251(c)(3) Unambiguously Forecloses the FCC's Decision to Impose Rule 315(b), Or That the Rule Is Arbitrary And Capricious Or Otherwise Unreasonable.

The incumbents make only a half-hearted effort to defend the Eighth Circuit's invalidation of Rule 315(b). They do not take issue with most of what was said in petitioners' opening briefs. They do not even mention (much less try to satisfy) the governing legal standard set forth in *Chevron*. Nor do they even acknowledge the FCC's detailed findings made in support of Rule 315(b).

The best the incumbents can do by way of textual analysis is to argue that the FCC's interpretation of § 251(c)(3) is not the only possible reading. More

specifically, they assert that the statutory term "unbundle" in the first sentence of § 251(c)(3) can mean "physically separated," and that "separately priced" is therefore not "the only reasonable" interpretation of the term. BA 54. That hardly suffices. Under *Chevron*, an agency has the discretion to adopt *any* reasonable interpretation of a term, and past agency usage and multiple dictionary definitions are powerful indications that the agency's construction is reasonable.[2]

To buttress their argument that "physically separated" is the better reading, the incumbents argue that the requirement in the second sentence of § 251(c)(3) that incumbents "shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements," must be read as authorizing the lease of individual elements *only* in a physically separated form. But that is not what the statute says. The incumbents read into § 251(c)(3) the qualifier "only," a word that does not appear in the text.[3] The FCC reasonably read the second sentence of § 251(c)(3) to mean that *when* a competitor wishes to combine elements on its own in order to reconfigure the elements, the incumbent must allow the competitor to do so. It does not follow that elements which are already combined must be ripped apart for no valid economic reason. The incumbents' different construction of § 251(c)(3) "is not an inevitable one," *Regions Hosp.*, 118 S. Ct. at

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[2] Elements that can be unbundled for use by a lessor at a separate price typically—though not inevitably—*can* be made available as physically separate items. It is therefore hardly surprising that the FCC on occasion has discussed the mechanics of separating elements that are to be unbundled.

[3] *See* BA 53 ("the 1996 Act says in no uncertain terms that incumbents need *only* provide 'access to network elements on an unbundled basis' and *only* in a 'manner that allows requesting cariers to combine such elements' ") (emphasis added); GTE 66 (section 251(c)(3) "concludes by specifying that incumbents are required to provide elements *only* 'in a manner that allows requesting carriers to combine such elements' ") (emphasis added).

916-17, and does not provide a basis for invalidating Rule 315(b).

Nor have the incumbents dealt with the conflict between their definition of "unbundled" and the nondiscrimination requirement of § 251(c)(3). The incumbents contend that it is not discriminatory to force new entrants to bear the cost of reconnecting elements the incumbent has ripped apart, because the incumbents did not "stumble[] on their networks already constructed and combined." U S West 52; *see also* BA 56. In other words, they argue that by being forced to put the network back together, a competitor is doing no more than what the incumbent had to do when it initially constructed the network. But that is to ignore the economies of scale that alone made it possible for the incumbents to construct their extensive networks—economies that the leasing provisions allow new entrants to share. In any event, as the incumbents know, when a competitor leases a network element, the cost of connecting that element to the rest of the telephone network has already been built into the lease price of that element.[4] As a result, when a competitor is forced to reconnect network elements the incumbent has ripped apart, it is paying twice, while the incumbent has paid only once (and has already been fully reimbursed for the competitor's share of that cost). Moreover, competitors' customers suffer a loss of service during the reconnection process, while the identically situated Bell Atlantic customer does not. That is the very definition of discrimination, prohibited by the plain terms of § 251(c)(3).

Because the text does not help them, the incumbents resort to the argument that the Court of Appeals' deci-

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[4] For example, as Bell Atlantic testified in Maryland at the proceeding through which element prices were set, included as part of the element price of the wire loop that connects the residence to the switch is a "central office termination cost," which represents the cost of connecting the loop to the switch at the central office. Testimony of E. Beard for Bell Atlantic-Maryland, Inc., MD PSC Case No. 8731-II at 5 (Jan. 10, 1997).

sion was appropriate because it "provides a bulwark against the total elimination of Congress' distinction between unbundled elements and resale." U S West 48; *see also* GTE 50. As we demonstrate below, however, there simply is no basis for the incumbents' predictions that the FCC's rules will eliminate the distinction between unbundled elements and resale. *See infra* pp. 14-16. In any event, that concern cannot possibly justify the Eighth Circuit's hopelessly overbroad "bulwark." Rule 315(b) applies to a competitor's request to lease *any* two elements in combination, not only to a request by a competitor with no facilities of its own to lease all of the network elements necessary to provide service, the so-called "platform" of elements the incumbents wrongly assert is the functional equivalent of resale. The invalidation of Rule 315(b) is thus a grossly overbroad response to the policy concern the incumbents have raised. Knocking out every existing combination of network elements merely to prevent new entrants from relying *entirely* on leased elements has enormously harmful marketplace consequences. MCI, for example, has invested nearly two billion dollars in local facilities, and had intended to offer its own new services through its own facilities and facilities leased in combination from the incumbents. The Eighth Circuit's invalidation of Rule 315(b) has dramatically inflated the cost of MCI's entry strategy, even though by no stretch of the imagination could that strategy be described as the functional equivalent of resale. In sum, it was hardly unreasonable for the FCC to reject the incumbents' policy-based arguments against Rule 315(b).

B. The Act Does Not Make Ownership of Facilities a Prerequisite to Leasing Unbundled Elements.

The incumbents' attack on the FCC's refusal to read a facilities-ownership requirement into § 251(c)(3) suffers from the same flaws as their arguments against Rule 315(b): the statutory text does not unambiguously foreclose the FCC's reading, and it was reasonable for the FCC to reject the incumbents' policy arguments. Indeed, incumbents' pejorative assault on what they call

"sham unbundling," and their arguments that the FCC's rule will "read resale out of the Act"—and thereby threaten their cherished subsidies—amount to nothing more than a disagreement with the predictive judgments of the expert agency. But the FCC made detailed findings supporting its approach, and the incumbents have advanced nothing but *ipse dixit* in response.

1. *The Eighth Circuit Correctly Concluded That the FCC's Interpretation Is Not Unambiguously Foreclosed by the Statutory Text.*

The incumbents have not shown that the text of § 251(c)(3), either standing alone or in context, "has directly spoken to the precise question at issue" and unambiguously foreclosed the FCC's interpretation. *See Chevron*, 467 U.S. at 842-43. In upholding the FCC, the Eighth Circuit relied upon the "plain language" of § 251(c)(3), which expressly imposes on incumbents "[t]he duty to provide, to *any* requesting telecommunications carrier . . . nondiscriminatory access to network elements on an unbundled basis at any technically feasible point." § 251(c)(3) (emphasis added); *see also* Pet. App. 55a. Indeed, the Eighth Circuit agreed with the FCC that a "facilities ownership" requirement is *foreclosed* by that plain language, which "is cast exclusively in terms of obligations imposed on incumbent LECs, and . . . does not discuss, reference, or suggest a limitation or requirement in connection with the right of new entrants to obtain access to unbundled elements." *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 F.C.C.R. 15499 at ¶ 294 (1996), Pet. App. 242a ("*Local Competition Order*").

The incumbents never address the FCC's reading of "any telecommunications carrier." Instead they rely on entirely different statutory language, which requires incumbents to provide access to "network elements . . . at any technically feasible point." § 251(c)(3). This language, they assert, shows that Congress contemplated that competitors would have their own facilities to con-

nect with leased facilities. But this is not an argument based on what the text says; it is an argument based on what the incumbents claim the text presupposes. Had Congress wanted to restrict leasing to carriers who owned facilities, it surely would have imposed the intended restriction directly—as it did in the immediately preceding section of the Act. *See* § 251(c)(2) (imposing a duty to provide interconnection only for carriers that own or lease facilities).

In any event, the text does not support incumbents. The statute merely imposes a duty on incumbents to make their network elements available in a way that enables competitors to interconnect with them if that is what competitors want. Elements provided under § 251(c)(3) will, of course, be used by new entrants that do have their own facilities; the statutory language on which the incumbents rely assures that these new entrants will be able to interconnect their elements with those they lease. And, it is equally true that a new entrant relying exclusively on leased elements would require a technically feasible point of interconnection with the incumbent's operational support systems—the computers and databases that run the local network. Otherwise it would be unable to order the elements, bill for them, and connect the leased elements to long-distance networks. Thus, the inference upon which the incumbents rely is untenable.

Nor are the incumbents correct that the broader "context" of § 251 compels the facilities-ownership limitation they seek to impose. As the incumbents would have it, a facilities-ownership requirement must be read into § 251(c)(3) because the absence of such a requirement "effectively nullifie[s]" the Act's resale provision (§ 251(c)(4)), in contravention of the canon of statutory construction that a statute should be interpreted so as to give meaning to all of its parts. BA 2. But for two reasons that canon of construction is inapplicable.

First, the FCC's reading of § 251(c)(3) will have the effect the incumbents claim only if the incumbents are correct in their self-serving predictions that resale will

always be more expensive and otherwise less desirable than combinations of network elements. In other words, the incumbents' nullification argument depends on a series of empirical assumptions about contingent possibilities. That is not, in any meaningful sense, an argument about the statutory text, but is, instead, an argument about the reasonableness of the factual findings and policy judgments the FCC made in concluding that its approach would not read resale out of the Act. As will be demonstrated, the incumbents have raised no meaningful challenge to those findings and judgments, and thus they must be affirmed as reasonable. *See infra* pp. 14-21.

Second, the incumbents' own arguments make clear that the FCC's reading does not nullify the Act's resale provision. The very point of their "regulatory arbitrage" argument is that new entrants will use resale to compete for customers whose rates are presently subsidized, *see* U S West 45 ("because competitors can obtain subsidized services at a discount from the below-cost rates incumbents must charge, competitors can resell them at comparably below-cost prices"), while relying on unbundled elements (which are priced at cost-based rates pursuant to § 252(d)(1)) to compete for classes of customers whose rates generate the subsidies. Thus, even if the incumbents' views are correct, resale will remain the preferred option for competing for some classes of customers. Whatever else might be said of such an argument, it does not involve the " 'emasculat[ion of] an entire section' of a statute." BA 60 (quoting *Bennett v. Spear*, 117 S. Ct. 1154, 1166 (1997)).

In sum, because the incumbents' construction of § 251 (c)(3) "is not an inevitable one," the FCC's contrary view must be upheld so long as it is reasonable. *Regions Hosp.*, 118 S. Ct. at 916-17. The FCC's interpretation easily passes muster under that deferential standard.

2. *The FCC's Decision Not to Impose a Facilities Ownership Limitation Was Not Arbitrary and Capricious Or Otherwise Unreasonable.*

The incumbents have not shown that the FCC acted in an arbitrary or unreasonable manner in rejecting their demand that only new entrants with their own facilities be permitted to lease unbundled facilities.

First, the key premise of the incumbents' argument—that resale will always be more expensive than relying exclusively on network elements—is wrong. In some states, the price of the "platform" of all of the elements combined together is lower than the resale price. But in others the resale price for new entrants is *less* than the cost of leasing only the wire loop and port on the switch connecting the home to the switch, without even considering the cost of switching and the other elements necessary to provide service.[5] Furthermore, much of the attractiveness of using elements today results from the fact that lessors can compete in the highly profitable market for exchange access—charging long-distance companies for the use of the local lines needed to begin and end long distance calls—while resellers cannot. But this is not a permanent state of affairs; competition will reduce the price of access. When that happens, different market conditions will prevail, and market participants will make new calculations about the relative merits of building, leasing elements, or reselling existing services.

Second, resale and relying exclusively on leased elements are not "functional equivalents." As the FCC

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[5] For example, the monthly resale price for providing residential service in Texas ranges from $6.39 to $8.66. *See Southwestern Bell Telephone Company Texas Local Exchange Tariff, 3.1.1 Residential Service*, at 3 (issued Jan. 27, 1995) (effective March 3, 1995); *Petition of MFS Communications*, Docket Nos. 16189 *et al.*, Arbitration Award, at 17-19 & Appendix B (Pub. Util. Comm'n Tex. Nov. 7, 1996). In contrast, the cost of leasing the loop and switch port alone is $17.05—almost double the highest resale rate. *Petition of MFS Communications*, Docket Nos. 16189 *et al.*, Arbitration Award, at Appendix B (Pub. Util. Comm'n Tex. Dec. 19, 1997).

found, resellers and lessors face entirely "different opportunities [and] risks." *Local Competition Order* ¶ 331, Pet. App. 244a. "[C]arriers reselling incumbent LEC services are limited to offering the same service an incumbent offers at retail." *Id.* ¶ 332, Pet. App. 244a. On the other hand,

> a carrier offering services solely by recombining unbundled elements can offer services that differ from those offered by an incumbent. For example . . . carriers using unbundled elements can bundle services that incumbent LECs sell as distinct tariff offerings, as well as services that incumbent LECs have the capability to offer, but do not, and can market them as a bundle with a single price. The ability to package and market services in ways that differ from the incumbent's existing service offerings increases the requesting carrier's ability to compete against the incumbent and is likely to benefit consumers. . . . These services, however, are not available for resale under section 251(c)(4) of the 1996 Act.

Id. ¶ 333, Pet. App. 244a-245a (footnotes omitted). Moreover, a competitor who leases the full "platform" of elements to provide service can combine the leased network in any way it sees fit, while the reseller can only use the network exactly as it is configured by the incumbent. Respondents contest none of this.

Indeed, the incumbents do not really argue that these two entry vehicles are the same. The essence of their position is that relying on leased elements is in every respect superior to resold service, and therefore to "preserve" resale, only competitors who already own some of their own facilities should be able to lease elements. *See, e.g.*, BA 62. In its order, however, the FCC concluded that resale did not need "protection," because although carriers "taking unbundled elements may have greater competitive opportunities than carriers offering services available for resale, they also face greater risks." *Local Competition Order* ¶ 334, Pet. App. 245a. As the FCC explained:

> A carrier purchasing unbundled elements must pay for the cost of that facility. . . . It thus faces the risk that end-user customers will not demand a sufficient number of services using that facility for the carrier to recoup its cost. (Many network elements can be used to provide a number of different services.) A carrier that resells an incumbent LEC's services does not face the same risk. This distinction in the risk borne by carriers entering local markets through resale as opposed to unbundled elements is likely to influence the entry strategies of various potential competitors.

Id.

The incumbents would have this Court reach precisely the opposite conclusion, on the theory that because all necessary elements can be leased on an "as needed" basis, lessors "need bear no risk of demand fluctuation." BA 62. But such a bold assertion, unsupported by any record evidence, provides no basis for overturning the FCC's contrary findings as arbitrary and capricious. Moreover, it is simply not the case that all elements may be leased on an as needed basis. The local loop, the "port" that connects the loop to the switch, and other elements are all priced at flat rates. Additionally, to compete in the market for exchange access, new entrants must lease facilities and develop billing and support systems the cost of which may or may not be recouped, depending on how much long distance service their customers use. In sum, just as the FCC determined, unlike a reseller, a lessor has no predictable margin, and faces the risk of unused capacity. For all of these reasons, competitors have chosen and will continue to choose to resell rather than to lease in a variety of market settings: for example, when the customer is receiving a subsidized rate, or when the competitor needs quick or easy entry into the market. The incumbents' argument to the contrary ignores the record and misstates the facts.

Third, the incumbents have nothing to say about the FCC's administrative and policy justifications for rejecting the facilities-ownership limitation on § 251(c)(3).

The FCC determined that such a limitation would be "administratively impossible" because "it would not be possible to identify the elements carriers must own without creating incentives to build inefficient network architectures that respond not to marketplace factors, but to regulation" and any such limitation "would likely be so easy to meet it would ultimately be meaningless." *Local Competition Order* ¶ 339, Pet. App. 248a. The FCC also concluded that such a restriction would artificially limit competition to those few markets that could "efficiently support duplication of some or all of the incumbent LEC's networks." *Id.* ¶ 340, Pet. App. 249a. Unable to respond to a single one of these conclusions, the incumbents instead berate the FCC for "seek[ing] shelter in policy arguments of [its] own." BA 63. That is, however, the FCC's job.

Fourth, and most importantly, it was eminently reasonable for the FCC to reject the incumbents' argument that the absence of a facilities-ownership restriction on § 251 (c)(3) will "subvert[] the important goal of preserving universal telephone service," BA 2, by subjecting the monopoly retail rates that allegedly fund such service to competitive pressures. The very point of the Act is to create local competition that will drive down those supracompetitive prices. As the incumbents themselves acknowledge, "[i]nterservice subsidy arrangements were economically sustainable only because the States preserved . . . legal barriers to entry." BA 4. Congress understood that the existing system of alleged implicit subsidies would not survive in a competitive market, and intended to replace it with a system of subsidies that "should be explicit, rather than implicit, as many support mechanisms are today." H.R. Conf. Rep. No. 104-458 at 131 (1996) ("Conf. Rep.").

The incumbents nevertheless insist that Congress intended this change to come gradually, so that states would have a "potentially lengthy period" of time, BA 50, in which to make the transition to a system of express "universal service" subsidies. In particular, they argue that

the current system of rate averaging should remain in place until full-fledged competing physical networks have emerged. From this they insist that it follows that the Act's leasing provision was designed to be an extremely limited transitional device, lest competition develop too quickly. Congress, the story goes, intended rapid competition to develop only through resale, a method that accordingly was designed to protect the current system.

But § 251(c)(3) is not a transitional measure—it imposes permanent obligations on the incumbents—and it contains no express or implied judgment that leasing is disfavored, or disfavored during some undefined interim period. Indeed, the FCC correctly found that Congress did not "express[] a preference for one particular entry strategy," but created alternative paths new entrants could employ "as market conditions and access to capital permit." *Local Competition Order* ¶ 12, Pet. App. 137a-138a. By requiring incumbents to facilitate all three types of competitive entry equally, Congress was drawing on past experience opening the long-distance market, where the Bell System's monopoly was broken up through a market-driven combination of resellers, lessors, and companies that built their own facilities. Congress was not attempting to micro-manage the development of local competition any more than regulators micro-managed the successful transition to long-distance competition.

Moreover, the incumbents' argument rests not on the statutory text, but on yet another assumption—namely, that Congress understood that facilities-based competition would take years to develop, and wanted no real competition in the interim. But the incumbents insistently told Congress that cable companies could provide meaningful facilities-based competition in the here and now. *See, e.g., Antitrust and Communications Reform Act of 1993 (Part 2) on H.R. 3626; Hearing Before the House Subcomm. on Economic and Commercial Law of the Comm. on the Judiciary*, 103d Cong. 154 (1994) (statement of Edward E. Whitacre, Jr., Chairman and CEO of Southwestern Bell Corp.) (noting "cable television companies

. . . already have or are entering the local telephone service market"); *see also* Conf. Rep. at 148 ("[M]eaningful facilities-based competition is possible, given that cable services are available to more than 95 percent of United States homes."). If Congress wanted to protect the current system of rate averaging and implicit subsidies, it therefore surely would have mandated full implementation of § 254's universal service reform requirements in *advance* of allowing competition by owners of competing networks.

The fact is that Congress took the opposite approach. It mandated that the local competition provisions of the Act be implemented as quickly as possible. *See* § 251 (d)(1) (FCC must issue implementing regulations within six months); § 252(b)(1) (new entrants may invoke arbitration within 160 days of seeking interconnection agreements); § 252(b)(4)(C) (state commissions must resolve arbitrations within nine months). At the same time, Congress provided that federal universal service reform would be accomplished on a less expedited basis, *see* § 254(a), while state reform could be completed as quickly as was necessary to offset the effects of emerging local competition, *see* § 254(f).

In this regard, it is telling that the state commissions have not joined the incumbents in their attacks on the FCC's unbundling rules. After all, the current system of rate averages and hidden subsidies is not the product of the incumbents' altruistic desire to ensure that everyone can afford phone service. The current system is the product of *state* policy choices. Had the FCC threatened those state policies in any meaningful way, the states would have objected. Their silence speaks volumes about the legitimacy of the incumbents' claims.

Nor did the FCC "ignore[]" the problems the state commissions would face as they were forced to address the realities of a competitive market. *Compare* GTE 52. To the contrary, the FCC enacted a series of protective measures to address the possibility "that the requirements

of the 1996 Act may be disruptive to existing state universal service support mechanisms during the period commencing with this order and continuing until we complete our universal service proceeding to implement section 254." *Local Competition Order* ¶ 715 (JA 155); *see also id.* ¶¶ 715-732 (JA 155-67) (establishing interim access charge regime to protect implicit universal service subsidies during transition to local competition). Respondents do not even acknowledge the FCC's reasoned response to the issues they have raised.

While the incumbents' principal policy argument is grounded in the premise that Congress did not intend facilities-based competition to develop too quickly, its second argument is, to the contrary, that Congress wished to encourage, not discourage, facilities-based competition, and that an unlimited right to lease is inconsistent with that legislative command. This argument suffers from the same defect as the argument that Congress favored resale over leasing. Nothing in the statutory text supports the incumbents' suggestion that Congress "carefully calibrated," BA 51, the three methods of competing service to assure that one was favored over another.[6]

Moreover, the FCC found it would serve no rational purpose for regulators artificially to encourage the building of facilities when market conditions otherwise would lead a competitor to lease them. *Local Competition Order* ¶ 340, Pet. App. 249a. No rational competitor would choose to rely on the incumbents' facilities as a long-term strategy, because it would require levels of cooperation that the incumbent would have no incentive to provide. Long-term reliance on unbundled elements would require a massive investment in monitoring, regulating, and litigation costs. For such reasons, MCI has already invested almost two billion dollars in constructing its own facilities.

Finally, the most sensible way to promote the construction of competing facilities is to encourage leasing. A competitor that leases all of the necessary elements from

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[6] *See supra* pp. 14-19.

the incumbent must first build the necessary operations support systems to order, repair, and bill for the leased elements,[7] and must decide which services to market. Then, as traffic volumes increase, or technological advancement makes building more economical than leasing, the competitor would find it relatively easy to substitute its own facilities for those it had previously leased from the incumbent. A reseller, on the other hand, is the furthest removed from a facilities-based provider, and would not develop systems or expertise that would be helpful if it subsequently chose to build its own facilities. It is leasing, not resale, that is the strategy of choice for competitors like MCI whose ultimate goal is to build their own facilities.

C. The Incumbents' Remaining Challenges to the FCC's Unbundling Requirements Are Without Merit.

The incumbents argue that the FCC exceeded Congress' plan in ordering the unbundling of such critical components of local service as operational support systems, directory assistance, operator service facilities, and vertical features. Once again, however, the incumbents have no argument that the plain text of the 1996 Act forecloses the FCC's unbundling rules. Their arguments rest instead on the most strained inferences from statutory text and proceed from the false premise that Congress wanted new entrants either to build their own facilities or to resell incumbent services rather than to rely on unbundled network elements. But Congress directly delegated to the FCC the task of prescribing nationwide rules for unbundling, including rules dictating what elements should be unbundled. Had Congress wanted to limit the FCC in the way the incumbents propose, it surely would have said so in a straightforward manner. It did not.

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[7] These operational support systems allow the competitor to connect directly to the incumbents' elements, including in particular to the incumbents' *own* operational support system. *See infra* pp. 23-25.

1. *The Eighth Circuit correctly upheld the FCC's reasonable interpretation of the Act's definition of network elements.*

A network element is

> a facility or equipment used in the *provision* of a telecommunications service. Such term also includes features, functions, and capabilities that are *provided* by means of such facility or equipment, including subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or *other provision* of a telecommunications service.

§ 153(29) (emphasis added). The incumbents argue that this text imposes a requirement that a network element must be "unalterably rooted in discrete physical parts" of the network and must be used to transmit or deliver calls. *See* GTE 54-55. The Eighth Circuit rejected that implausible reading of the Act. *See* Pet. App. 41a-43a.

The statutory text does not limit "network elements" to call routing facilities, because it encompasses all facilities used in the provision of service as well as all the features, functions, and capabilities of those facilities used "in the transmission, routing, or *other provision* of a telecommunications service." § 153(29) (emphasis added). The incumbents argue that under the principle of *ejusdem generis* the term "other provision" of service is limited only to alternate means—in addition to transmission and routing—of *physical* delivery of a call. *See, e.g.*, U S West 40. But Congress previously defined the concept of "provision" of service broadly to include the features, functions, and capabilities that are "provided by" means of a facility, and it explicitly listed "information sufficient for billing and collection" as an example of network elements so defined. § 153(29). Provision of these features—critical to telecommunications service—is not a means of physical delivery of a telephone call.

Because Congress defined the term "provision" so broadly in the first part of § 153(29), the canon of

ejusdem generis does not dictate that the terms "transmission" and "routing" necessarily modify the later use of the same term and restrict it to physical delivery of a call. *See* GTE 56; U S West 40. Had Congress meant to restrict the meaning of the term "provision" after initially defining it so broadly, it would have done so explicitly. Instead, Congress emphasized again that "provision" of a service includes more than transmission and routing: the language specifies "transmission, routing, or *other*" provision of service; in context it cannot be taken to mean "transmission, routing, or *similar*" provision of service. The FCC reasonably found that because " 'transmission' and 'routing' refer to physical delivery, the phrase 'or other provision of a telecommunications service' goes beyond mere physical delivery." *Local Competition Order* ¶ 261 (JA 40).

a. *The FCC reasonably found that the incumbents must provide access to their operational support systems.*

Operational support systems ("OSS") are "software systems and accompanying databases that are necessary to process orders, handle billing, and provide maintenance and repair capabilities to phone customers." Pet. App. 42a. They allow a telephone company to assign and track the specific facilities that serve individual customers, advise new customers of their telephone numbers, and schedule repair visits when customers report service troubles. The FCC concluded, and the Eighth Circuit agreed, that OSS and the information it contains "fall squarely within the definition of 'network element.' " *Local Competition Order* ¶ 516 (JA 116-17); Pet. App. 42a-43a. In so doing, the FCC reasoned that the text of the Act reflects Congress' recognition that new competitors cannot enter local markets successfully without access to OSS, and found that "[o]perational interfaces are essential to promote viable competitive entry." *Id.* (citation and internal quotations omitted).

The FCC further found that incumbents must lease their OSS functions to competitors pursuant to § 251(c)(3) for three independent reasons. First, OSS is a network element because the systems themselves are " 'databases' " or " 'facilit[ies] . . . used in the provision of a telecommunications service,' " and their functions are " 'features, functions, and capabilities that are provided by means of such facilit[ies].' " *Id.* ¶ 517 (JA 117) (quoting § 153(29)). Second, OSS is a network element because the information contained in and processed by the systems is "information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service." *Id.* Third, even if OSS were not itself a network element, access to OSS is a "term and condition" of access to other network elements, and must, therefore, be provided on a nondiscriminatory basis pursuant to § 251(c)(3) and (c)(4). *Local Competition Order* ¶¶ 510, 518-519 (JA 114-16, 118-19). The incumbents do not even address this third and independent ground for the ordering of competitors' access to incumbents' OSS. This ground in itself provides an adequate basis for upholding the FCC's interpretation of the Act. In any event, the incumbents' argument that OSS does not fall within the statutory definition of network elements because it is not a physical part of the call-routing network fails: meeting that requirement is not necessary because the incumbents fabricated it. *See supra* pp. 22-23. The Act's definition *explicitly* encompasses OSS functions like "billing and collection," which are neither physical nor parts of the call-routing network.

Beyond this, the incumbents can only take issue with Congress' policy choices. They complain that allowing competitors access to their software would allow new entrants to run their business "just as efficiently as incumbents." GTE 59. But that is precisely what Congress hoped to accomplish when it included "databases" and "information" in the definition of network elements and directed nondiscriminatory access to those elements. *Local*

Competition Order ¶¶ 510, 518-519 (JA 114-16, 118-20). Incumbents' complaint is with the Act and not with the FCC.

b. ***The FCC reasonably found that directory assistance, operator service facilities, and vertical features are network elements.***

The Eighth Circuit's "agreement with the FCC's determination that the Act broadly defines the term 'network element' " properly led the court "also to agree with the Commission's conclusion that operator services, directory assistance, caller ID, call forwarding, and call waiting are network elements that are subject to unbundling." Pet. App. 44a. The court held that operator service facilities and directory assistance are "features, functions, or capabilities that are provided by facilities and equipment that are used in the provision of telecommunication services." *Id.* Operator service facilities include the physical equipment used to complete certain types of calls mechanically (such as calling card calls), frequently without any human intervention, as well as live operators who can, when needed, use the equipment to switch or complete calls. Contrary to the incumbents' rhetoric, it is *not* live operators that the FCC "deemed 'elements' of the network subject to unbundling." GTE 57. Rather, it is the "function" and "capability" provided by the operator services system that the FCC and the Eighth Circuit agreed fall within the Act's definition of network elements. It matters not that some human services may be involved. Human intervention is often required to deliver the features, functions, and capabilities of network equipment that are indisputably network elements.[8] For example, a switch may need to be reconfigured or to have routing information added to its database, and people perform these functions. Congress drew no line excluding the human support necessary to deliver the functions of a network element.

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[8] Indeed, labor costs are included in the pricing of most network elements. *See supra* n.4.

Incumbents also challenge the FCC's inclusion of the software features of the switch that the incumbents use to provide caller ID, call forwarding, and call waiting as network elements. *See Local Competition Order* ¶ 423 (JA 95). The Eighth Circuit properly deferred to the FCC's judgment that these so-called "vertical features" of switches are features and functions of the switch that are no different from any other "features, functions, and capabilities" of the switch which competitors therefore have the right to lease at cost-based rates. § 153(29); *see* Pet. App. 42a-43a, 47 C.F.R. §§ 51.307(c); 51.319(c)(i)(C); *Local Competition Order* ¶¶ 412-413, 423 (JA 86-88, 95). The FCC held that switching is a "network element" that includes all of the features, functions, and capabilities of the switch: both the basic software embedded in the switch needed to route any telephone call and the switching software that makes possible *added* services such as caller ID, call forwarding, and call waiting. Both the FCC and the Eighth Circuit found this result compelled by the plain meaning of the statutory text. *See* Pet. App. 43a.

In the incumbents' view, the Court of Appeals erred in refusing to consider the practical consequences of the FCC's approach. Those consequences, the incumbents argue, are that, by leasing, competitors will be able to offer their customers services like call forwarding at a lower retail price than the inflated prices the incumbents are currently offering. The incumbents insist that if competitors can compete effectively by offering such enhanced local telephone services at cost-based rates, competition will deny the monopolists the profits they claim to need to support implicit universal service subsidies. *See, e.g.*, GTE 52-53.

That policy rationale is insupportable. A competitor's ability to offer vertical features at a lower price than an incumbent's current price is precisely what Congress intended. For the reasons previously stated, *see supra* 17-20, the incumbents' arguments based on the need to preserve universal service are groundless.

Nor do respondents gain anything by calling certain pieces of the telephone network "services." The incumbents contend that all of these systems—operator service systems, directory assistance, and vertical features—are "services" rather than "facilities," and therefore do not qualify as network elements. But the FCC and the Eighth Circuit agree that simply because certain features or functions of equipment may also be characterized as services does not preclude their characterization as network elements. *Local Competition Order* ¶ 263 (JA 41); Pet. App. 42a, 44a-45a. Indeed, the incumbents assert a distinction without a difference: *all* services are comprised of collections of features, functions, or capabilities of network facilities or equipment. The Eighth Circuit held that vertical features "satisfy the definition of 'network element;' consequently they are subject to the unbundling requirements of subsection 251(c)(3)." Pet. App. 45a. It agreed with the FCC that the incumbents' arguments to the contrary "would allow the incumbent LECs to evade a substantial portion of their unbundling obligation." Pet. App. 44a-45a.

For example, switching and lines that run from the switch to the business location have all been or could easily be offered as "services" available to retail customers. If none of these elements could be considered "network elements," the statutory provisions that allow for competitive service through unbundled network elements would be a dead letter. Nothing in the Act says (or even suggests) that "services" and "elements" are mutually exclusive categories, and the FCC's interpretation of the term facilities is, as the Eighth Circuit held, consistent with the Act's purposes. It must, therefore, be sustained.

D. The Eighth Circuit Correctly Upheld the FCC's Reasonable Interpretation of the Act's Standards for Competitors' Access to the Incumbents' Network Elements.

The incumbents also take issue with the FCC's implementation of § 251(d)(2), arguing that the agency ne-

gated the Act's limitations on competitor access to incumbents' network elements. *See, e.g.*, GTE 49. Section 251(d)(2) provides that the FCC, in determining what network elements should be unbundled pursuant to § 251(c)(3), "shall consider" whether access to proprietary network elements is "necessary" and whether the failure to provide access to such network elements would "impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer." § 251(d)(2).

The incumbents disagree with the FCC's refusal to include in the "necessary" and "impairment" analyses an inquiry into the availability of similar but not identical network elements from alternate sources, *i.e.*, those outside the incumbents' networks. The incumbents argue that this refusal discourages innovation, particularly as to proprietary elements, BA 67, and that it creates disincentives to facilities-based competition. They invoke the antitrust doctrine of essential facilities in proposing that the proper analysis should examine whether the competitor can reasonably or practically duplicate the relevant element, BA 66, or at the very least should examine the availability of existing alternatives outside the incumbent's network, GTE 62.[9]

The factors Congress enumerated, however, need only be "considered." Having done so, the FCC is free to reach a reasoned conclusion that the element must be provided even if not necessary and not impairing the competitors' service. *See Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 95 (1995); *id.* at 103 (O'Connor, J., dissenting) (agreeing with majority that where Medicare Act provides that Health and Human Services "shall consider" generally accepted accounting principles in prescribing Medicare reimbursement standards, the Secretary retains "broad and

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[9] Of course, if the antitrust and the Act's standards were the same, there would be no need for the Act in this regard, because competitors would achieve no more and no less by invoking the Act rather than the antitrust laws.

flexible authority" and "is not bound" to adopt these specific principles). Thus, incumbents' argument that § 251 (d)(2) expressed a congressional policy of truncating the availability of network elements cannot stand scrutiny. Beyond that, the FCC had ample basis to reject the notion that incumbents need not provide proprietary elements if competitors can obtain similar elements from a source outside the incumbents' networks, *Local Competition Order* ¶ 283 (JA 51-52), and to reject the incumbents' position that competitors are not impaired in providing service if they can obtain similar elements from another source or can provide the proposed service through resale; *id.* ¶ 286 (JA 53-54).

The FCC could hardly have been on firmer ground in so rejecting the claim that "necessary" must mean "indispensable," an interpretation that this Court has rejected in a similar context as too rigid for a word that should "be harmonized with its context." *Armour & Co. v. Wantock*, 323 U.S. 126, 129-30 (1944); *see also M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 413 (1819) ("necessary" means "convenient, or useful"). The court of appeals determined that the FCC's definition was "a reasonable one and entitled to deference," Pet. App. 49a, agreeing with the FCC that "[a]n overly strict reading of the word 'necessary,' as the petitioners propose, would unduly restrict the unbundling duty of incumbent LECs and hinder the development of competition in the local telecommunications industry." *Id.* By the same token, the court found the FCC's definition of "impair" to be consistent with dictionary definitions and consistent as well with the Act's pro-competitive purposes. It therefore concluded that the agency's definition was entitled to deference under *Chevron*. *Id.* at 50a.

As to both the "necessary" and "impairment" standards, the incumbents' "alternative sources" position would simply nullify the Act's unbundling requirements. Incumbents control almost all the network elements that currently exist. A competitor could, of course, in theory—

with enough capital and enough time—build a competing network and so provide itself with all these network elements from other sources. To say, as the incumbents do, that the analysis should at least examine existing alternatives outside the incumbents' network is to say nothing: "As a practical matter, if it is more efficient and less costly for new entrants to obtain network elements from a source other than an incumbent LEC, new entrants will likely pursue the more efficient and less costly approach." *Local Competition Order* ¶ 287 (JA 54-55); *see* Pet. App. 48a. But if (as is likely) because of economies of scale and scope, the incumbent monopolist is the most efficient source of a network element, the Act requires that those economies be shared with competitors. *See Local Competition Order* ¶ 10, Pet. App. 136a-137a. As the Eighth Circuit observed, Congress required that the monopolists' network elements be made available for lease precisely so that incumbents would have to share those economies with potential competitors, because of the extraordinary time and expense involved in constructing duplicate ubiquitous telephone networks. Pet. App. 48a.

Moreover, "requiring new entrants to duplicate unnecessarily even a part of the incumbent's network could generate delay and higher costs for new entrants, and thereby impede entry by competing local providers and delay competition, contrary to the goals of the 1996 Act." *Local Competition Order* ¶ 283 (JA 51-52). The incumbents accuse the FCC of denigrating and deliberately ignoring the Act's purpose of promoting—against other forms of entry—facilities-based competition by simply masking the concept of facilities-based competition in the pejorative term "unnecessary duplication." *See* U S West 32. But, in fact, the FCC reasonably understood that Congress could not have desired *unnecessary* duplication. Instead, competition is enhanced and consumers benefitted when the decision whether to build or to lease is dictated to the greatest extent possible by the market. Additionally, it is competition, and not just facilities-based competition, that is the primary and most urgent goal of the Act. *See*

supra 21-22. As the Eighth Circuit reasoned in determining that the FCC's alternate sources ruling was a reasonable one entitled to deference:

> Allowing incumbent LECs to evade their unbundling duties whenever a network element could be obtained elsewhere would eviscerate unbundled access as a means of entry and delay competition, because many network elements could theoretically be duplicated eventually. The Act, however, provides for unbundled access to incumbent LECs' network elements as a way to jumpstart competition in the local telecommunications industry.

Pet. App. 48a.

The FCC reasonably interpreted the Act's standards for access to network elements.

II. CONGRESS GRANTED THE FCC THE AUTHORITY TO IMPLEMENT THE LOCAL COMPETITION PROVISIONS OF THE 1996 ACT, INCLUDING THE PRICING PROVISIONS.

Congress, in the 1996 Act, unambiguously preempted state laws governing a host of local competition issues and enacted in their place a set of comprehensive federal standards. Despite this, in the name of federalism and purported loyalty to congressional intent, the Eighth Circuit denied the FCC the jurisdiction to implement many of those new federal provisions—including the pricing provisions—thus depriving the FCC of the authority to implement key provisions of federal communications law. In so doing, the Eighth Circuit ensured that, contrary to Congress' intent, the key federal provisions of the Act will be authoritatively interpreted not in an orderly, comprehensive fashion informed by the analysis of the federal agency entrusted to interpret communications law, but instead in a piecemeal fashion, over many years, by federal courts that lack any expertise in national communication policy. In part as a result of that decision, the prospects for the rapid opening of local markets have been destroyed. Neither the text of the 1996 Act, nor policy concerns, nor

any other provision of the Communications Act can justify that decision.

A. The Plain Text of the Statute Confirms That the FCC Has Authority to Implement the Local Competition Provisions of the Act, Including § 251's Rate Provisions.

The Eighth Circuit's decision to strip the FCC of rulemaking authority over most of the local competition provisions—including the pricing provisions—depends on the false premise that nothing in the 1934 Act, or in the 1996 Act (which amended it), confers on the FCC plenary authority to implement the 1996 Act's local competition provisions. Respondents' arguments in support of this premise fail.

First, the argument flies in the face of the statutory text affirmatively granting the FCC rulemaking authority. Section 251(d)(1), which instructs the FCC to "establish regulations to implement the requirements of" § 251, is not merely a time constraint but an affirmative grant of authority. Indeed, the language of § 251(d)(1) is drawn from the virtually identical provision of the House Bill, *see* H. Rep. at 4 (§ 241(b)(4)), which clearly was intended as a grant of authority. *See* Conf. Rep. at 120 ("Section 241(b)(4) directs the Commission to establish regulations"); *see id.* at 121 (same). Moreover, in § 276(b) of the Act, Congress used virtually identical language that incumbents concede (BA 36) empowers the Commission to issue regulations to implement the Act's provisions on payphone services. *See, e.g., Sorenson v. Secretary of the Treasury*, 475 U.S. 851, 861 (1986) ("identical words used in different parts of the same act are intended to have the same meaning") (citation omitted).

Section 201(b) also provides the FCC with a broad source of power. Respondents are left with the difficult prospect of arguing that § 201(b)—which authorizes the FCC to prescribe regulations "to carry out the provisions of the Act"—does not mean what it says. BA 43-44; GTE 33-34. They suggest that this clear grant of au-

thority should be limited by "context" to apply only to interstate communications. But Congress knew well the difference between a grant of authority that was section-specific, and a grant of authority that affected the entire Act. *Compare* § 317(e) ("The Commission shall prescribe appropriate rules and regulations to carry out the provisions *of this section*") (emphasis added), *with* § 201(b) ("Commission may prescribe rules and regulations . . . to carry out the provisions *of this Act*") (emphasis added).[10] Section 201(b) makes clear that Congress granted the FCC authority to prescribe regulations to carry out the provisions of the Act.[11]

Second, respondents have no cogent response to the point that their reading of § 251(d)(1) and § 201(b)

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[10] While § 201(b) grants the FCC regulatory authority to implement the provisions of the Communications Act, provisions such as § 276(b) and § 317(e) not only *grant* the FCC authority, they also *require* the exercise of that authority or add particular instructions regarding its exercise.

[11] Respondents rely on legislative history to suggest that the last sentence of § 201(b) applies only to that portion of § 201(b) that allowed radio companies to furnish reports of the location and positions of ships at sea to newspapers without charge. *See* NARUC 27. Respondents thus suggest that when Congress gave the FCC the power to implement the provisions of "this Act" it actually meant to give the FCC the power to implement the "last sentence of part (b) of this section of the Act." To state the argument is to refute it. Indeed, respondents misread the legislative history: Earlier in the bill that added the last two sentences of § 201(b), Congress used the same term—"this Act"—in a context that plainly refers to the Communications Act, making clear that Congress' use of the same term in the next sentence could not have been accidental. *See Wisconsin Dep't of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214, 225 (1992) (a phrase "ought to be accorded a consistent meaning within the section"). Finally, in passing this provision, Congress *explicitly* noted that it was amending § 201(b) of the Communications Act, *see* Communications Act of 1934, amendment, Pub. L. No. 561, 52 Stat. 588 (1938); Congress thus had to know that giving the FCC the power "to carry out the provisions of this Act" would give the FCC the broad power to implement the Act that the new bill amended, *i.e.*, the Communications Act of 1934.

would leave the FCC without authority to implement many of the other provisions of § 251, which all agree it may implement. *See, e.g.*, Pet. App. 12a n.10. These other provisions are not, as respondents claim, specific grants of authority in themselves. Most of these sections *presume* FCC power to regulate; they do not grant it. *See, e.g.*, § 251(c)(4)(B) ("a State commission may, *consistent with regulations prescribed by the Commission under this section*, prohibit" certain actions) (emphasis added); § 251(g) (requiring local exchange carriers to continue to comply with preexisting equal access and nondiscriminatory interconnection restrictions and obligations "until such restrictions and obligations are explicitly superseded *by regulations prescribed by the Commission*") (emphasis added). The text of these provisions also answers respondents' rhetorical question: "if section 251(d)(1) *already* provided the FCC with generic authority over all of sections 251 and 252, why would Congress have included these specific delegations of authority to the FCC?" BA 39 (emphasis in original). These provisions do not delegate authority to the FCC; they limit FCC authority delegated elsewhere or define limits on the power of state commissions. *See, e.g.*, § 251(d)(2) (limiting FCC authority by describing standards that the FCC must consider in determining what elements are available for unbundling); § 251(c)(4)(B) (giving state commissions the power to prohibit certain actions by a reseller, but limiting that power by requiring that it be "consistent with regulations prescribed by the Commission under this section").

Third, § 252(c)(2)—which provides that "[i]n resolving . . . any open issues . . . a State commission shall . . . establish any rates for interconnection, services, or network elements"—cannot bear the weight respondents place on it. Respondents' reliance on § 252(c)(2) is linked to their argument that the FCC lacks plenary authority to implement §§ 251 and 252. They contend that § 252(c)(2) unambiguously grants state commissions the power to set rates and pricing methodologies, BA 20;

GTE 27-28, or, at the very least, § 252(c)(2) confirms Congress' understanding that the FCC lacks such authority, and that the state commissions possess it.

Nothing in § 252(c)(2) can plausibly be read to deprive the FCC of jurisdiction to implement any of the provisions of the 1996 Act. Section 252(c)(2) merely assumes that state commissions will at times set rates, and it imposes substantive limits on state commissions when they do. The provision is conditional: It provides that "[i]n resolving . . . any open issues . . . a State commission shall—establish any rates . . . according to subsection (d)." § 252(c)(2). In terms, it requires only that whatever issues remain open, the state commission will resolve consistent with the limitations provided in § 252(c). *See, e.g.*, § 252(c)(1) (state commissions' resolution of any open issues must comply with § 251 and FCC regulations thereunder); § 252(c)(2) (state commissions' resolution of any open pricing issues must meet additional requirement of § 252(d)(1)).

Respondents suggest that § 252(c)(2) deprives the FCC of jurisdiction because it directs state commissions engaged in setting rates "to apply *solely* the standards of § 252(d)," and not the standards contained in § 252(c)(1), which incorporate by reference the FCC regulations promulgated under § 251. GTE 30 (emphasis added); *see also* BA 23. The word "solely," however, does not appear anywhere in § 252(c)(2), and with good reason. The restrictions on the state commissions' resolution of any open issues are conjunctive; thus § 252(c)(2) places an *additional* restriction on the state commissions' determinations of open issues concerning price: those determinations must comply with the requirements of § 252(d). The *additional* requirement imposed by § 252(c)(2), however, does not eliminate the other requirements imposed by § 252(c) with respect to "*any* open issues," a term which by its plain language includes price issues. In particular, § 252(c)(2)'s additional requirement governing pricing obligations cannot insulate such determinations from § 252(c)(1)'s directive to apply

"the regulations prescribed by the [Federal Communications] Commission pursuant to section 251." [12]

Moreover, the fact that § 252(c)(2) reflects Congress' assumption that state commissions would at times set rates does not deprive the FCC of jurisdiction over pricing methodology. Just as state commissions can resolve other "open issues" consistent with binding FCC regulations pursuant to § 252(c)(1), state commissions can "establish rates" pursuant to § 252(c)(2) by taking binding FCC regulations that prescribe a pricing methodology and applying them in concrete fact situations in a way that takes account of local conditions. *See also Local Competition Order* ¶¶ 135-137, Pet. App. 223a-224a.[13]

Fourth, the legislative history—and in particular the decision of the conference committee to split § 251 from § 252—does not help respondents. BA 24-25; GTE 29-31. The conference committee's decision to make §§ 251 and 252 separate provisions was not an effort to withdraw the FCC's authority over price and give it to the state commissions. Section 251 sets forth substantive standards for rates just as much as § 252 does. *See, e.g.*, § 251(c)(2)(D); § 251(c)(3); § 251(c)(4)(A). Moreover, Congress itself entitled § 252 "*Procedures* For Negotiation,

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[12] For this reason, there is no merit to respondents' suggestion that petitioners' reading of the statute renders § 252(c)(2) "wholly superfluous." BA 24; GTE 29. Section 252(c)(2) imposes an additional requirement on state commissions when they resolve open rate issues that does not exist when state commissions resolve other open issues, thus making explicit that state commissions must comply with *both* the FCC's regulations *and* the requirements of § 252(d), including in particular § 252(d)(1)'s prohibition on using rate of return or other rate based methods.

[13] Respondents argue that § 252(c)(2) trumps § 251(d)(1) and § 201(b) because the specific controls the general. *See* BA 34; GTE 34. But that argument simply assumes its conclusion, *i.e.*, that there is a conflict between the two provisions that must be resolved. As noted above, however, there is no conflict (and thus no need to resolve the tension between a specific provision and a general one) because the provisions can, and therefore must, be read harmoniously.

Arbitration, and Approval of Agreements" (emphasis added). *See, e.g., INS v. National Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 189 (1991) (title of section can aid in resolving meaning of the statutory text). Given that Congress itself indicated that the separation of § 251 from § 252 was intended to embody a separation of the substance of the interconnection agreements from the procedures for negotiating and approving them, there is no reason to believe that Congress' decision to separate §§ 251 and 252 was at all intended to foreclose FCC regulation of prices.

Respondents' arguments are not bolstered by their reliance on unsupported and self-serving assertions that their allies successfully lobbied the conference committee to make these changes in order to protect state authority. *See* BA 25 n.13; GTE 30 & nn.15-16. These arguments —which ask this Court to interpret a statute based on the unsupported assertions of private parties that they successfully lobbied Congress—are not "legislative" history at all. *See Kelly v. Robinson*, 479 U.S. 36, 51 n.13 (1986) (declining to "accord any significance" to statements because "none of those statements was made by a Member of Congress, nor were they included in the official Senate and House Reports").

In any event, respondents' cavalier approach to legislative history ignores the conference committee's own assertion that it noted changes "except for clerical corrections, conforming changes made necessary by agreements reached by the conferees, and minor drafting and clerical changes." "Conforming" changes are those changes required as a result of other, explained agreements of the conference committee. The changes respondents claim were made in conference would have been radical, substantive changes, unrelated to any explained agreement of the committee, and thus cannot possibly be considered "minor" or "clerical" or "conforming" changes.[14] *See Central States Motor*

[14] Both the House bill and the Senate bill gave the FCC the regulatory authority over pricing the respondents claim the confer-

Freight Bureau, Inc. v. Interstate Commerce Comm'n, 942 F.2d 1099, 1107 (D.C. Cir. 1991) (R.B. Ginsburg, J.).

Fifth, respondents can reconcile their reading of the statute with the plain language of other provisions of the Act such as §§ 271 and 160 only by ignoring the terms of those provisions or reading in limitations that Congress did not include. *See* MCI Opening Brief at 36-38. For example, they suggest that in passing on an application to enter the long distance market pursuant to § 271, the FCC "can require no more than interconnection in accordance with the pricing principle promulgated *by the States*." BA 42 (emphasis in original). But that is not what § 271 says. Section 271(c)(2)(B) requires the FCC independently to determine whether the § 271 applicant has provided "[i]nterconnection in accordance with the requirements of Sections 251(c)(2) and 252(d)(1)." *See SBC Communications, Inc. v. FCC*, 138 F.3d 410, 416-17 (D.C. Cir. 1998). Section 251(c)(2) includes the requirement that rates be "just, reasonable, and nondiscriminatory." No fair reading of § 271 permits the conclusion that Congress gave state commissions the license to determine the future of the nation's long-distance telecommunications markets.[15]

Similarly, respondents' arguments that the FCC's forbearance authority is limited to "certain aspects" of § 251(c)—excluding price—ignores the fact that § 160 not only contains no such limitation, but in fact *requires* the FCC to consider whether charges are just and reasonable before the FCC may exercise that authority.

In sum, respondents' arguments cannot obscure what Congress has made clear: the FCC has authority to imple-

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ence committee stripped away without comment. *See* MCI Opening Brief at 32.

[15] Respondents make no effort even to try to defend the procedural and jurisdictional chaos with respect to § 271 applications that would result from their reading of the Act, *see* MCI Opening Brief at 37, nor to explain why Congress would have created such a bizarre scheme.

ment the local competition provisions of the Act, including the provisions concerning rates.

B. Respondents' Contention That the 1996 Act Created a "Decentralized State-centered Scheme" Is Untenable.

Unable to make a case on the basis of statutory text, respondents once again resort to policy and rhetoric to justify limiting the FCC's authority to implement the substantive requirements of federal law. Respondents contend that Congress wanted a "decentralized, State-centered" approach, BA 44, that was "deregulatory," and advanced values of federalism. But it is simply not true that the 1996 Act sought to divest the federal government of powers that were transferred to the state commissions. To the contrary, the Act took back from the state commissions much of the substantive authority they had over intrastate matters under the 1934 Act. Indeed, respondents' arguments trivialize the revolutionary aspect of the 1996 Act. For the first time, Congress applied a comprehensive set of *federal* standards to govern entry into local markets. The 1996 Act is "State-centered" principally in the sense that the state commissions have been enlisted as partners in the administration of *federal* law embodied in the new national policy. It is manifestly *not* "State-centered" in the sense that state commissions decide all of the key substantive policy issues by themselves. That much is confirmed not only by the sweeping preemptive federal directives governing local competition, but also by Congress' choice of exclusive federal district court review of state actions applying the 1996 Act. *See Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 383 (1996) (one principal purpose underlying a grant of exclusive jurisdiction is "to achieve greater uniformity of construction") (internal quotation omitted).

The incumbents deride this argument as "audacious," BA 44, but the audacity is theirs. Here, they argue that the 1996 Act contemplated "differing discretionary judg-

ments" and "State autonomy and discretion." BA 45; *see also* GTE 40. But in federal courts in § 252(e)(6) proceedings, they conveniently advocate the opposite. Thus, for example, respondent U S West has argued that federal courts should apply a *de novo* standard of review and accord no deference to state commissions' determinations, because had Congress "intended that any deference be accorded the state commissions, it would not have precluded review in the state court systems, where deference to State commissions is routinely accorded." [16] Similarly, respondents have argued that "unlike a uniform application by a federal agency, a federal statute could be subject to 50 different interpretations in 50 different states. Under these circumstances, deference to a State agency's interpretation of federal law is not appropriate." [17] *See also GTE South Inc. v. Morrison*, Civ. Act. No. 3:97-CV-493, GTE's Brief in Opposition to the Commissioners' Motion for Partial Summary Judgment, at 7-8 (E.D. Va. filed Dec. 1, 1997) (deference to state agency is inappropriate because "giving deference to state agency interpretations of federal law would result in multiple, inconsistent legal interpretations of the federal statute around the country" and because "state agencies lack the expertise in implementing federal laws and the nationwide perspective characteristically possessed by a federal agency").[18]

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[16] *U S West Communications, Inc. v. MFS Intelenet, Inc.*, No. 98-35146, Brief of Appellant, at 11 (9th Cir. filed June 11, 1998).

[17] *Southwestern Bell Telephone Co. v. AT&T Communications of the Southwest, Inc.*, Civ. Act. No. A-97-CA-132-SS, Motion for Summary Judgment of Southwestern Bell Telephone Company Based On Violations Of Statutory Standards and Supporting Brief, at 16 (W.D. Tex. filed Apr. 30, 1997).

[18] State commissions have unsuccessfully argued in § 252(e)(6) proceedings that a federal court should defer to decisions of state commissions on the meaning of federal law. Although this position avoids the brazen hypocrisy of the incumbents, it is simply wrong: federal courts do not defer to state agencies on questions of federal law. *See, e.g., AMISUB (PSL), Inc. v. Colorado Dep't of Soc. Servs.*, 879 F.2d 789, 795-96 (10th Cir. 1989); *Perry v. Dowling*, 95 F.3d 231, 236 (2d Cir. 1996). Unsurprisingly, the district courts have

Ultimately, incumbents are forced to concede that the 1996 Act adopted a "centralized" approach by providing for "ultimate federal oversight of State arbitrations," but they claim that Congress "chose a judicial, not an administrative, mechanism for this oversight." BA 5. Under incumbents' approach, the federal courts, on *de novo* review of state arbitration decisions, will decide the substance of the 1996 Act's federal requirements in a piecemeal fashion, over an extended period of time, and without the benefit of the views of the expert federal agency. But respondents offer no explanation why Congress would have wanted the federal courts and not the FCC to set national communications policy within the broad statutory framework. Moreover, as noted above, respondents' view that the Act contemplates a gradual unfolding of its key provisions is contrary to the numerous provisions of the Act that emphasize the need for rapid implementation, *see supra* p. 19, and would destroy the prospects for rapid competition in local markets, *see Local Competition Order* ¶ 618 (JA 131) ("such a process could delay competition for years"); *id.* ¶ 114, Pet. App. 212a ("Lack of national rules could . . . create great uncertainty for the industry, capital markets, regulators, and courts as to what pricing policies would be pursued by each of the individual states, frustrating the potential entrants' ability to raise capital.").

Respondents' invocation of "federalism" is similarly unavailing. BA 44-45, GTE 40-41. To be sure, the 1996 Act preserves a role for the state commissions if they choose

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uniformly refused to defer to the state commissions on the interpretation of the 1996 Act. *See, e.g., U S West Communications, Inc. v. Hix*, Civ. Act. No. 97-D-152, Memorandum Opinion and Order, at 9 (D. Colo. Dec. 5, 1997) (*Chevron* deference is inappropriate because state commissions "have little or no experience in implementing federal laws and policies and do not have the nationwide perspective characteristic of a federal agency."); *MCI Telecommunications Co. v. Bell Atlantic-Virginia Inc.*, Civ. Act. No. 3:97-CV-629, Order Ruling on the Commissioners' Motion for Partial Summary Judgment, at 3 (E.D. Va. filed Dec. 24, 1997) (no deference to state agency).

to accept it, but it is not a "State-centered scheme" that permits state commissions to act under state law with only limited federal constraints. Instead, the Act imposes federal standards interpreted at a general level by the expert federal agency, with state commissions having autonomy to apply these federal regulations to local conditions. This is not "patronizing rhetoric," GTE 38, and does not reduce the state commissions to the "ministerial" and discretionless task of implementing the FCC's methodology. *See* BA 7. To the contrary, as the FCC found, "state commissions will make critical decisions concerning a host of issues involving rates," *Local Competition Order* ¶ 137, Pet. App. 224a, including decisions about the prime components of rates, such as depreciation, joint and common costs, and profit. *See id.* ¶¶ 686, 696, 702 (JA 140-41, 143-44, 146-47). *See generally Louisiana Pub. Serv. Comm'n*, 476 U.S. at 364-65 ("depreciation practices contribute importantly to the calculation of both the carrier's investment and its expenses"). Regulations that promulgate broad ratemaking methodologies but leave open for state commission determination most of the critical inputs that go into a rate cannot be said impermissibly to establish the rate, to relegate state commissions to performing "ministerial" functions, or to deprive state commissions of their considerable discretion in carrying out federal law.

In a similar vein, respondents mistakenly trumpet the statement in the Conference Report that the 1996 Act produced a "pro-competitive, de-regulatory national policy framework." BA 4; *see also* GTE 11. The issue is not *whether* the Act will be interpreted and applied by regulators, but rather *which* regulatory agency (or agencies) will perform this task. Respondents never explain why "deregulation" counsels in favor of vesting rulemaking authority in 50 different state commissions rather than in the FCC. For national competitors such as MCI, respondents' interpretation of the Act—which subjects competitors to 50 different sets of regulations—is anything but "deregulatory." Moreover, the "deregulatory" nature of the 1996 Act surely stems in large part from its elimination

of anticompetitive *state* regulations which previously governed intrastate telephone markets. The Act's "deregulatory" nature thus cannot support the view that Congress intended for state commissions rather than the FCC to implement the Act's new federal standards.

In sum, respondents' State-centered vision of the Act is not only inconsistent with the vision of the Act they have put forth in § 252(e)(6) proceedings around the country, it is at odds with the language and purpose of the statute, ignores the extension of *federal* law to intrastate matters, and results in an irrational and unworkable scheme for local competition.

C. Section 2(b) Does Not Deprive the FCC of Jurisdiction to Implement the Federal Standards That Govern Rates.

In the 1996 Act, Congress took the extraordinary step of subjecting intrastate telephone markets to federal substantive law for the first time and (in § 253) gave the FCC unambiguous authority to preempt "*any* statute, regulation, or legal requirement" imposed by a State that "prohibits or has the effect of prohibiting" an entity from providing intrastate or interstate telephone service. In this context, it would be illogical to conclude that Congress nonetheless intended that state commissions—whose enabling acts, rules, and regulations were the very ones superseded by 1996 Act—have the *sole* authority to implement the key pricing provisions of the 1996 Act. *Cf. United Savs. Ass'n of Tex. v. Timbers of Inwood Forest Assoc.*, 484 U.S. 365, 371 (1988) ("A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law"). Nothing in § 2(b) requires this illogical result. First, even under respondents' mistaken understanding of § 2(b), § 2(b) erects no barrier to the FCC's implementation of the local competition provisions of the Act. Just as Congress provided in a straightforward and unambiguous manner for

the federal local competition provisions—including the pricing provisions—to *apply* to intrastate telephone services, Congress provided in a straightforward and unambiguous manner to *give the FCC jurisdiction* over those same services. Second, as MCI demonstrated in its opening briefs, § 2(b) was intended to limit only the FCC's *ancillary* jurisdiction over intrastate matters not governed by substantive federal law and has no application when, as here, federal law clearly applies to those matters.

As described above, *see supra* p. 34, in §§ 251(d)(1) and 201(b), Congress unambiguously gave the FCC authority to implement the local competition provisions of the 1996 Act. Respondents contend nonetheless that Congress' expression of its intent is insufficiently clear to satisfy § 2(b), on the theory that § 2(b) "precludes the FCC's assertion and exercise of authority over intrastate pricing and related matters without an *express* grant of jurisdiction over such matters." CA 33 (emphasis in original).[19]

That cannot be correct. The statement of congressional intent necessary to overcome § 2(b)'s presumption that the Communications Act does not "apply" to intrastate matters is the same as that necessary to overcome § 2(b)'s presumption that the Act does not "give the Commission jurisdiction" to regulate intrastate matters. Thus, if respondents are correct about what is necessary to overcome the § 2(b) presumption, then virtually *none* of the obligations in § 251 would even *apply* to intrastate communications. For virtually none of § 251's local competition provisions explicitly mentions intrastate matters or otherwise demonstrates the kind of "comparable language" that respondents assert is required. Respondents' § 2(b) argument would thus render the 1996 Act a nullity.

Uncomfortable with the implications of their argument, respondents simply ignore them, and blithely assert that

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[19] *See also* NARUC 33 ("The absence of an *explicit* grant of federal authority in sections 251 and 252 is fatal to the FCC's jurisdictional claim") (emphasis added)); BA 36; GTE 44.

Congress unambiguously intended for the pricing provisions of the Act to apply to intrastate matters but deny that Congress made sufficiently clear its intent that the FCC implement those provisions. But they cannot ignore that the applicability of § 251 to intrastate matters is just as "implicit" as—and is no more unambiguous than—the authority of the FCC to implement that section. Just as § 251(c) sets forth substantive federal requirements that all agree apply to intrastate matters, *see, e.g.*, GTE 11; *Local Competition Order* ¶ 71, Pet. App. 179a-180a ("None of the commenters appears to claim that section 251 addresses exclusively interstate matters"), § 251(d)(1) gives the FCC authority to implement those requirements.[20]

Moreover, this examination into whether Congress indicated its intent with sufficient clarity is unnecessary because § 2(b) limits only the FCC's *ancillary* jurisdiction. Thus, § 2(b) precludes the FCC from exercising jurisdiction over matters to which federal law does not unambiguously apply, *i.e.*, the sort of jurisdiction approved by this Court in *Shreveport*. Respondents' arguments to the contrary are unpersuasive. For example, respondents accuse petitioners of ignoring the term "or" and eliminating the second clause of § 2(b). BA 29; GTE 45. But this is simply incorrect. Petitioners merely disagree with respondents about the meaning of the second clause. As MCI indicated in its opening brief, the second clause of § 2(b) was intended to preclude the FCC from exer-

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[20] Respondents also argue that § 251(d)(1) cannot grant the FCC jurisdiction to implement the pricing provisions because, in contrast to § 276 of the Act, which explicitly refers to "intrastate and interstate" calls, § 251(d)(1) makes no mention of intrastate matters. BA 36; GTE 44. In § 276, however, had Congress omitted the term "intrastate," it would have been unclear whether the payphone provisions applied at all to intrastate matters. With respect to the local competition provisions, all concede that the relevant provisions of the Act clearly apply to intrastate matters, so the added specificity that was critical in § 276 to ensure that the substantive provisions applied intrastate would have been completely redundant.

cising ancillary jurisdiction; there is simply no indication that the clause was intended to perform the quite different function of severing the jurisdiction of the FCC from the substantive reach of federal law.

Respondents' treatment of the interaction of § 2(b) with § 201(b) only highlights their insupportable approach to statutory interpretation. They argue that the plain language of § 201(b) cannot mean what it says because it is limited by "context," and that, even if it does, it is trumped by § 2(b). But respondents' approach, in addition to doing violence to the plain language of § 201(b), relies on an inconsistent approach to context, using it to limit the plain meaning of § 201(b) but ignoring it when deciding the meaning of § 2(b). Respondents are forced into this inconsistency because, under their erroneous understanding of § 2(b), the provisions are in irreconcilable conflict. But as MCI showed in its opening brief, that conflict is purely one of respondents' own creation. In fact, the provisions are complementary: § 201(b) gives the FCC authority over interstate and intrastate matters to the extent that federal law applies to those matters, and § 2(b)—which limits the FCC's ancillary jurisdiction—provides that the FCC may go no further. *See Louisiana Pub. Serv. Comm'n*, 476 U.S. at 370 ("where possible, provisions of a statute should be read so as not to create a conflict").

Similarly meritless is respondents' assertion that *Louisiana* resolved the question now before this Court. In *Louisiana*, the Court resolved two separate issues; first, whether § 220 of the Act, establishing a uniform system of accounts, itself preempted state law, and second, if it did not, whether the FCC nevertheless could exercise *ancillary* jurisdiction—*i.e.*, jurisdiction over matters to which the Act did not directly apply—to preempt state law concerning depreciation. In the instant case, however, the contested division of authority between the FCC and the state commissions has nothing to do with preemption because Congress has already made the decision to preempt state law. Whatever entity regulates will indis-

putably be implementing new provisions of *federal* law that now govern local (*i.e.*, intrastate) telephone markets. Nothing in the holding of *Louisiana* suggests that § 2(b) was intended to deny the FCC jurisdiction even when federal law clearly applies and preempts state law.

Respondents nevertheless suggest that the ancillary jurisdiction argument is untenable because the *Louisiana* Court rejected the argument that § 2(b) was intended solely to prevent application of the *Shreveport* doctrine. *See* BA 30; GTE 46. But the *Louisiana* Court rejected an entirely different argument based on *Shreveport*. Respondents there argued that because *Shreveport* applied only to "rates," § 2(b) also applied only to rates and not to the other intrastate matters such as depreciation. Thus, the Court noted that it was "certainly true" that § 2(b) was intended to prevent "excessive federal regulation of intrastate service such as was sanctioned by the *Shreveport Rate Case*," but found "no authority in the legislative history to support respondents' proposition that the sole concern of the state commissioners was with 'protection against federal preemption of the states' setting of *individual customer charges* for specific intrastate services.' " 476 U.S. at 372 (citation omitted) (emphasis added). The *Louisiana* decision thus was not a rejection of the contention that § 2(b) was intended to overturn the *Shreveport* ancillary jurisdiction principle, but rather was a rejection of respondents' overly restrictive characterization of what that principle was.

Finally, there is no merit to respondents' argument that the legislative history of the 1996 Act is inconsistent with petitioners' approach. GTE 42-43; BA 27-28. Respondents view the conference committee's decision not to amend § 2(b) as working a major substantive change, even though that change appeared nowhere in the conference report. As noted above, that inference is flatly inconsistent with the conference committee's own description of its actions. *See supra* pp. 37-38. Respondents' reading of the conference committee's actions is particularly inappropriate when there is a ready explanation for those

actions: because an amendment to § 2(b) would be redundant with respect to the FCC's authority over the substantive provisions of the 1996 Act, amending § 2(b) could be seen as giving the FCC the license to exercise precisely the sort of ancillary jurisdiction the 1934 Congress had intended to prevent—for example, jurisdiction over local *retail* rates and depreciation, which remain regulated by state law. In any event, given the uninterrupted congressional practice of the last century and given Congress' decision to displace state laws governing competition in local markets, something more than silence is required to justify the conclusion that Congress intended to sever the FCC's authority to regulate from the reach of federal communications law.[21]

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[21] California and NARUC suggest that the legislative silence supports their argument because § 2(b) has a 60-year history as a "universally understood reservation of State authority." CA 32; NARUC 36-37. But so far as petitioner is aware, § 2(b) has *never* been relied upon to deny the FCC jurisdiction to implement a federal provision that clearly applied to intrastate matters. Indeed, the state respondents' argument on this point serves only to underscore their inability to come to grips with the revolutionary aspect of the 1996 Act: Congress' decision to apply for the first time substantive *federal* law to intrastate matters.

CONCLUSION

The Eighth Circuit's decisions invalidating Rule 315(b) and stripping the FCC of plenary authority to implement the requirements of § 251 of the 1996 Act should be reversed, and its decision upholding the FCC's remaining unbundling rules should be affirmed.

Respectfully submitted,

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Supreme Court of the United States
OCTOBER TERM, 1997

MCI TELECOMMUNICATIONS CORPORATION,
Petitioner,

v.

IOWA UTILITIES BOARD, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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PETITIONER'S BRIEF ON THE MERITS

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QUESTIONS PRESENTED

1. Whether the Eighth Circuit, in disregard of *Chevron*, improperly invalidated regulations promulgated by the FCC implementing the 1996 Act that prohibit incumbent local monopolists from engaging in discriminatory conduct against new entrants seeking to lease parts of the incumbents' existing local telephone networks, and thereby thwarted Congress' goal of creating competition in local markets as quickly as possible.

2. Whether, in light of the explicit grants of authority to the FCC to establish regulations to implement the requirements of both the Communications Act and the local competition provisions of the Telecommunications Act of 1996 amending the Communications Act, the Eighth Circuit improperly held that the FCC exceeded its jurisdiction when it promulgated regulations implementing the federal pricing requirements of the 1996 Act, on the theory that the regulations applied to intrastate matters that had traditionally been subject to the jurisdiction of state public utility commissions.

LIST OF PARTIES AND AFFILIATES

The parties to the proceedings in the Eighth Circuit are listed at Pet. App. 1a-4a, 73a-79a, 92a.

Pursuant to Supreme Court Rule 29.6, petitioners state as follows:

MCI Telecommunications Corporation is a wholly-owned subsidiary of MCI Communications Corporation. MCI Telecommunications Corporation has the following non-wholly owned subsidiaries: General Communications, Inc.; IFP Holdings, Inc.; ICS Communications, Inc.; Digital Network Television, Inc.; Genesys Telecommunications, Inc.; Inflight Phone Corp.; Multimedia Medical Systems, Inc.; News T Investments, Inc.; News Triangle Finance, Inc.; Pioneer Holding L.L.C.; and Security Technologies, Inc.; Portugal Telecom.

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PETITIONER'S BRIEF ON THE MERITS

JURISDICTION

The Eighth Circuit issued its decision on rehearing and its mandate on October 14, 1997. This Court has jurisdiction under 28 U.S.C. § 1254(1).[1]

STATUTORY PROVISIONS INVOLVED

This case involves the Telecommunications Act of 1996 (the "1996 Act"), Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. §§ 151-276. Relevant provisions are reprinted at Pet. App. 93a-130a.

STATEMENT OF THE CASE

MCI seeks reversal of the Eighth Circuit decision vacating FCC regulations that implement the 1996 Act, a landmark statute designed "to shift monopoly [telephone] markets to competition as quickly as possible."[2] In the 1996 Act, Congress asserted federal jurisdiction over local telecommunications matters that had previously been left to the States. Congress did so because historically the States had fostered monopoly provision of local telephone service, and Congress desired a uniform national policy "promot[ing] competition in the local telephone service market." *Reno v. American Civil Liberties Union*, 117 S. Ct. 2329, 2338 (1997). Specifically, Congress preempted all state laws that would restrict competition in local markets (47 U.S.C. § 253(a)) and required local telephone companies to make the local phone networks available for use by new competitors (47 U.S.C. §§ 251-252). Congress required the FCC to "establish regulations to implement" those new federal requirements within six months of the Act's passage. 47 U.S.C. § 251(d)(1). The FCC did so, but the Eighth Circuit invalidated many of those regulations, crippling the prospects for local competition.

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[1] The Court of Appeals had jurisdiction to review the FCC's regulations pursuant to 28 U.S.C. § 2342(i) and 47 U.S.C. § 402(a), (b).

[2] *See* H.R. Rep. No. 104-204 at 89 (1995) ("H. Rep.").

The Regulatory Structure Prior to 1996. The nation's telephone system consists of local and long distance networks. A local network is an integrated system of wires and switches that connects all homes and businesses in a defined local service area. The long distance network consists of wires and switches that transmit telephone calls between local networks. The local network is used to provide local telephone service and is also indispensable to long distance service. A long distance call initiated by a customer first travels on a local network from the customer's premises to a point where it is handed off to a long distance company, which then transports the call to a distant point, where it is handed off to a second local network for completion. Prior to 1984, the Bell System operated an integrated network that provided local phone service in regions covering more than 80% of the nation's homes and businesses, and nearly 100% of all long distance service.

The Communications Act of 1934 divided responsibility for regulation of telecommunications markets into well-defined (albeit overlapping) spheres: federally-regulated interstate long-distance services, and state-regulated intrastate services. 47 U.S.C. § 152. *See Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355 (1986). Under this regulatory framework, state and federal regulators pursued fundamentally different goals. The States uniformly preferred a monopoly rate-of-return regime in which regulators could—through maintaining supracompetitive rates to some classes of customers, and subsidizing others—set intrastate retail prices that ostensibly ensured "universal service," but in fact responded more to political than to markets forces. *See generally* M. Kellogg et al., *Federal Telecommunications Law* 68 (1992). As Congress noted, incumbent local telephone companies historically have "been protected from competition by State and local government barriers to entry." H. Rep. at 49. In contrast, federal regulators in the last three decades promoted competition in the interstate long-distance market, and in doing so required local carriers to allow new long distance

competitors (such as MCI) to use the local network on reasonable terms to originate and terminate interstate long distance calls.[8]

The FCC's efforts to make the interstate market competitive were resisted by the Bell System, which used its control over local networks to discriminate against these new competitors in ways that evaded regulatory control. To halt that anticompetitive conduct, the Department of Justice brought a pivotal antitrust suit which resulted in the consent decree that broke up the Bell System. *See United States v. AT&T*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd*, 460 U.S. 1001 (1983). That decree divested AT&T of the Bell Operating Companies ("Bell Companies"), which provided monopoly local service, and barred those divested companies from the long distance market to preclude any future possibility that they might use their control over local networks to harm long-distance competition. As a result, there is now vibrant long distance competition. *See AT&T Reclassification*, 11 F.C.C.R. 3271, 3307-08 (1995).

Notwithstanding these pro-competitive changes in the interstate market, the States persisted in suppressing competition in local markets. Local incumbents, including the individual companies spawned from the former Bell System, continued to operate their monoply franchises, while "state regulators helped sustain the [incumbents'] bottleneck control, arguably because they preferred the subsidies and price-averages the local monopoly allowed."

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[8] Specifically, the FCC required incumbents to connect existing local networks with the facilities of the new competing long distance carriers so that customers could choose among competing long distance providers. *E.g., Specialized Common Carriers*, 29 F.C.C.2d 870 (1971), *aff'd sub nom. Washington Util. Comm'n v. FCC*, 513 F.2d 1142 (9th Cir. 1975). State public utility commissions and the incumbents unsuccessfully challenged these federal actions on the ground that they impermissibly invaded the States' authority over intrastate matters. *E.g., North Carolina Util. Comm'n v. FCC*, 537 F.2d 787, 791-94 (4th Cir. 1976); *National Ass'n of Reg. Util. Comm'rs v. FCC*, 880 F.2d 422, 431 (D.C. Cir. 1989).

SBC Communications, Inc. v. FCC, No. 97-1425, 1998 WL 121492 at *1 (D.C. Cir. Mar. 20, 1998) (quotation omitted). By 1996, the incumbent local carriers were still receiving over 99% of all local service revenues.[4]

The 1996 Act. In the 1996 Act, Congress radically changed the allocation of regulatory authority that had existed under the 1934 Communications Act, as well as the substantive policies that had prevailed under the old regime. Abandoning its acquiescence in state-regulated local monopolies, Congress preempted any state laws and regulations that "prohibit, or have the effect of prohibiting, the ability of any entity to provide any . . . intrastate telecommunications service." 47 U.S.C. § 253(a). Congress also mandated termination of the practice of implicit subsidies by which some customers paid below-cost retail rates while others paid inflated rates—requiring instead that "universal service" be assured through explicit subsidies funded by telecommunications carriers on a competitively neutral basis. *Id.* § 254. Congress recognized, however, that merely removing these regulatory impediments to competition would not make local markets competitive. It therefore went further and adopted uniform substantive federal requirements designed to reduce barriers to entry by authorizing new entrants to make use of existing local networks. Those requirements are at issue here.

Section 251 establishes three complementary routes new entrants can use to compete in local markets, each involving different economic characteristics and different physical arrangements. The first is pure facilities-based competition—that is, the construction of competing networks. A new entrant constructing its own network facilities must be allowed to "interconnect" with the incumbent's network. The 1996 Act therefore requires "interconnection." 47 U.S.C. § 251(c)(2). Without this net-

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[4] *See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Notice of Proposed Rulemaking, 11 F.C.C.R. 14171 at ¶ 6 & n.13 (1996) (JA 8-9) ("NPRM").

work-to-network interconnection, a new entrant's phone service would have limited value because the new entrant's customers could not make calls to or receive calls from the incumbent's customers. But even with mandatory interconnection, this form of competition will take years to emerge "because the investment necessary [to build a competing network] is so significant." *See* H.R. Conf. Rep. No. 104-458 at 148 (1996) ("Conf. Rep.").[6]

The Act's second route for entry is "resale." § 251 (c)(4). Incumbents must permit new entrants to purchase their retail services at wholesale rates so that new entrants can compete by reselling these services under a different brand to retail customers. Resale allows quick and widespread entry. But resale presents only limited opportunities for price competition because the wholesale rate is calculated by subtracting from the retail rate the incumbents' "avoided costs"—that is, the costs the incumbent will save by virtue of being a wholesaler (47 U.S.C. § 252(d)(3)). Resale alone will not, therefore, drive retail prices to the cost-based levels that would prevail in a competitive market. Nor does the resale option permit innovation; new entrants may resell only the same services the incumbent offers its local customers.

The Act's third route for entry is leasing designated elements of the existing local network. Section 251(c)(3) requires incumbents to provide to new entrants "nondiscriminatory access to network elements on an unbundled basis . . . in a manner that allows requesting carriers to combine such elements in order to provide . . . telecommunications service." This provides new entrants with the flexibility to order some or all of the following basic components of the local network: (i) the interface box attached to the outside of the home or business connecting the phone line to the wires inside the home or business; (ii) the "local loop," which is the line that runs

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[6] The FCC estimated that an investment of more than $29 billion would be required today to construct local networks capable of reaching even 20% of available subscribers. NPRM, ¶ 7 & n.15 (JA 9-10).

from the interface box at the customer's premises to the nearest switching center; (iii) the telephone "switches" (to which the local loops connect) which are essentially large computers that direct calls to their intended destinations; (iv) "transport" facilities, the wires that carry calls between switches; and (v) databases and other related support services. Making use of these elements, a new entrant could build its own switches and transport facilities while leasing wire loops and interface boxes from the incumbent to reach customers' homes. Or a new entrant could rely entirely on components of the incumbent's network, but use them to offer services the incumbent does not currently offer, or to compete in ways resale does not permit.

Recognizing that the price charged new entrants for these uses of the local network would determine the viability of these entry strategies, Congress established specific substantive federal requirements governing pricing. These federal pricing requirements were intended not only to ensure that new competitors would enter the market, but also that they would do so on an economically efficient basis. Thus, Congress required that these rates must be "just, reasonable and nondiscriminatory," and "based on . . . cost," 47 U.S.C. §§ 251(c)(3), 252(d)(1), and Congress specifically prohibited the traditional "rate of return" proceedings in which state regulators had set monopoly rates. § 252(d)(1).

The 1996 Act also sets forth procedures for translating these substantive federal requirements into action. Congress empowered new entrants to request interconnection, access to network elements, or resale, and required incumbents to negotiate with new entrants over these items. § 251(c)(1). Anticipating that incumbents would be unlikely to agree to terms that allow a new entrant to take away their customers, Congress gave state public utility commissions (or, if they are unwilling, the FCC) authority to adjudicate under federal law all disputed issues in a process the Act refers to as "arbitration." This process results in an "interconnection agreement" incor-

porating final terms (both negotiated and adjudicated).[6] §§ 252(b), (c). Congress placed tight time deadlines on this process: States are required to arbitrate final "interconnection agreements" within nine months of the time a new entrant first requests negotiations. § 252(b)(4)(C).

Congress assigned this adjudicatory role to state commissions because of their familarity with local conditions, but Congress was quite explicit that substantive federal law would govern resolution of any disputed issues. § 252(c)(1) (state commission shall "ensure that such resolution [of any open issues] . . . meet[s] the requirements of [§] 251 . . . including the regulations prescribed by the Commission pursuant to [§] 251"). To ensure that uniform federal standards were in place before § 252's negotiation and arbitration process commenced in earnest, Congress directed the FCC to "complete all actions necessary to establish regulations to implement the requirements of [§ 251]" within 6 months of passage of the 1996 Act. § 251(d)(1). As the Conference Committee explained, "it is important that the Commission rules to implement new section 251 be promulgated within 6 months after the date of enactment, so that potential competitors will have the benefit of being informed of the Commission['s] rules in requesting access and interconnection." Conf. Rep. at 148-49. As a further guarantee of uniformity, Congress granted federal courts exclusive jurisdiction to review state commission actions to ensure compliance with the requirements of §§ 251 and 252. § 252(e)(6). *See also* § 252(e)(4) (denying state courts jurisdiction to review interconnection agreements).

Finally, the local competition provisions of the 1996 Act also play a critical role in the process of determining whether the divested Bell Companies will be allowed to provide long distance service in their regions. Section 271 gives the FCC the responsibility to decide whether the Bell Companies will be allowed to enter long distance

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[6] These "interconnection agreements" cover more than just "interconnection" provided by § 251(c)(2) of the Act, and include as well all terms related to access to unbundled elements and resale.

markets from which they are presently barred. In doing so, the FCC must determine whether the Bell Company has met a "competitive checklist," which includes many of the requirements of §§ 251 and 252—including, in particular, the pricing requirements. § 271(c)(2)(B).

The FCC Regulations. The FCC issued regulations on August 8, 1996. Two critical components of those regulations are at issue here. First, the FCC's Order implemented the 1996 Act's requirements concerning the prices competitors pay to interconnect with the incumbents' networks and to lease network elements. The FCC decided it was "critical . . . to establish among the States a common, pro-competition understanding of the pricing standards" that would govern relations between new entrants and incumbents. *In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, First Report and Order, 11 F.C.C.R. 15499 (1996) at ¶ 618 (JA 131) (*"Local Competition Order"*). The regulations accordingly establish a basic pricing methodology for state commissions to apply in establishing actual rates in light of particular local conditions. *See Local Competition Order* ¶¶ 618-954 (JA 719-879). The FCC determined that prices had to be based on the forward-looking economic cost of each of the leased elements as reflected in a methodology known as "Total Element Long Run Incremental Cost," or "TELRIC." As the FCC explained, setting prices at forward-looking cost is most consistent with the 1996 Act's goal of creating efficient competition as quickly as possible because it replicates the costs new entrants would incur in entering a competitive market, allowing them to price their own retail offering at levels that would prevail in a competitive market, and thereby "driv[ing] retail prices to their competitive levels." *Local Competition Order* ¶ 679 (JA 138).[7]

Second, the FCC issued regulations implementing the statutory unbundling requirements of § 251(c)(3), which

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[7] The FCC's pricing regulations also implement the statutory provisions governing resale prices and prices for transport and termination. 47 U.S.C. §§ 251(c)(4), 252(d)(2), 251(b)(5).

require "nondiscriminatory access" to network elements. One of these FCC rules dealt with requests to incumbents to provide elements that were *already connected* in their networks; it prohibited incumbents from disconnecting those already-connected elements solely for the purpose of making it more difficult and expensive for competitors to use them. 47 C.F.R. § 51.315(b). The FCC concluded that this prohibition was compelled by the text of § 251(c)(3). *Local Competition Order* ¶ 293 ("section 251(c)(3) bars incumbent LECs [local exchange carriers] from separating elements that are ordered in combination"), Pet. App. 231a-232a. As the FCC observed, absent such a rule, new entrants "would be seriously and unfairly inhibited in their ability to use unbundled elements to enter local markets." *Id.*

Proceedings in the Eighth Circuit. As soon as the regulations were published, the incumbents (joined by various state utility commissions on some issues) challenged them. Pursuant to 28 U.S.C. § 2112(a)(3), the cases were consolidated in the Eighth Circuit. That court issued a decision on the merits on July 18, 1997, which it modified on rehearing on October 14, 1997. The court first held that the FCC lacked plenary authority to promulgate the regulations implementing the requirements of § 251. Although the 1996 Act expressly required that "[w]ithin 6 months . . . the Commission shall complete all actions necessary to establish regulations to implement the requirements of this section [251]," (47 U.S.C. § 251(d)(1)), the court held that this statutory command was "primarily a time constraint, directing the Commission to complete expeditiously its rulemaking regarding only the areas in section 251 where Congress expressly called for the FCC's involvement." Pet. App. 12a. The court also rejected the FCC's reliance on its comprehensive authority under § 201(b) of the Communications Act, 47 U.S.C. § 201(b), to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act," on the ground that § 201 authorized only regulation of common carriers

engaged in "interstate or foreign communication." Pet. App. 12a.[8]

Believing the FCC lacked plenary rulemaking authority, the court held that the FCC could implement only six specific narrow substantive requirements of § 251 where Congress had "expressly" mentioned particular attributes of the Commission's regulatory powers.[9] Outside these six areas *any* FCC action was held to be *ultra vires* because Congress intended for the States, not the FCC, "to dictate the substantive standards" necessary to implement the Act's federal requirements. Pet. App. 29a-30a. Chief among the many areas over which the FCC allegedly lacked jurisdiction is price. The court held that because of "[t]he absence of any direct FCC pricing authority over local telephone service," Pet. App. 13a, the FCC had violated the "plain meaning" of the Act in concluding that it could issue pricing regulations. Pet. App. 14a-15a & n.15.

The court held that the FCC's pricing regulations were also barred by § 2(b) of the original 1934 Communications Act, 47 U.S.C. § 152(b), which provides that "nothing in this chapter shall be construed to apply or to give the [FCC] jurisdiction with respect to . . . charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communications service." The court of appeals described § 2(b) as a "fence that is hog tight, horse high, and bull strong, preventing the FCC from intruding on the states' intrastate turf," Pet. App. 23a, and concluded that even though the 1996 Act's

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[8] For similar reasons, the court also concluded that the FCC could not use its traditional enforcement authority under § 208, to enforce *any* of the 1996 Act's local competition requirements in administrative complaint proceedings. Pet. App. 30a-34a.

[9] Pet. App. 12a & n.10. *See* § 251(b)(2) (number portability), § 251(c)(4)(B) (prevention of discriminatory conditions on resale), § 251(d)(2) (identification of network elements), § 251(e) (numbering administration), § 251(g) (continued enforcement of exchange access), and § 251(h)(2) (treatment of comparable carriers as incumbents).

pricing provisions clearly apply to intrastate services, Congress additionally needs to set out "an unambiguous grant of intrastate authority to the FCC [for it] either to jump over or pass through section 2(b)'s fence," Pet. App. 17a. The Eighth Circuit concluded that in the 1996 Act Congress acted in "exactly the opposite" manner, because "the Act directly and straightforwardly assigns to the states the authority to set the prices." *Id.*[10]

The Eighth Circuit then considered the substantive validity of the remaining rules it found to be within the FCC's jurisdiction. The court upheld many of the FCC's rules but struck down others as inconsistent with the Act's plain meaning.[11] The court initially upheld 47 C.F.R. § 51.315(b), the prophylactic rule barring incumbents from discriminating against new entrants by breaking apart existing combinations of network elements prior to providing them. On rehearing, however, the court invalidated § 51.315(b). In the court's view, when a competitor requests two network elements that are already combined, the incumbent is to "uncombine" them, and the competitors must then do the "actual [re]combining" of those elements. Pet. App. 52a-53a.

SUMMARY OF ARGUMENT

The court of appeals unlawfully vacated critical FCC regulations implementing the 1996 Act, which was enacted

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[10] Relying on § 2(b) the court also vacated FCC regulations concerning exemptions for rural carriers, Pet. App. 30a; the FCC's jurisdiction to hear complaints concerning local competition issues under § 208, *id.* at 31a-32a; and the standards for reviewing interconnection agreements entered into before the effective date of the Act, *id.* at 34a.

[11] The court vacated as unreasonable or contrary to the Act's plain meaning the FCC's regulations implementing the 1996 Act's "pick and choose" provision, Pet. App. at 24a-27a; rules implementing the agency's interpretation of the preemptive effect of its own regulations, *id.* at 36a-40a; rules implementing the agency's interpretation of "the standards to determine which elements must be unbundled," *id.* at 46a; and rules implementing the agency's interpretation of the quality of access incumbents must provide to competitors, *id.* at 50a-52a.

to bring competition to monopoly local telephone markets as quickly as possible.

First, the court improperly vacated Rule 315(b), the FCC rule that protected new entrants from discriminatory treatment when they lease elements of the incumbent local telephone companies' telephone networks. That rule is a straightforward implementation of the requirement of § 251(c), imposing on incumbent monopolists the "duty to provide [to a new entrant] *nondiscriminatory* access to network elements on an unbundled basis."

The court erred in finding this rule inconsistent with the plain meaning of the word "unbundled" in § 251(c). The uniform dictionary definition of "unbundle" is "separately priced," *not* "physically disconnected," and that has also been the FCC's consistent historical understanding of the term. The Eighth Circuit's preferred definition also is irreconcilable with other provisions of § 251(c), including in particular that section's requirement of nondiscriminatory access to network elements. It was error under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984), for the court to vacate Rule 315(b) on this ground. The policy rationales offered by the court of appeals in support of its unlawful construction of the statute are equally flawed, and show only how far the court departed from a reasonable interpretation of the statute and from the rule of judicial deference to reasonable agency actions. Point I.

Second, the court of appeals erred in concluding that the FCC lacked jurisdiction to issue regulations implementing the pricing provisions of the 1996 Act. In promulgating these regulations for interconnections and elements obtained under § 251, the FCC properly relied on its plenary authority to "establish regulations to implement the requirements of § 251," 47 U.S.C. § 251(d)(1), and to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act." 47 U.S.C. § 201(b). The court of appeals' conclusion that the FCC had no general authority to issue

regulations to implement the provisions of the 1996 Act was plain error, based on clear misreadings of the statutory text.

Believing the FCC to lack broad rulemaking authority, the court erroneously looked exclusively to the pricing provisions themselves to determine whether the FCC was given the authority to make rules establishing a pricing methodology. In concluding that the statute instead gave such jurisdiction exclusively to the states, the court failed to acknowledge that the state commissions' authority to set rates indicates nothing at all about the FCC's broader rulemaking authority to prescribe a pricing methodology. Nothing in § 252 of the Act limits the FCC's authority to make rules to implement the provisions of the 1996 Act. Point II(A).

Any other result would be inconsistent with the structure and purpose of the 1996 Act. As a result of the Eighth Circuit's invalidation of the regulations implementing the Act's pricing requirements, disputes over pricing methodology are being resolved piecemeal through drawn out litigation in the federal courts, delaying the onset of local competition that Congress sought to ensure. Denying the FCC the authority to address pricing also is flatly inconsistent with § 271 of the Act, which requires the FCC to determine whether local phone companies can begin to offer long-distance service in their regions. Section 271 specifies that the FCC must consider interconnection and element prices when it makes that determination. Ultimately, the court failed in its obligation to give the statute an interpretation that makes sense of its terms as well as its practical operation. Point II(B).

Finally, nothing in § 2(b) of the 1934 Communications Act supports the court's jurisdictional ruling. That provision states that nothing in the Communications Act should be construed to apply to intrastate matters or to give the FCC jurisdiction over those matters. But here, no construction is necessary: the 1996 Act plainly both applies to intrastate matters and gives the FCC jurisdiction over those matters. Moreover, § 2(b) ensures that the FCC

not assert preemptive ancillary jurisdiction over intrastate matters that Congress has left to the States. Here, Congress plainly has regulated intrastate telephone service and preempted state law, and the FCC has not regulated any further than Congress has legislated. Additionally, Congress intended that the interconnection agreements contain a single set of rates, terms, and conditions that apply without distinction to both interstate and intrastate services. Because separation of the intrastate aspects from the interstate aspects would be contrary to that congressional intent, § 2(b) is no bar to FCC regulation. Point II(C).

ARGUMENT

I. THE EIGHTH CIRCUIT'S DECISION INVALIDATING RULE 315(b) CONSTITUTED IMPROPER JUDICIAL POLICYMAKING IN CONTRAVENTION OF *CHEVRON*.

The Eighth Circuit's invalidation of Rule 315(b), 47 C.F.R. § 51.315(b), violates the "dominant, well-settled principle of federal law" requiring "judicial deference to reasonable interpretations by an agency of a statute that it administers." *National R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 417 (1992).

Rule 315(b) implements § 251(c)(3) of the 1996 Act, which imposes on incumbents

> the duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis . . . on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the . . . requirements of this section and section 252. . . . An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.

47 U.S.C. § 251(c)(3). In particular, Rule 315(b) implements § 251(c)(3)'s requirement of "nondiscriminatory access." The Rule provides that "[e]xcept upon re-

quest an incumbent LEC shall not separate requested network elements that the incumbent LEC currently combines." 47 C.F.R. § 51.315(b). *Local Competition Order* ¶ 293, Pet. App. 231a-232a.

As the FCC explained in detailed findings, *id.*, ¶¶ 289-341 (JA 550-76), Rule 315(b) anticipates and proscribes a blatant form of discrimination. For example, under the FCC's rules, a new entrant may lease from the incumbent the telephone wire (or "loop") that runs from a customer's house to the incumbent's switch, and the switch itself. In such cases, Rule 315(b) prohibits the incumbent from responding to such a request by separating the loop from its connection to the switch, thus forcing the competitor to reconnect the two elements(if it can), and interrupting the customer's phone service in the interim. Such disconnection of elements ordered in combination, if allowed, would add substantially to the costs of would-be competitors. By contrast, when an *incumbent* begins serving a local customer who has just moved into a house, *it* does not senselessly break apart the constituent parts of its network and then piece them back together prior to providing service—and thus does not bear any cost of "recombining" the elements into a finished service. It just enters new data in its computers. In promulgating Rule 315(b), the FCC simply placed the potential competitor in the same position as the incumbent, preventing the incumbent from exploiting its position as a monopoly vendor to favor itself by unilaterally imposing pointless and discriminatory costs on its rivals.

The Eighth Circuit nevertheless held that Rule 315(b) was contrary to the plain meaning of § 251(c)(3). The court read the statute's requirement that elements be provided on an "unbundled basis" as meaning that the incumbent is to provide the elements in separated form, and for that reason concluded that any requirement that incumbents provide elements in combination violated the statute.

As will be demonstrated, that ruling constituted a wholly inappropriate usurpation of the FCC's proper role

in interpreting and administering the unbundling requirements of § 251(c)(3). First, as the FCC concluded on the basis of detailed findings (that the Eighth Circuit did not so much as mention), Rule 315(b)'s antidiscrimination rule is not merely permitted by the text of § 251(c)(3)—it is compelled by that text. Second, in all events, the FCC's interpretation of § 251(c)(3) is surely a permissible one. *See Chevron*, 467 U.S. at 842-44. "Unbundling" means separate pricing, not physical separation —as multiple dictionary definitions, consistent prior regulatory usage of the term, and the structure and purposes of the 1996 Act all unequivocally show. And as the FCC's findings make clear, the Eighth Circuit's reading of the term is irreconcilably in conflict with § 251(c)(3)'s requirement of "nondiscriminatory access." Third, the policy rationale offered by the Eighth Circuit to support its decision—that permitting the imposition of such discriminatory costs is necessary to preserve a distinction between resale and the use of unbundled elements—represents wholly unsupported speculation and is in fact contradicted by unchallenged FCC findings.

A. Rule 315(b) Implements the Requirement of the Plain Language of the Statute to Provide Nondiscriminatory Access to Network Elements.

In the administrative record, the FCC explained in detail why Rule 315(b) is necessary to enforce the statutory mandate of nondiscriminatory access to network elements. *Local Competition Order* ¶¶ 289-341 (JA 550-76). The FCC determined that the language of § 251(c) requiring "nondiscriminatory access to network elements on an unbundled basis" "bars incumbent LECs from imposing limitations, restrictions, or requirements on requests for, or the sale or use of, unbundled [network] elements that would impair the ability of requesting carriers to offer telecommunications services in the manner they intend." *Id.* at ¶ 292, Pet. App. 230a-231a. Because "t[he] incumbent LECs have little incentive to . . . provision unbundled elements in a manner that would provide efficient competitors with a meaningful opportunity to compete," but

rather "have the incentive and the ability to engage in many kinds of discrimination," ¶ 307 (JA 55-56), the agency determined that "some national rules regarding nondiscriminatory access will reduce the costs of entry and speed the development of competition." *Id.* at ¶ 308 (JA 56).

The FCC then concluded that a rule prohibiting incumbents from discriminatorily separating elements that are already combined in its network was necessary to enable new entrants to make use of combinations:

> in practice it would be impossible for new entrants that lack facilities and information about the incumbent's network to combine unbundled elements from the incumbent's network without the assistance of the incumbent. If we [permit incumbents to separate combined elements and require requesting carriers to recombine them], we believe requesting carriers would be seriously and unfairly inhibited in their ability to use unbundled elements to enter local markets.

Id. at ¶ 293, Pet. App. 231a-232a (footnote omitted).

None of these findings has been challenged as unreasonable or unsupported by the administrative record. Thus, they must be accepted as conclusive here.

B. The Eighth Circuit Erred in Concluding That the Statutory Text Unambiguously Foreclosed the FCC's Interpretation of the Statute.

Even if the FCC erred in concluding that Rule 315(b) was *compelled* by the text of § 251(c)(3)—and it did not—the Eighth Circuit's decision to invalidate that rule still is wrong because the FCC's judgment is entitled to "controlling weight unless [it is] arbitrary, capricious or manifestly contrary to the statute." *Chevron*, 467 U.S. at 844; *Holly Farms Corp. v. NLRB*, 116 S. Ct. 1396, 1402 (1996) (agency interpretation must be upheld unless "inevitable construction" of statute precludes it). Moreover, because Congress expressly authorized the FCC "to prescribe legislative rules" implementing the 1996 Act's

substantive unbundling requirements, the Eighth Circuit "owe[d] the Commission's judgment more than mere weight or deference." *United States v. O'Hagan*, 117 S. Ct. 2199, 2217 (1997). As will be demonstrated, the FCC's judgment in this matter should have been conclusive.

The Eighth Circuit concluded that Rule 315(b) is contrary to law because § 251(c)(3) unambiguously "requires an incumbent LEC to provide access to the elements of its network only on an unbundled (as opposed to a combined) basis." Pet. App. 71a. To reach this conclusion, the Eighth Circuit interpreted the requirement in the first sentence of § 251(c)(3)—that incumbents have "[t]he duty to provide . . . access to network elements on an unbundled basis"—to mean that the incumbents' only obligation is to provide network elements in a *separated form*. The court then interpreted the second sentence of § 251(c)(3)—stating that incumbents must "provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide . . . telecommunications service"—as meaning that potential competitors (not incumbents) are responsible for physically reconnecting the elements. Pet. App. 70a. But these are not "inevitable construction[s]" of the statutory text. To the contrary, the Eighth Circuit's construction of the statute is plainly wrong. *See Holly Farms*, 116 S. Ct. at 1402.

First, the incumbent's statutory "duty to provide . . . nondiscriminatory access to network elements on an unbundled basis" does not unambiguously mean that the incumbent has the right to separate its network into its constituent physical components and to provide each of those components only in *separated* form. To the contrary, as the FCC recognized, the dictionary definition of the term "unbundled" is "to separate the *charges* for (related products and services usually offered as a package)." *Random House Dictionary of the English Language*, p. 2005 (2d Ed. Unab. 1981) (emphasis

added).[12] The existence of multiple dictionary definitions supporting the FCC's interpretation alone is enough to overturn the Eighth Circuit's conclusion that the statutory text unambiguously foreclosed that interpretation. *See National R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. at 418-19. Indeed, in the Notice of Proposed Rulemaking in this very proceeding the FCC relied on these dictionary definitions in proposing that "unbundled" be given its normal meaning of "separately available at a separate price," and the incumbents' trade association endorsed that definition.[13]

Moreover, the FCC's reading of "unbundled" is consistent with the FCC's uniform regulatory use of that term over the 15 years prior to passage of § 251(c)(3). When the FCC in 1980 provided for the "unbundling" of telephone sets from local service, that meant that telephone sets were to be *priced* separately from local service, so the customer would have the option of replacing the incumbent-supplied telephone with a telephone from another vendor, or of continuing to lease the phone from the incumbent at a separate price. Unbundling did not give the incumbent the right like the one that respondents now assert, to rip the phone from the customer's wall, forcing the customer to reconnect it.[14] Separate pricing was also the uniform interpretation given the term when the FCC unbundled the features used to provide computer-

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[12] *See also Webster's New Collegiate Dictionary* (Merriam, 1981), p. 1263 ("to give separate prices for equipment and supporting services . . . to price separately"); *American Heritage Dictionary*, p. 1315 (2d Col. Ed. 1991) ("[t]he separate pricing of goods and services").

[13] NPRM at 86 & n.116 (JA 11). *See* Comment of the United States Telephone Association, p. 26 (May 16, 1996).

[14] *Second Computer Inquiry*, 77 F.C.C.2d 384, 388-89, 443-44 (1980), *aff'd sub nom., Computer and Communications Industry Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982).

related services, and other aspects of the network.[15] When Congress used the same term in the 1996 Act, it is presumed to have known of this well-established meaning. *See McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 342 (1991).

The Eighth Circuit's reading of the term "unbundled" in § 251(c)(3) to mean "separated" also conflicts irreconcilably with the 1996 Act's definition of "network elements." (47 U.S.C. § 153(29)). As the appeals court recognized elsewhere in its opinion, network elements consist not only of the "physical parts" of an incumbent's network, but also of "features, functions, and capabilities" that do not correspond to individual, physically separate parts of the network. Pet. App. 42a-43a. For example, Congress expressly identified "signaling" as a network element. 47 U.S.C. § 153(29). But signaling is an electronic stream shared by all customers whose calls are routed through a particular switch. It cannot be "separated" from the switch without disrupting many of the calls being routed through the switch. When Congress commanded that signaling be "unbundled" as a discrete "network element," it cannot possibly have intended that signaling be separated from the rest of the network. Rather, it meant that signaling, as all other elements, be "priced separately."

Second, the Eighth Circuit's interpretation of the term "unbundled" is in conflict with the express requirement of § 251(c)(3) that new entrants be provided with "nondiscriminatory access" to network elements. As the FCC explained, forcing competitors to take network elements on a disassembled basis when they are already combined in an incumbent's network "would impose costs on competitive carriers that incumbent LECs would not incur,

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[15] *Third Computer Inquiry*, 104 F.C.C.2d 958, 1064-66 (1986) ("unbundling" means that "competitors will pay only for Basic Service Elements that they use"), *vacated on other grounds, California v. FCC*, 905 F.2d 1217 (9th Cir. 1990); *Inside Wiring*, 59 Rad. Reg. 2d 1143, 1151-53 (1986), *aff'd, NARUC v. FCC*, 880 F.2d 422 (D.C. Cir. 1989).

and thus would violate the requirement under section 251(c)(3) that incumbent LECs provide nondiscriminatory access to unbundled network elements."[16] As the FCC noted, the text of § 251(c)(3) compelled the anti-discrimination rule it promulgated. *Local Competition Order*, ¶ 293, Pet. App. 231a-232a. The Eighth Circuit, however, made no effort to reconcile its ruling with the express nondiscrimination provision in the statutory text, and instead ignored the very premise of the FCC's decision to promulgate Rule 315(b). That was fundamental error. *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 118 S. Ct. 956, 962 (1998); *John Hancock Mut. Life Ins. Co. v. Harris Trust and Sav. Bank*, 510 U.S. 86, 94-95 (1993) (courts must be "guided not by a single sentence or member of a sentence, but [by] look[ing] to the provisions of the whole law, and to its object and policy") (citation omitted). Because the Eighth Circuit's construction of the term "unbundled" cannot be harmonized with the statutory requirement of "nondiscriminatory access," it cannot possibly be the sort of "inevitable construction" necessary to overturn the agency's judgment.

This conclusion is not undercut by the second sentence of § 251(c)(3) which requires incumbents to "provide such unbundled network elements in a manner that allows requesting carriers to combine" them into a "telecommunications service." Indeed, that sentence supports the FCC's conclusion. The appeals court believed the "plain meaning" of this provision to be that new entrants have the obligation to put together that which the incumbents have taken apart. But this meaning is based on the assumption that "unbundling" and "combining" are antonymous terms connoting actions taken by an incumbent and a new entrant, respectively, to break apart and put back together the telephone network. The statute's text,

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[16] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Third Order on Reconsideration, 12 F.C.C.R. 12460, at ¶ 44 (1997), *petitions for judicial review pending on other grounds, U S West Inc. v. FCC*, Nos. 97-3576 et al. (8th Cir. filed Sept. 5, 1997) (JA 247).

however, does not purport to allocate responsibilities in this way. "Combine" plainly means that competitors can offer the elements to customers in combination with other elements, and the Act employs that term to forbid incumbents from artificially restricting the combinations, or uses, to which new entrants can put network elements.

In sum, the FCC's regulation is not "unambiguously foreclosed" by the text of § 251(c)(3), and the Eighth Circuit therefore erred in striking down the regulation. The regulation prohibits a form of "discriminatory access to network elements" and implements a statutory mandate expressly forbidding such discrimination. It is the Eighth Circuit that has misread the statutory text, and this Court should reinstate Rule 315(b).

C. The Eighth Circuit's Policy Rationale Is Insupportable.

What we have shown is sufficient to require reversal. In addition, there is no plausible policy justification for the Eighth Circuit's decision. That court adopted its strained reading of the statute to alleviate its concern over one permissible entry strategy. It feared that new entrants might lease all of the incumbent's network elements in combination at a lower cost than the cost of purchasing local telephone service for resale, thereby effectively "obliterat[ing] the careful distinctions Congress has drawn" between lease of network elements, and purchase of local telephone service at wholesale rates for "resale" to customers. Pet. App. 71a. Accordingly, the court concluded, without citing any record support, that it was necessary artificially to *raise* the cost of using network elements, so that leasing network elements would not become a less costly way to enter local markets than resale. *Id.* Imposing such burdens is especially necessary, according to respondents, because Congress created resale as an entry vehicle—and priced it in a particular manner—to serve policy objectives that supposedly need to be protected against encroachment by other forms of local competition.

For at least two reasons, this conflict is entirely manufactured.

First, as the FCC determined (again, in findings ignored by the Eighth Circuit), there is no risk of its anti-discrimination rule "obliterating" the distinction between these two different methods of entry, because the two routes of entry are economically quite distinct. *Local Competition Order* ¶¶ 332-334, Pet. App. 244a-246a. The Eighth Circuit's refusal to acknowledge the force of this argument in this context is especially perplexing, because elsewhere in its decision it affirms the right of new entrants to provide service through elements leased entirely from the incumbents, and acknowledges these very differences. Pet. App. 56a-57a.

As determined by the FCC, providers of service through combinations of elements face risks resellers do not. A reseller has a guaranteed margin that can be calculated in advance, because it simply purchases services its customers request, at a discounted rate. It faces no risk of unused capacity. A competitor that provides service through leasing combinations of unbundled network elements, in contrast, bears the risk that it will pay for elements to provide service, while its customers "will not demand a sufficient number of services using that facility for the carrier to recoup its costs." *Local Competition Order* ¶ 334, Pet. App. 245a-246a. A competitor using leased elements must also build internal systems the reseller does not need, to create, bill for and repair the network it builds out of the leased elements. The FCC found as a fact, on the basis of a voluminous record, that network elements and resale establish two entirely distinct modes of entry, and that neither undermines the viability of the other. Pet. App. 243a-244a. The Eighth Circuit had no business substituting its own uninformed understanding of the economics of local telephone competition for these findings of the expert agency.

Second, the court's assumption that there would be an "inherent" economic advantage in competing via combina-

tions of elements rather than resale was based on sheer speculation that lacks any support in the administrative record, and is wrong. The relative advantages and disadvantages of these entry vehicles are determined by any number of factors. Although at present the cost-based rates the Act requires for unbundled elements may impose costs on new entrants in many markets that are less than the wholesale rates provided by the Act's resale provision, that is principally because current resale rates reflect the absence of local competition. Once that competition emerges in earnest, retail rates (and by definition wholesale rates as calculated under the Act) can be expected to decline. In such circumstances there will be no reason to think that either entry vehicle will provide "inherent" cost advantages. Moreover, new entrants' current choices of entry vehicles may well be affected by other contingent factors. In particular, the FCC has authorized new entrants to compete in the market for exchange access—to collect access charges from long distance companies—when the new entrant uses unbundled elements. *Local Competition Order* ¶ 333, Pet. App. 244a-245a. Because those charges are today greatly above cost, new entrants will have strong incentives to compete using entry strategies that allow them to capture some of those revenues. Once those charges are brought into line with cost, as the FCC has announced it intends to do (*In re Access Charge Reform*, First Report and Order, 12 F.C.C.R. 15982 at ¶ 293 (1997)), that incentive will disappear. Thus, even if the Eighth Circuit were correct (and it is not), the court has imposed a permanent solution for what is at most a temporary problem.

In opposing *certiorari*, respondents proposed a separate policy rationale for the Eighth Circuit's campaign to "save" resale. They asserted that the invalidation of Rule 315(b) is necessary to preserve local telephone retail rate structures that contain implicit cross-subsidies benefitting rural residential customers at the expense of high-volume business customers. These so-called "universal service"

subsidies are preserved, the argument goes, when new entrants resell an incumbent's service, because the wholesale price of resold service is set at a discount off the retail price that reflects the implicit universal service subsidies. Because element prices are by law "cost-based," service through elements could lead to retail price competition and so pose a threat to these subsidies. Service through elements with its accompanying price competition therefore needs to be penalized in order to preserve the implicitly subsidized retail rates.

This argument could not be more at odds with the procompetitive letter and spirit of the Act. It ignores Congress' resolve in § 254 of the 1996 Act to *eliminate* the very implicit "universal service" subsidies the respondents would preserve, requiring that "any [universal service] support mechanisms . . . should be explicit, rather than implicit as many support mechanisms are today." [17] The very point of the 1996 Act was to replace a monopoly regime in which prices are set by regulators with a competitive market in which prices are set by market forces. In this new regime, universal service subsidies will be explicit. And Congress expressly commanded that all three forms of competitive entry (resale, facilities-based, and combinations of network elements) become available "as quickly as possible," [18] declining to make universal service reform a precondition for opening local markets to competition via *any* of these three entry strategies. The incumbents, in sum, are arguing that the 1996 Act should be interpreted to protect the very implicit subsidies which Congress sought to extirpate. Their complaint is with the Congress, and not the FCC.

At bottom, both the Eighth Circuit and the respondents fundamentally misconstrue the 1996 Act, which is designed to allow market forces, and not regulators or appellate courts, to dictate to the greatest extent possible the course of competition. The FCC concluded that Congress

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[17] H.R. Conf. Rep. No. 104-458 at 131 (1996) ("Conf. Rep.").

[18] H. Rep. at 89.

did not "express[] a preference for one particular entry strategy," but created alternative paths new entrants could employ "as market conditions and access to capital permit." *Local Competition Order* ¶ 12, Pet. App. 137a-138a. Before the invalidation of Rule 315(b), a new entrant could use one or another entry strategy depending on its cost and the entrant's evaluation of the relative economic potential and risk associated with being an owner, a reseller, or a lessor. The Eighth Circuit's decision to handicap one of these strategies to further a postulated policy objective in the end serves only to compel market participants to compete through inefficient means, or not to compete at all. In this regard, Congress and the FCC understood what the court below did not—that it is bad policy to require competitors to dig up roads to lay down unnecessary phone lines because a regulator has imposed unnecessary costs upon what would otherwise be the rational economic choice to lease the existing lines from the incumbent. And it is contrary to the law for a court to foist this bad policy choice on market participants by contravening the far more sensible policy judgment of the expert agency in which Congress vested the power to make such judgments. *Chevron* dictates that the ruling of the Eighth Circuit be reversed.

II. CONGRESS GRANTED THE FCC PLENARY AUTHORITY TO ISSUE RULES IMPLEMENTING ALL LOCAL COMPETITION REQUIREMENTS OF THE 1996 ACT, INCLUDING ITS PRICING REQUIREMENTS.

The FCC possesses statutory authority to issue regulations implementing all requirements of § 251, including its pricing requirements. The text of both the 1996 Act and the original Communications Act unambiguously confer such authority, and the structure and purposes of the 1996 Act confirm its existence. The Eighth Circuit's decision to strip the FCC of much of that authority has wreaked havoc with the practical operation of the 1996 Act, and has created an incoherent jurisdic-

tional scheme that cannot be justified on federalism grounds or any other.

A. The Statutory Text Unambiguously Grants the FCC Plenary Authority to Implement All Local Competition Requirements of the 1996 Act.

Congress unambiguously gave the FCC the authority to implement all requirements of the 1996 Act. In reaching the contrary conclusion, the Eighth Circuit fundamentally misconstrued the statutory text. It held that the FCC's pricing rules were unlawful because Congress had not authorized the FCC "*specifically* to issue rules governing . . . rates." Pet. App. 12a (emphasis added). But there was no need for such a specific grant of authority because Congress granted the FCC plenary authority to implement all of § 251's requirements. Th[illegible], the fact that the 1996 Act does not contain any language specifically authorizing the FCC to issue pricing regulations (or for that matter any other specific category of regulations) proves nothing.

1. The grant of implementing authority contained in the 1996 Act is straightforward. Section 251(d)(1) authorizes the FCC to "complete *all actions necessary* to establish regulations *to implement the requirements of this section*" within 6 months of the date of enactment. 47 U.S.C. § 251(d)(1) (emphasis added). Section 251 contains the express pricing requirement that rates for interconnection and access to unbundled elements be "just, reasonable, and nondiscriminatory, in accordance with . . . the requirements of this section and [§] 252," which in turn requires that such rates be "based on . . . cost." 47 U.S.C. §§ 251(c)(2), (c)(3), 252 (d)(1). Nothing in the statutory language forbids the FCC from issuing regulations implementing those requirements. Thus, § 251 (d)(1) gives the FCC authority to implement all requirements of § 251, including its pricing requirements.

Even apart from § 251(d)(1), the general rulemaking provisions of the original Communications Act provide

alternative sources of authority sufficient to justify the FCC's pricing rules. Section 201(b) of the Communications Act authorizes the FCC to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act." 47 U.S.C. § 201(b). The 1996 Act amended the Communications Act, adding §§ 251 and 252 to that Act. *See* 110 Stat. 61 (1996). Because §§ 251 and 252 are now "provisions of this Act," and Congress did not amend § 201(b) to restrict the FCC's rulemaking authority in any way, this provision plainly authorizes the FCC to issue rules implementing § 251.[19]

The Eighth Circuit's refusal to give effect to these statutory provisions is insupportable. It is not plausible to assert—as the Eighth Circuit did—that § 251 is only a time limit and not a grant of authority, when it is literally both.[20] Nor is there merit to the Eighth Circuit's holding that § 201(b), which authorizes the FCC to carry out all provisions of the Act, applies only to interstate matters. Although the first sentence of § 201(b) does deal with interstate matters, the grant of rulemaking authority is not so confined. The last sentence of § 201(b) grants the FCC authority to implement all provisions of "the Act," not merely the provisions of § 201. It may be that when originally enacted, that statutory language had the effect

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[19] Two other provisions—§ 4(i) and § 303(r)—likewise authorize the FCC to implement *all* of Chapter 5 of the Act, which now includes §§ 251 and 252. 47 U.S.C. § 154(i) ("The Commission may . . . make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions"); 47 U.S.C. § 303(r) (the Commission shall "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act").

[20] *See Krauel v. Iowa Methodist Medical Ctr.*, 95 F.3d 674, 677 (8th Cir. 1996) (noting EEOC authority to issue regulations implementing the ADA under 42 U.S.C. § 12116, which provides that "[n]ot later than 1 year after July 26, 1990, the Commission shall issue regulations in an accessible format to carry out this subchapter").

of conferring only interstate rulemaking authority, but that is because the substantive provisions of the 1934 Act applied only to interstate matters. As the Act's substantive scope expanded, the rulemaking authority conferred by § 201(b) necessarily expanded with it. That is the plain meaning—indeed, it is the inevitable meaning—of the statutory text. This is hardly a surprising result: administrative agencies are typically granted rulemaking authority coextensive with the substantive scope of the organic statute they are charged with administering.

The Eighth Circuit's construction of these provisions leads directly to an absurd result—the absence of *any* source of authority for the FCC to implement *any* of the 1996 Act's local competition provisions. That cannot be correct because, as the Eighth Circuit recognized, several provisions of the 1996 Act "expressly called" for FCC involvement. *See* Pet. App. 12a n.10 (citing provisions). But those provisions do not themselves supply the kind of specific and unambiguous grant of rulemaking authority the Eighth Circuit held was required. Those provisions are not *grants* of authority at all. They are, rather, *limitations* on the FCC's authority, *see, e.g.*, § 251(d)(2) ("[i]n determining what network elements should be made available . . ., the Commission shall consider"), or on the States' authority, *see* § 251(c)(4)(B) ("a State commission may, consistent with regulations prescribed by the Commission"). The provisions on which the Eighth Circuit relied *presuppose* the existence of FCC rulemaking authority—and thus confirm that it must have been conferred by some other provision of the Act. *See NationsBank v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 258 (1995) (existence of statutory limitation on grant of authority "presupposes" existence of that authority, and "makes sense only if" authority is elsewhere conferred).

2. Because the statutory text confers plenary rulemaking authority, the FCC's pricing rules must be upheld unless some other provision of the 1996 Act expressly limits that authority. The Eighth Circuit purported to

find such a limitation in § 252(c)(2), which instructs state commissions to "establish . . . rates according to [252(d)]." *See* Pet. App. 14a. ("the Act plainly grants the state commissions, not the FCC, the authority to determine the rates involved in the implementation of the local competition provisions of the Act"). Indeed, the Eighth Circuit concluded that the "plain language" of § 252 denied the FCC any authority to issue pricing regulations. *Id.* at 10a-14a.

Section 252 does no such thing. It merely grants to state commissions the authority to "establish" actual rates to govern particular interconnection agreements. But establishing actual rates and prescribing a pricing methodology are two different things. The former is an adjudicatory task, the latter a prescriptive one. By no stretch of language or logic does giving each State the task of applying Federal rules in a concrete factual context negate the FCC's authority to prescribe general rules for States to apply in carrying out their assigned role. Thus the "plain language" of § 252 does not eliminate the FCC's authority to prescribe rules implementing § 251's pricing requirements.

In truth, the Eighth Circuit's decision rests not on the "plain language" of the 1996 Act, but on a negative inference drawn from what the Eighth Circuit mistakenly believed was legislative silence. Believing wrongly that Congress gave the FCC no plenary rulemaking authority, the appeals court assumed the task of making *ad hoc* judgments about each requirement of § 251, assigning principal implementing responsibility to the FCC or to the States depending on whether the statutory text appeared to contemplate FCC or state action. The court thought it critical that "the absence of any reference whatsoever to the FCC in the sections of the Act that directly authorize the state commissions to establish prices confirms to us that Congress did not envision the FCC's participation in determining [prices]." Pet. App. 13a. But once §§ 251(d)(1) and 201(b) are properly recognized as

affirmative grants of rulemaking authority, the purported negative inference arising from § 252(c)(2) loses all its force. *See Field v. Mans*, 516 U.S. 59, 67-68 (1995) (negative inference from legislative silence "should not be elevated to the level of interpretive trump card," particularly where it would yield "odd" results).

This Court made precisely the same point in its recent decision in *Lexecon*, 118 S. Ct. at 962. In assessing the nature of the obligation of the Judicial Panel on Multidistrict Litigation to remand a previously transferred case back to its original jurisdiction for trial, the Court rejected the argument that the absence of any mention of the Panel's obligation in § 1407(b) trumped the explicit assignment of that obligation in § 1407(a). Noting that "a statute is to be considered in all its parts," this Court reasoned that:

> to emphasize that § 1407(b) says nothing about the Panel's obligation when addressing a transferee court's powers is simply to ignore the necessary consequence of self-assignment by a transferee court: it conclusively thwarts the Panel's capacity to obey the unconditional command of § 1407(a).

Id. at 962. Similarly, to emphasize that § 252(c)(2) says nothing about the FCC's authority to establish a pricing methodology "conclusively thwarts" the FCC's ability to exercise the authority conferred by §§ 251(d)(1) and 201(b).

More fundamentally, however, § 252 is not silent: it expressly instructs state commissions to resolve "any open issue" in arbitrations in accordance with "the requirements of section 251 of this title, *including the regulations prescribed by the Commission pursuant to section 251.*" 47 U.S.C. § 252(c)(1) (emphasis added). The question of what pricing methodology to use in establishing rates in a § 252 adjudication is plainly one such "open issue." Congress did not need to repeat that instruction when, in the immediately following subsection, it authorized state commissions to "establish" the actual rates. 47

U.S.C. § 252(c)(2). Thus, there is no basis in the statutory text for concluding that Congress intended to deny the FCC authority to implement the pricing requirements of § 251.[21]

3. The legislative history of the 1996 Act confirms what the text makes plain. The bills passed by both houses of Congress indisputably granted to the FCC authority to implement all of the Act's local competition requirements, including its pricing requirements. The House bill expressly instructed the FCC to "establish regulations to implement the requirements of this section," and made specific mention of pricing requirements. H. Rep. at 143, §§ 242(b)(4)(A), (C). In the Senate version, the substantive provisions that are now divided between § 251 and § 252 were contained in a single section, which also included a provision instructing the FCC to "implement the requirements of this section." S. Rep. at 93, § 251(i)(1).[22] In reconciling the relevant provisions of these two bills, the Conference Committee made quite clear that it intended no substantive changes: the Confer-

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[21] At a minimum, §§ 251 and 252 do not convey an "unambiguously expressed intent" on the part of Congress to deny the FCC authority to implement § 251's pricing requirements. *See Holly Farms Corp.*, 116 S. Ct. at 1407 (O'Connor, J., concurring in part, dissenting in part) (*quoting Chevron*, 467 U.S. at 842-43). Thus, the Eighth Circuit was wrong to conclude on this basis that it did not owe the FCC's interpretation of the 1996 Act any deference. *See generally Chevron*, 467 U.S. at 842-46; *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 382 (1988) (Scalia, J., concurring) (*Chevron* deference extends to agency's determination of the scope of its own authority). Indeed, the Eighth Circuit was wrong as a matter of law in concluding that the mere "absence of any FCC pricing authority" (Pet. App. 13a) constituted the kind of clear Congressional statement necessary to override an agency's interpretation of its authority. Under *Chevron*, when a statutory provision is "silent or ambiguous with respect to [a] specific issue," reviewing courts must defer to any reasonable agency interpretation. 467 U.S. at 843.

[22] The Senate bill also directed state commissions to comply with the FCC's regulations in conducting arbitrations. S. Rep. at 91-92, § 251(d)(5)(A), (D).

ence report states that where no change was noted, no substantive change was intended,[23] and that report nowhere suggests any intent on the part of Congress to take away from the FCC any of the implementing authority each House of Congress had given it. *See Mead Corp. v. Tilley*, 490 U.S. 714, 723-24 (1989) (where conference committee noted differences between final version of statute and predecessor bills, it is reasonable to assume that had committee intended a change to be substantive, it would have discussed it); *Union Elec. Co. v. EPA*, 427 U.S. 256, 262-63 (1976). Moreover, there is no reason to think the Conference Committee intended to reduce radically the scope of the FCC's jurisdiction in light of the Senate rule forbidding Conferees from eliminating matters agreed to by both Houses. *See* Standing Rules of the Senate, 104th Cong., Rule XXVIII, c. 2.

B. The Eighth Circuit's Decision to Strip the FCC of Authority to Issue Pricing Regulations Is Utterly at Odds With the Structure and Purposes of the 1996 Act.

The structure and purposes of the 1996 Act also compel the conclusion that Congress granted the FCC authority to implement all of § 251—including its pricing requirements. The 1996 Act does more than merely commit the nation to a policy of competition in local telephone markets. It also establishes a process designed to open local markets as quickly as possible, and to manage an orderly transition to Bell Company participation in long distance markets. Granting the FCC authority to implement the Act's pricing requirements is fully consistent with this process because it ensures rapid and uniform national execution of Congress' objectives. Stripping the FCC of that authority, in contrast, stands as a serious obstacle to the

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[23] *See* Conf. Rep. at 113 ("The differences between the Senate bill, the House amendment, and the substitute agreed to in conference are noted below, except for clerical corrections, conforming changes made necessary by agreements reached by the conferees, and minor drafting and clerical changes.").

practical operation of the process set forth in the 1996 Act.

1. The essential outlines of the Congressional plan are clear on the face of the statute:

First, uniform substantive federal law now governs competitive relations in local service, displacing the prior state regimes which were (with a few exceptions) antithetical to local competition. The basic federal requirements have been announced by Congress, are to be implemented in detailed regulations by the FCC, and are ultimately to be enforced by federal district courts with exclusive jurisdiction to ensure that state commissions have met the requirements of §§ 251 and 252 and implementing FCC regulations.

Second, speed is critical. The 1996 Act is replete with action-forcing deadlines—most importantly the requirement that the FCC issue its regulations within six months of the Act's passage. Congress made clear that it wanted national rules in place before the § 252 arbitration process was underway, in order to narrow the range of issues subject to legal dispute and to rein in the incumbents' natural incentives to obstruct the process:

> it is important that the *Commission rules to implement new section 251* be promulgated within 6 months . . . so that potential competitors w[ould] have the benefit of being informed of the Commission['s] rules in requesting access and interconnection.

Conf. Rep. at 148-49 (emphasis added). Additionally, the substantive validity of the FCC's rules could be settled quickly, in a single proceeding before a single federal court of appeals.

Third, States play a critical role in implementing the new federal policy, but a role that differs fundamentally from that of the federal government. Federal authorities announce the law; States apply it. Congress permitted States to assume that role for two obvious reasons: (i) by virtue of their long history of regulating local service,

state authorities have the factual knowledge needed to translate the new federal requirements into action; and (ii) permitting the States to assume this responsibility will bring about competition much faster than would the alternative of assigning this responsibility to the FCC, which would have been administratively overwhelmed by an effort of this magnitude.

Fourth, the FCC's responsibility under § 271 of the 1996 Act to decide whether the Bell Companies can enter long distance markets in their region is inextricably linked to the FCC's responsibility to implement the Act's local competition provisions. The FCC may not grant such authority to a Bell Company unless the FCC finds, *inter alia*, that the Bell Company has met the requirements of § 251.

2. By stripping the FCC of pricing authority, the Eighth Circuit has scuttled the coherent regulatory approach created by Congress and replaced it with an incoherent jurisdictional scheme in which authority is dispersed among the FCC, state commissions, and federal courts without any rhyme or reason—thereby "frustrat-[ing] the statute's practical operation as well as its formal command." *See Oubre v. Entergy Operations, Inc.*, 118 S. Ct. 838, 842 (1998).

a. The Eighth Circuit's decision has made it far more difficult to bring competition to local markets "as quickly as possible." *See* H. Rep. at 89 (action within 15 months thereafter). As a result of the Eighth Circuit's action, uniform national pricing rules were not in place to govern the onslaught of § 252 arbitrations that followed passage of the 1996 Act. The Eighth Circuit thus opened the door to what Congress had acted to prevent: state-specific trench warfare over the meaning of the Act's pricing requirements. Dozens of cases are now pending across the country in federal district courts, challenging the pricing determinations of state commissions as inconsistent with the requirements of § 251. If the Eighth Circuit's decision is not reversed, this trench warfare will persist

for years. Once the federal courts of appeals (and perhaps this Court) have settled on a uniform meaning of the Act's pricing requirements, the inevitable result will be invalidation of some state decisions, requiring those States to revise fundamental assumptions years after initial determinations have been made. Not only will this process waste substantial resources, it promises tremendous delay in the introduction of actual competition, as competitors wait for federal courts to sort through the Act before making (or resuming) the multi-billion dollar investments necessary to compete meaningfully in local markets.

b. In addition, the Eighth Circuit's jurisdictional ruling cannot be reconciled with the plain text of § 271 of the 1996 Act—the provision governing whether Bell Companies will be permitted to provide interstate long-distance service to customers in their regions—and undermines coherent administration of that provision. Section 271 specifically vests the FCC with the authority to decide when a Bell Company should be permitted to enter the long distance market in its home region. In making that determination, the FCC must "find" that the Bell Company has satisfied all requirements of § 271's "competitive checklist," which is designed to test whether its local market has become competitive. § 271(d)(3). The checklist expressly includes many of the requirements of § 251, including its pricing requirements. § 271(c)(2)(B). As the D.C. Circuit recently explained, the FCC must find "to its own satisfaction" that the statutory requirements are met, because "Congress has clearly charged the FCC, and *not the State commissions*, with deciding the merits of the [Bell Companies'] requests for interLATA authorization." *SBC Communications Inc. v. FCC*, 1998 WL 121492 at *6. Thus, the Eighth Circuit has denied the FCC the authority to issue regulations prescribing a pricing methodology sufficient to satisfy the requirements of § 251(c)(3), even though the plain text of § 271 directs the FCC to reject an application for long distance authority if it determines that the prices set by a State do not satisfy the requirements of § 251(c)(3).

The Eighth Circuit has, of course, sought to square the circle by issuing a mandamus order denying the FCC the very authority that the text of § 271 (and the recent D.C. Circuit decision) insist the FCC must exercise respecting pricing issues. *See* Order on the Motions (JA 284-301) (FCC must "confine its pricing role under [§] 271(d)(3)(A) to determining whether applicant [Bell Companies] have complied with the *pricing methodology and rules adopted by the state commissions and in effect in the respective states in* which such [Bell Companies] seek to provide in-region, interLATA services") (emphasis added). That ruling (which is the subject of a separate petition for certiorari) cannot be correct. Although the Eighth Circuit has tied the FCC's hands respecting state pricing determinations, federal courts are free to invalidate state pricing determinations that the Eighth Circuit has forced the FCC to accept in adjudicating § 271 applications—thus creating the possibility of genuine chaos in the long distance market, as the FCC is forced (by judicial decisions in § 252 cases invalidating state pricing decisions) to revoke long distance authority it previously was forced to grant as a result of the Eighth Circuit's ruling. Similarly, the D.C. Circuit in reviewing an FCC decision under § 271 would presumably be free (as the FCC, according to the Eighth Circuit, is not) to disagree with the State's pricing determination in deciding whether a Bell Company had met the statutory standards for obtaining long distance authority. Congress cannot possibly have intended such chaos. That the Eighth Circuit would be driven by the logic of its original decision to such an implausible and impractical conclusion about the FCC's § 271 authority is a powerful indicator that the original decision is wrong.

c. The Eighth Circuit's decision is also impossible to reconcile with a host of other provisions in the Act. It cannot, for example, be squared with § 410, 47 U.S.C. § 160, which grants the FCC the authority to forbear from enforcing any regulation or provision of the Act (relating *inter alia* to "charges")—including the pricing

provisions of § 251(c). Congress has given the FCC the power to suspend enforcement of the requirements of § 251(c)—including its pricing requirements—if the FCC decides those requirements have been fully implemented, and are no longer necessary to promote competition or protect the public interest. 47 U.S.C. §§ 160(a)(1), (d). In order to exercise that authority, the FCC must necessarily decide what the pricing requirements of § 251 mean. Once the FCC makes such a decision, a State is forbidden from continuing to enforce those requirements. *Id.* § 160(e). It would have been entirely capricious to deny the FCC authority to issue regulations implementing those requirements in the first instance.

Nor can the Eighth Circuit's ruling be squared with the plain text of § 208, which gives the FCC authority to adjudicate complaints by "[a]ny person . . . complaining of anything done or omitted to be done by any common carrier subject to this Act, in contravention of the provisions thereof." 47 U.S.C. § 208. Indeed, much as it did with § 271, the Eighth Circuit had to ignore the plain language of the statute in order to vindicate its view of the proper scope of FCC authority. *See* Pet. App. 30a-34a (holding that FCC may not consider § 208 complaints alleging violations of § 251). *But see* § 252(d)(3) ("in prescribing and *enforcing* rules to implement the requirement of this Section. . . .") (emphasis added). And the Eighth Circuit did not explain how its ruling could be squared with § 253 of the 1996 Act, which authorizes the FCC to preempt any state-set requirement (including pricing requirements) that effectively prohibits entry into intrastate markets.

3. The Eighth Circuit's construction of the 1996 Act must be rejected because it destroys the prospects for coherent national administration of the Act and, by haphazardly dispersing decisional authority under the Act, "would yield an incoherent jurisdictional scheme." *See Bank One Chicago v. Midwest Bank & Trust Co.*, 516 U.S. 264, 275 (1996) (rejecting interpretation of § 4010 of Expedited Funds Availability Act because it would

randomly disperse authority for deciding related claims among state and federal agencies and courts). Under the Eighth Circuit's approach, the FCC has the authority to implement some substantive requirements of § 251 (such as deciding what network elements should be unbundled). States must follow those FCC implementing regulations when adjudicating disputes pursuant to § 252, and are subject to federal court review to ensure conformity with the FCC's rules. However, for other substantive requirements of § 251—including the critical pricing requirements—States are now free, in the first instance, "to dictate the substantive standards" that will apply, Pet. App. 30a. No coherent rationale exists for why Congress would have chosen the distribution of jurisdictional authority resulting from the Eighth Circuit's decision.

In view of all the adverse consequences flowing from the Eighth Circuit's decision—the delay and uncertainty it is causing, its incompatability with §§ 271, 410, 208 and 253, and its incoherent allocation of jurisdictional responsibilities—that decision simply cannot be a correct reading of the 1996 Act.

4. This litany of adverse consequences cannot be justified on the only ground thus far offered—federalism. At bottom, the Eighth Circuit appeared to believe its ruling was necessary to protect the States' traditional regulatory authority over intrastate telecommunications matters. But States had such authority as a result of a decision *by Congress* in 1934 to allocate regulatory responsibility in that way. There can be no question, however, that Congress has sufficient authority under the Commerce Clause to regulate intrastate telecommunications services, and the 1996 Act represents an unambiguous decision on the part of Congress to preempt traditional state laws restricting competition in local markets. Section 251 prescribes comprehensive substantive federal requirements governing carrier-to-carrier relationships in the intrastate market. Moreover, Congress indisputably gave the FCC authority to prescribe binding national rules governing many important requirements of § 251, including all of its substantive unbundling

requirements and many of the resale requirements of § 251(c)(4). FCC rules in these areas govern intrastate matters fully as much as did the pricing rules invalidated by the Eighth Circuit. Indeed, Congress has gone even further, expressly preempting all state laws restricting competition in local markets (§ 253), and mandating an end to the old regime of hidden subsidies associated with monopoly rate-of-return regulation (§ 254). A plausible defense of the Eighth Circuit's decision therefore cannot rest on broad brush invocations of federalism. It must instead explain why Congress would have chosen to deny the FCC authority to implement one critically important subset of nationally uniform federal requirements under § 251 while granting the FCC authority to implement other important requirements contained in the same provision, and granting the federal courts (while denying state courts) the power to review even the provisions initially assigned to the States. No such explanation has even been attempted.

Nor is there a plausible case to be made that Congress simply decided to leave the critical question of pricing methodology to the States' discretion. To begin with, the legitimacy of any such delegation of federal substantive authority would be suspect. Congress may of course delegate such authority to federal agencies, but only because they are supervised by the President and thus accountable to the national electorate. State agencies lack that political accountability. *See Printz v. United States*, 117 S. Ct. 2365, 2378, 2381 (1997) (unlawful to transfer federal executive power to "the 50 States, who are left to implement the program without meaningful Presidential control"); *Bowsher v. Synar*, 478 U.S. 714, 733 (1986) ("[i]nterpreting a law enacted by Congress to implement the legislative mandate is the very essence of 'execution' of the law"). Indeed, that is why federal courts do not accord *Chevron* deference to state agency interpretations of ambiguous provisions of federal law,[24] and have uni-

[24] *See, e.g., AMISUB v. Colorado Dep't of Social Services*, 879 F.2d 789, 795-96 (10th Cir. 1989); *Turner v. Perales*, 869 F.2d 140, 141 (2d Cir. 1989).

formly rejected such deference in adjudicating cases pursuant to § 252(e)(6) of the 1996 Act.[25] Moreover, Congress' decision to vest federal courts with exclusive jurisdiction to ensure that state commissions have complied with the requirements of § 251 is a powerful indication that Congress intended uniform national interpretations of those requirements.

For all these reasons, the Eighth Circuit erred in concluding that Congress intended in the 1996 Act to deny the FCC authority to issue nationwide regulations establishing pricing methodologies.

C. Section 2(b) of the 1934 Act Does Not Deny the FCC the Authority to Issue Rules Implementing the Pricing Requirements of the 1996 Act.

The Eighth Circuit's invalidation of the FCC's pricing rules cannot be sustained on the alternative ground that it is compelled by § 2(b) of the 1934 Act, 47 U.S.C. § 152(b). Relying on § 2(b) and this Court's preemption decision in *Louisiana Public Service Commission v. FCC*, 476 U.S. 355 (1986), the Eighth Circuit concluded that the FCC lacked jurisdiction over intrastate matters unless the Communications Act "*both* unambiguously appl[ied] to intrastate telecommunication matters *and* unambiguously direct[ed] the FCC to implement its provisions." Pet. App. 19a (emphasis in original). In the Eighth Circuit's view, because the 1996 Act did not "unambiguously direct" the FCC to implement its provisions, and because no other exception to § 2(b) was applicable, the FCC had no jurisdiction to prescribe regulations implementing many of the substantive provisions of the 1996 Act, including those involving pricing.

That holding is indefensible. Even under the Eighth Circuit's restrictive approach, § 2(b) does not preclude

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[25] *See, e.g., US West v. MFS Intelnet*, No. C97-222WD, Order on Motions for Summary Judgment (W.D. Wash. Jan. 7, 1998); *US West v. Hix*, No. 97-D-152, Memorandum Opinion and Order (D. Colo. Dec. 5, 1997).

the FCC's assertion of jurisdiction under the 1996 Act, because the Act "straightforward[ly]" and "unambiguous[ly]" *both* applies to intrastate matters *and* gives the FCC jurisdiction over those matters. More important, the Eighth Circuit misunderstood the nature of § 2(b). That section simply limits the FCC's *ancillary* jurisdiction over intrastate matters not governed by substantive federal law; it has no role when, as here, a provision of the Act indisputably applies to intrastate matters. The court's contrary interpretation was based on a fundamental misreading of *Louisiana Public Service Commission v. FCC*, 476 U.S. 355 (1986). *Louisiana* addressed whether the FCC had ancillary jurisdiction to preempt state laws governing certain aspects of intrastate services; *Louisiana* is thus inapplicable to this case, in which Congress has plainly preempted state law, and the only question is whether the FCC or the state commissions will have authority to implement the federal law. Finally, the Eighth Circuit's decision must be reversed because that court misapplied § 2(b)'s "inseverability" exception. *See Louisiana*, 476 U.S. at 375 n.4.

1. All that § 2(b) creates is a rule of construction—a presumption—that the Communications Act does not apply to, and that the FCC lacks jurisdiction over, intrastate matters. The presumption governs, of course, only in the absence of congressional intent to the contrary. *See Louisiana*, 476 U.S. at 377. When Congress in an "unambiguous" or "straightforward" manner demonstrates either an intent to reach intrastate communications service or to give the FCC jurisdiction over such service, § 2(b)'s rule of construction simply has no application.[26]

Here, Congress has done both. As demonstrated, *see supra* pp. 4-7, 34, and as the Eighth Circuit acknowledged, §§ 251 and 252 "clearly apply to intrastate telecommuni-

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[26] This rule is consistent with the well-established rule that a more specific statute controls a more general one. *See, e.g., Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992).

cation service." Pet. App. 19a. Indeed, one of the principal purposes of the 1996 Act was to open to competition local—*i.e.*, intrastate—telephone service, and the provisions of the Act unambiguously implement that purpose.[27] As we have also demonstrated above, it is equally clear that the 1996 Act provides in a straightforward and unambiguous manner for FCC jurisdiction to implement these federal statutory provisions. Section 251(d)(1) expressly empowers the FCC to issue regulations "to implement the requirements of this section." And § 201 of the Communications Act provides unambiguously and without limitation that "[t]he Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act." Clearer congressional authorization for FCC action can hardly be imagined. *See* Part II(A). Thus, even under the Eighth Circuit's dual test—requiring both explicit coverage in federal legislation *and* explicit authorization of FCC regulations—the § 2(b) presumption is overcome.

2. Moreover, the Eighth Circuit misunderstood the requirements of § 2(b). Although the Eighth Circuit conceded that the 1996 Act created uniform *federal* standards to govern pricing and other aspects of intrastate services, it concluded that the FCC lacked jurisdiction to issue regulations implementing those standards, because the FCC allegedly had not received "unambiguous direction" from Congress. That conclusion is inconsistent with the text and history of § 2(b) and is not required by any precedent of this Court.

The Eighth Circuit's faulty conclusion about the need for "unambiguous direction" arose largely from its misreading of *Louisiana*, which it viewed as standing for the proposition that "section 2(b) 'fences off' intrastate matters from FCC regulation." Pet. App. 15a. In *Louisiana*,

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[27] *See, e.g.*, § 251(c)(2) (interconnection to local network facilities), § 251(c)(4) (resale of local telephone service); § 251(c)(3) (access to the unbundled elements of the local network); § 252 (framework for generating agreements between incumbent LECs and new entrants); § 254 (universal service).

the Court faced the quite different question whether the FCC had the power to issue depreciation regulations that preempted contrary requirements established under state law for intrastate service. *See* 476 U.S. at 358. The statutory provision at issue, § 220(b) of the Act, provided that the Commission "shall . . . prescribe" regulations governing the treatment of depreciation by common carriers. *Id.* at 366. There was thus no question that the statute applied to—and that the FCC had jurisdiction to regulate—depreciation rates for *interstate carriers.* The statute, however, made no reference to *intrastate* matters, and did not otherwise contain clear indications that such matters were within the statute's purview. The Court's conclusion that, against the background of § 2(b), the FCC had not been clearly granted the power to preempt contrary state depreciation schedules with respect to intrastate rates was, therefore, a rejection of the FCC's exercise of *ancillary* jurisdiction, *i.e.*, the FCC's jurisdiction over matters to which the Act did not directly apply. *Id.* at 371-73. The Court's decision did not at all address the issue presented here—namely, whether the FCC has the power to regulate intrastate matters when Congress has unambiguously determined that federal law applies to those matters.

When Congress has enacted laws expressly governing intrastate matters, § 2(b) does not require Congress to use unusually clear and specific language to authorize the FCC to implement those laws. In other words, § 2(b) restricts the FCC's ancillary jurisdiction, not its ability to enforce substantive federal law. That § 2(b) was intended only as a limit on the FCC's exercise of ancillary jurisdiction is confirmed by the existence of § 201(b). Section 201(b) states, unambiguously and without limitation, "The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act." Prior to passage of the 1996 Act, § 201(b) and § 2(b) were complementary and mutually reinforcing provisions. The plain text of § 201(b) gave the FCC authority to "prescribe rules and regulations" for all provisions of the Act, which then ap-

plied only to interstate matters, while at the same time the plain text of § 2(b) precluded the FCC from regulating purely intrastate matters (to which the Act did not then apply).

Following the passage of the 1996 Act, however, the Eighth Circuit treated these complementary provisions as conflicting. Under the Eighth Circuit's construction of § 2(b), § 2(b) deprived the FCC of authority to implement the provisions of the 1996 Act, while the plain text of § 201(b) gave the FCC that same authority. The Eighth Circuit resolved this tension by concluding that § 2(b)'s provision governed, in derogation of the unambiguous command of § 201(b). This resolution was accomplished by judicial fiat, without reference to the history of either § 201(b) or § 2(b).

This history makes clear that the tension between the plain meaning of § 201(b) and § 2(b) resulting from the Eighth Circuit's decision is the result not of poor congressional drafting, but of the Eighth Circuit's misreading of § 2(b). Section 2(b) was enacted to overrule *Houston E. and W. Texas Ry. Co. v. United States,* 234 U.S. 342 (1914) (*Shreveport*). The *Shreveport* decision upheld the ICC's preemption of intrastate state agency ratemaking, even though the Interstate Commerce Act (ICA) specified that its provisions "shall not apply to" intrastate matters. 234 U.S. at 356-57. The Court reasoned that the state agency had set an unnaturally low rate for intrastate traffic, which resulted in a form of discrimination against interstate traffic. This discriminatory effect on interstate commerce was held sufficient to give the ICC "jurisdiction" over the intrastate rate even though, by its terms, the ICA did not apply to intrastate services. *Id.* The *Shreveport* Court, in other words, permitted the ICC to exercise "ancillary" jurisdiction over intrastate matters even where the statute made clear that federal law did not "apply" to those matters.

The history of § 2(b) leaves no doubt that the 1934 Congress (which modeled the Communications Act on the

Interstate Commerce Act) adopted § 2(b)—and in particular § 2(b)'s limitation on the FCC's jurisdiction—to prevent application of *Shreveport*'s ancillary jurisdiction doctrine to the telecommunications field. *See generally A Legislative History of the Federal Communications Act of 1934* (Max D. Paglin ed. 1989) at 53-59.[28] *See also NARUC v. FCC*, 746 F.2d 1492, 1500 (D.C. Cir. 1984) (Bork, J.) ("Section 152(b) merely confirms that the States retain jurisdiction over purely intrastate calls notwithstanding the economic effect such State jurisdiction might have on the interstate market. Section 152(b) thus prevents the application of the so-called *Shreveport* rate decision . . . to the communications field.") (internal citation omitted).[29] Congress incorporated the ICA's prohibition that the Act not "apply" to intrastate matters, and then added a new prohibition to prevent the FCC from exercising jurisdiction over matters to which federal law did not otherwise apply. The latter provision thus prevented the FCC from using the *Shreveport* decision to circumvent Congress' decision as to the scope of federal law. Thus, § 2(b) makes clear that the FCC may *regulate* no further than Congress has chosen to *legislate*; it was at enactment, and remains, a bar only to the FCC's exercise of *ancillary* jurisdiction over intrastate services to which the Act does not otherwise apply.

If § 2(b) is read, as it was intended, to prevent only the FCC's exercise of ancillary jurisdiction, then § 201(b) and § 2(b) can each be given full effect. Section § 201(b) gives the FCC jurisdiction to regulate intrastate matters when Congress has unambiguously intended for federal law to apply to those matters, and § 2(b) bars the FCC

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[28] *See* Senate Hearings on S. 2910 (March 14, 1934), at 179 (colloquy between Senators Dill and Long). *See also id.* at 154 (statement of K.R. Clardy); 78 Cong. Rec. 8823 (May 15, 1934) (statement of Chairman Dill).

[29] *See North Carolina Util. Comm'n v. FCC*, 552 F.2d 1036, 1047 (4th Cir. 1977) ("in enacting the Communications Act [of 1934], Congress sought to deny the FCC the kind of jurisdiction over local rates approved by the Shreveport Rate Case").

from exercising ancillary jurisdiction over intrastate matters when, as is the case with the establishment of consumer rates for intrastate services, federal law does not unambiguously apply. The sections thus remain, after the 1996 Act as they were before the 1996 Act, complementary.

In sum, the 1934 Act erected a presumptive partition between interstate matters—which were governed by federal law—and intrastate matters—which were governed by state law. Section 2(b) helped to maintain that partition by cabining the reach of federal law and of the FCC's corresponding jurisdiction. In the 1996 Act, Congress unambiguously made federal law applicable to intrastate matters that had previously been under the sole control of state commissions. Because Congress left no doubt that federal law applies to these intrastate matters, § 2(b) simply has no application to FCC rules implementing that federal law. The Eighth Circuit's failure to recognize § 2(b)'s inapplicability in such circumstances has resulted in an illogical and unprecedented regime that mocks the congressional intent to which it professes allegiance.

3. As if this were not enough—and it is—the FCC's implementation of the federal requirements of §§ 251 and 252 also falls squarely within § 2(b)'s "inseverability" exception. Under that exception, § 2(b) does not preclude FCC regulation of intrastate facilities when "it [is] not possible to separate the interstate and intrastate components of the asserted FCC regulation." *Louisiana*, 476 U.S. at 375 n.4. *See, e.g., California v. FCC*, 39 F.3d 919, 933 (9th Cir. 1994); *Public Utility Commission of Texas v. FCC*, 886 F.2d 1325, 1334 (D.C. Cir. 1989).

That exception—were it necessary—applies here. Because the new relationships mandated by § 251 will allow interstate uses of incumbents' facilities, *e.g.*, to originate and terminate interstate long distance calls, they have "interstate aspects" that are within the FCC's jurisdiction.[30]

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[30] *See Local Competition Order* ¶¶ 87, 89, Pet. App. 192a-194a; Conf. Rep. at 123 (it is "the conferees' intent that the provisions

And, although the 1934 Act generally provided for separate spheres in which States regulate rates for intrastate services, while the FCC regulates rates for interstate services, the new regulatory paradigm envisioned by Congress and adopted in the 1996 Act, *see Local Competition Order* ¶¶ 83, 92, Pet. App. 190a-191a, 194a-195a; *see supra* pp. 4-8, eschews traditional jurisdictional boundaries and requires the States and the FCC to exercise parallel and complementary jurisdiction, with the FCC adopting regulations that affect both the interstate and intrastate aspects of interconnection, and with the States applying those regulations to local conditions to develop specific interconnection arrangements and prices. Because the Act's federal interconnection requirements contemplate carrier-to-carrier agreements that have *a single set of rates, terms, and conditions* and that apply without distinction to both interstate and intrastate uses of newly created local networks, the Act does not permit the new interconnection arrangements to be separated into "interstate aspects" and "intrastate aspects" that would be separately regulated. *See Local Competition Order* ¶ 92, Pet. App. 194a-195a. Thus, the Eighth Circuit's suggestion that a separations process could be used to allow the FCC to set rates for interstate uses of the local network, *see* Pet. App. 20a, therefore is flatly inconsistent with Congress' intent that a new regulatory paradigm—with a single rate—govern those agreements. Indeed, if Congress had intended for there to be different rates for the intrastate and interstate uses of the local network, it would no doubt have said so, and would have specified different procedures for establishing those different rates.[31]

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of new section 251 are in addition to, and in no way limit or affect, the Commission's existing authority regarding interconnection").

[31] Indeed, no petitioner or other party to the FCC proceedings contended that the new duties of § 251 and § 252 could or should be divided between "interstate aspects" and "intrastate aspects" that the FCC and the States would separately regulate. *See Local Competition Order* ¶ 92, Pet. App. 194a-195a.

It is also no answer to assert, as the Eighth Circuit did, that the local competition provisions of the Act have only a "tangential impact" on interstate services. Pet. App. 22a-23a. Given that the incumbents receive over 20% of their revenues from *interstate* exchange access,[32] that suggestion is unsustainable. It is also beside the point. The FCC has undisputed authority to regulate interstate services, including the facilities and agreements relating to the provision of those services. Under the inseverability exception, if there is no basis for separating the interstate aspects of those facilities and agreements from the intrastate aspects, the FCC has jurisdiction regardless of the fraction of that service that is interstate.

Nor is it either accurate or relevant to state that the FCC "has no valid pricing authority over these areas of new localized competition." Pet. App. 21a. For the reasons stated above, *see* Parts II(A), (B), the Eighth Circuit's conclusion regarding the FCC's jurisdiction over intrastate matters is incorrect. In any event, the relevant point is that there is no indication that Congress intended to oust the FCC of its traditional jurisdiction over *interstate* matters (*see* n.30, *supra*), jurisdiction which is inextricably intertwined with the intrastate matters which the Eighth Circuit believed were not subject to the FCC's jurisdiction.

In sum, because it requires no "construction" to find an express grant of FCC jurisdiction over the substantive terms of the 1996 Act, § 2(b)'s rule of construction does not apply. And even if it did, application of § 2(b) would lead to the same result that obtains in its absence: the FCC properly exercised jurisdiction over the pricing requirements of the 1996 Act.

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[32] *See* FCC, *Telecommunications Industry Revenue: TRS Fund Worksheet Data* (Nov. 1997) at Table 18B.

CONCLUSION

The Eighth Circuit's decisions invalidating § 51.315(b) of the FCC's rules, and stripping the FCC of plenary authority to implement the requirements of § 251 of the 1996 Act, should be reversed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

AT&T CORP., *et al.*,
Petitioners,
v.
IOWA UTILITIES BOARD, *et al.*,
Respondents.

AT&T CORP., *et al.*,
Petitioners,
v.
CALIFORNIA, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Eighth Circuit

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FEDERAL COMMUNICATIONS COMMISSION

No. 96-98

IMPLEMENTATION OF THE LOCAL COMPETITION PROVISIONS IN THE TELECOMMUNCATIONS ACT OF 1996

RELEVANT DOCKET ENTRIES

Date	PROCEEDINGS
04/19/96	DOC TYPE: NPRM APPL: COMMON CARRIER BUREAU LAW FIRM: FCC RELEASE/DENIED
08/01/96	DOC TYPE: R&O APPL: COMMON CARRIER BUREAU LAW FIRM: FCC RELEASE/DENIED: 08/08/96 FCC/DA#: 96-325
08/08/96	DOC TYPE: R&O APPL: COMMON CARRIER BUREAU LAW FIRM: FCC RELEASE/DENIED: 08/08/96 FCC/DA#: 96-333
08/18/97	DOC TYPE: ORDER APPL: COMMON CARRIER BUREAU LAW FIRM: FCC RELEASE/DENIED: 08/18/97 FCC/DA#: 97-295

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 96-3321

IOWA UTILITIES BOARD

v.

FCC

RELEVANT DOCKET ENTRIES

Date	PROCEEDINGS
9/6/96	PETITION for Review of an order of the FCC
9/13/96	Consolidation Order issued by Judicial Panel on Multidistrict Litigation: Eighth Circuit designated to hear petitions for review from District of Columbia, Second, Fifth, Sixth and Eighth Circuits.
10/3/96	ARGUED in Kansas City on Motion for Stay to Judges Pasco M. Bowman, Roger L. Wollman, David R. Hansen. William P. Barr for Petitioners, the Local Exchanges. Diane C. Munns for Petitioners, the State Utility Boards; Christoper J. Wright for Respondent, FCC & USA; David W. Carpenter for proposed Intervenors, the Telecommunications carriers. Rebuttal by Mr. Barr and Ms. Munns.
10/15/96	JUDGE ORDER: Having concluded that the petitioners satisfy the four requirements for granting a stay, we grant the petitioners' motion to stay the FCC's pricing rules and the "pick and choose" rule contained in its First Report and Order pending a final decision on the merits. Upon the filing of this order, the stay imposed by our order of September

Date	PROCEEDINGS
	27, 1996, is dissolved, and is replaced by the stay imposed by the terms of this order. (See order filed October 15, 1996).
11/1/96	JUDGE ORDER: The stay entered herein on October 15, 1996, is modified by lifting the stay only as to Sec. 51.701, Sec. 51.703, and Sec. 51.717, First Report and Order. To the extent requests were made in the filed resonses to lift the stay as to other of the final Rules, those requests were deemed to be motions seeking such relief and are denied.
1/17/97	ARGUED AND SUBMITTED IN ST. LOUIS TO JUDGES Pasco M. Bowman, Circuit Judge, Roger L. Wollman, Circuit Judge, David R. Hansen, Circuit Judge. William P. Barr for Large LECS (Bell Atlantic Corp., Bellsouth Corp., Pacific Telesis, SBC Communications, US West, GTE, Ameritech, NYNEX on Appeal in 96-3321+, Maureen E. Mahoney for Small LECS (USTA, Rural Telephone) on Appeal in 96-3321, Mark R. Kravitz for Mid-Size LECS (North State Telephone, Concord Telephone, Rock Hill Telephone, Roseville Telephone, SNET, Cincinnati Bell, Pacific Telecom, ALLTEL Telephone Services, Aliant Communications Co., New York Telephone, New England Telephone) on Appeal in 96-3321, Diane Carol Munns for Petitioner The State Commissioners (Iowa Utilities Board, MD Public Service, APSC, HUC, MPUC, KPSC, KCC, PSCW, AL Public Service, NMSCC, MPSC, PSC, PCC, CUC, COPUC, People of the State of New York, Public Service, New York; LA Public Service; SD Public Service; NC Utilities; CA Public Utilities; MS Public Service; MO Public Service; PS Public Utility) in 96-3321. Christoper J. Wright for Respondents FCC in 96-3321, Bruce J. Ennis and David Carpenter for Intervenors (Aging Forum, U.S. Coalition on Aging, College for Living, Coun-

Date	PROCEEDINGS
	cil for Silver Haired Legislatures, Missouri Alliance of Area Agencies on Aging, Missouri Association for the Deaf, Missouri Council for the Blind, President's Club for Telecommunications Justice, Paraquad, Rural Advocates for Independent Living, Services for Independent Living, Ad Hoc Coalition of Telecommunications Manufacturing Companies, American Electric Power Service Corp., Commonwealth Edison, Northern States Power Co., Pennsylvania Power Co., AT&T Corp., MCI, ACC, ACTA, Comcast, Cable & Wireless, Allied Communications, CTA, Excel, GST, Cox, GCI, ICG, KMC, MFS, National Cable Television, Nextlink, Sprint Corp., CTRA, Teleport, Vanguard Cellular, US One, Western Wireless, Winstar, Worldcom, Western Alliance, Texas Office of Public Utility Counsel, Competition Policy, RTG, ProNet, PageNet, SCBA) on Appeal in 96-3321, Glenn B. Manishin for CFA (Intervenor Consumer Federation of America) and Irwin Popowsky for NASUCA (Intervenor National Association of State Utility Consumer Advocates) on Appeal 96-3321, Robert A. Long for Intervenors (CMRS Providers) on Appeal in 96-3321. Rebuttal by: Barr and Munns. RECORDED.
7/18/97	THE COURT: Pasco M. Bowman, Roger L. Wollman, David R. Hansen. OPINION FILED by David R. Hansen PUBLISHED.
7/18/97	JUDGMENT: Pasco M. Bowman, Roger L. Wollman, David R. Hansen: The order of the FCC is AFFIRMED, and VACATED in accordance with the opinion.
10/14/97	JUDGE ORDER: 1. The petitions for rehearing filed by AT & T, MCI, America's Carriers Telecommunications Assoc, Cable & Wireless WorldCom, Competitive Telecommunications Assoc, Sprint, Telecommunications Resellers Assoc, Fron-

Date	PROCEEDINGS
	tier, Competition Policy Institute, Assoc, for Local Telecommunication Services, Winstar Communications, Nextlink Communications, LLC, Time Warner, US One Communications, ICG Telecom Group, ACSI, and the Natl. Cable Television Assoc, are denied. The petitions for rehearing filed by GTE Entities, SBC Communications, Inc. BellSouth Corporation, US WEST, Bell Atlantic Corp, the Mid-Sized LEC's and Ameritech are granted. 2. Upon rehearing the Court' strikes Part II(G)(1)(f) of the opinion issued July 18, 1997, reported at 120 F.3d 753,813 (8th Cir. 1997), and substitutes the following (SEE ORDER FOR DETAILS) 3. Footnote 38 and 39 of the opinion filed July 18, 1997, are amended as follows: The citations to rule 51.315(c)-(f) are amended to read "51.315(b)-(f)."
1/15/98	ARGUED in ST. LOUIS on Petitioners' motion to enforce to Judges Pasco M. Bowman, Roger L. Wollman, David R. Hansen. Diane Carol Munns for Petitioner IUB in 96-3321, et al.; Mark Evans for Petitioners Bell South, et al. in 96-3321; M. Edward Whelan for Petitioners/Intervenors on Appeal GTE in 96-3321, et al.; Christopher J. Wright for Respondents FCC in 96-3321, et al., David W. Carpenter for Intervenors FCC in 96-3321, et al.; Rebuttal by Ms. Diane Munns and Mr. Mark Evans. RECORDED.
1/22/98	JUDGE ORDER: Writ of Mandamus. In accordance with the order of the United States Court of Appeals for the Eighth Circuit herein delivered, the FCC is hereby ordered to obey the Court's October 14, 1997, mandate in Appeal No. 96-3321, Iowa Utilities Board v. FCC. The FCC is ordered to apply section 252(d) of the Telecommunications Act of 1996 in the context of section 271 as the court's decision in Iowa Util. Bd. v. FCC, 120 F.3d

Date	PROCEEDINGS
	753 (8th Cir. 1997) requires. It is further ordered that the FCC cease and desist from attempting to give effect to its interpretation of the substantive requirements of section 252(d) of the Act. The FCC is ordered to confine its pricing role under section 271(d)(3)(A) to determining whether applicant BOCs have complied with the pricing methodology and rules adopted by the state commissions and in effect in the respective states in which such BOCs seek to provide in-region, inter-LATA services. It is so ordered.
1/22/98	THE COURT: Pasco M. Bowman, Roger L. Wollman, David R. Hansen. OPINION FILED by David R. Hansen PUBLISHED.

FCC 96-182

Before the
FEDERAL COMMUNICATION COMMISSION
Washington, D.C. 20554

CC Docket No. 96-98

IN THE MATTER OF

IMPLEMENTATION OF THE LOCAL COMPETITION PROVISIONS IN THE TELECOMMUNICATIONS ACT OF 1996

NOTICE OF PROPOSED RULEMAKING

Adopted: April 19, 1996 Released: April 19, 1996

Comment Date: May 16, 1996
Reply Date: May 30, 1996

Separate Dates for Dialing Parity/Number Administration/ Notice of Technical Changes/Access to Rights of Way:
Comment Date: May 20, 1996
Reply Date: June 3, 1996

By the Commission:

* * * *

A. Background

4. In contrast to the 1996 Act, the common carrier provisions of the Communications Act of 1934 were grounded in the notion that interstate telecommunications services would be offered and regulated on a monopoly basis. For decades, state legislatures also followed this traditional approach in regulating LECs' intrastate services. Local and long distance telephone monopolies were created and maintained on the grounds that the provision of telecommunications services was a natural monopoly [8]

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[8] A market is characterized as a natural monopoly if a single firm can serve the market at a lower cost than two or more firms. This

and, consequently, service could be provided at the lowest cost to the maximum number of consumers through a single regulated telecommunications network. The monopoly paradigm was thought to further goals of universal service, service quality, and reliability. The Modification of Final Judgment (MFJ) that required AT&T to divest the Bell Operating Companies (BOCs) in 1984 was not so much a repudiation as a reduction in the scope of this paradigm.[9] It reflected the judgment that the markets for interexchange services, telecommunications equipment, and information services could become competitive. At the same time, the local exchange continued to be treated as a natural monopoly that required rigorous regulatory oversight by state and federal authorities.

* * * *

6. We believe that, in enacting the 1996 Act, Congress recognized that although removing legal barriers to entry is necessary, it is still not sufficient to enable competition to replace monopoly in the local exchange. Congress acknowledged that incumbent LECs have constructed and put in place high quality, reliable, redundant local networks that can provide virtually ubiquitous service, and that they possess an approximate 99.7 percent share of the local market as measured by revenues.[13] Because of this

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result is due to one provider being able to exploit economies of scale throughout the range of output likely to be demanded by the market. *See, e.g.*, Alfred Kahn *The Economics of Regulation* Vol. II 119 (1988); *see also* Daniel Spulber *Regulation and Markets* 3 (1989).

[9] *United States v. AT&T*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983), *vacated sub nom. United States v. Western Elect. Co.*, slip op. CA 82-0192 (D.D.C. Apr. 11, 1996).

[13] *Telecommunications Industry Revenue: TRS Fund Workshop Data*, FCC Industry Analysis Division, Feb. 1996, Tables 14 and 15 show that LEC revenues in 1994 were $98.4 billion, while total Competitive Access Provider revenue was $287 million. Even though competitive access provider (CAP) revenues have grown to approximately $1.15 billion in 1995, they still represent a *de minimis* por-

existing infrastructure, an incumbent LEC typically can serve a new customer at a much lower incremental cost than could a new entrant that is denied access to the incumbent LEC's facilities, and thereby is denied access to as many central office switches and as much trunking and subscriber loops as the incumbent LEC operates. Moreover, because virtually all existing customers subscribe to the incumbent LEC, a consumer of local switched service would not subscribe to a new entrant's network if the customer could not complete calls to the incumbent LEC's end users. As Congress appeared to recognize in enacting section 251, if the incumbent LEC has no obligation to interconnect and to arrange for mutual transport and termination of calls, it could effectively block or greatly retard entry into switched local service by using its economies of scale and network externalities as impediments to entry.

7. Congress expressly recognized that "it is unlikely that competitors will have a fully redundant network in place when they initially offer local service, because the investment necessary is so significant."[14] AT&T, for example, in filings before the Commission, has estimated that it would have to invest approximately $29 billion to construct new facilities in local markets in order to be able to provide full facilities to reach 20 percent of the 117 million access lines served by the BOCs.[15] Similarly,

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tion of the market. *Local Telecommunications Competition Annual 1995-96*. Connecticut Research, Glastonbury, Conn. (1995) at i-5. Table 1.3.

[14] Joint Explanatory Statement at 148.

[15] AT&T submission, Mar. 18, 1996. By contrast, AT&T's capital construction cost for 1995 was $4.96 billion. *See* Merrill Lynch, *Telecom Services-Long Distance, Fourth Quarter Review: How Much Longer Can the Equilibrium Last? The Catalyst: The Telecommunications Act of 1996*, Feb. 15, 1996 at Table 6. Since January 1994, MCI Metro has spent $500 million to deploy a total of 2.338 route miles of fiber and 11 switches in 25 cities across the country.

cable [16] and wireless [17] systems will require substantial investment before either is capable of providing a widespread substitute for wireline telephony services.

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[16] Cable systems pass 96 percent of homes in the United States. *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Second Annual Report. 11 FCC Rcd 2060 (1995) (based on a total of 91.6 million television households as of year-end 1994). The provision of telephony over cable systems, however, is largely in the experimental stages today. For example, Motorola recently announced that it will provide cable-telephony products to TCI Telephony Services, enabling TCI to begin cable-based telephony services in the Chicago area this year. Motorola Multimedia Announces Purchase Agreement with TCI. Press Release (September 21, 1995). As of October 1995, Time Warner was providing telephony to approximately 50 homes in the Rochester area. *The Big Boys Come Calling*, N.Y. Times, Oct. 19, 1995, at 1. Some other cable operators have announced plans to deploy cable-telephony systems by the end of 1996. *See* Paul Farhi, *Alexandria Cable Firm to Offer Phone Service: Company Would Compete With Bell*, Wash. Post, Feb. 17, 1996, at B1. Virtually all cable systems, however, will require significant network upgrades in order to provide telephony service, including additional deployment of fiber optic cable, additional electronics, and backup power systems.

[17] Although wireless technologies are continuing to develop, some wireless carriers, particularly in urban areas, currently face serious capacity constraints. These will be alleviated through the conversion from analog to digital service, further advances in compression technology, and the deployment of personal communications service (PCS). Huge investments to reduce cell size and increase frequency reuse may be required to give wireless systems a significant fraction of the traffic-carrying capacity of the incumbent LECs' networks. There is also currently a significant price difference between wireless and wireline service. A wireless call, for example, is typically priced at several times the price of a wireline call. Sprint Spectrum offers an introductory price for its wireless service of $15 per month, which includes access to the system, 15 minutes of air time, and $.31 per minute thereafter. *See A Beginner's Guide to the Cellular Maze*, Wash. Post. Dec. 4, 1995. In contrast, the average price paid by residential customers for local wireline service is about $.03 per minute. *See Trends in Telephone Service*, FCC Industry Analysis Division, Feb. 1995. Tabels 6 and 19.

(2) Access to Network Elements

86. Section 251(c)(3) requires incumbent LECs to provide "access" to network elements "on an unbundled basis."[115] We interpret these terms as requiring incumbent LECs for a fee to provide requesting carriers with the ability to obtain a particular element's functionality, such as a local loop's function of transmitting signals from a LEC central office to a customer premises, separate from that of other functionalities or network elements, such as the local switch. Further, the term "unbundled" suggests that there must be a separate charge for each purchased network element.[116] We seek comment on this and any alternative interpretations of section 251(c)(3).

* * * *

261 . We seek comment on whether the Commission can and should establish some standards that would assist the states in satisfying their obligations under this section. For example, should the Commission establish standards regarding what would constitute a "bona fide" request? We tentatively conclude that the states alone have authority to make determinations under section 271(f).

* * * *

265. Section 252(e)(5) directs the Commission to assume responsibility for any proceeding or matter in which the state commission "fails to act to carry out its responsibility" under that section.[374] We note that, unlike section 251(d)(1), there is no specified time within which the

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115 1996 Act, sec. 101, § 251(c)(3).

116 "Access" is defined as the "ability or permission to approach, enter. . . . or use." *Random House College Dictionary* 9 (revised ed. 1980). "Unbundle" is defined as "to separate (the charges for related products and services usually offered in a single transaction at one all-inclusive price)." *Id.* at 1428.

374 1996 Act, sec. 101, § 252(e)(5). Before doing so, section 252(e)(5) requires the Commission to issue an order preempting the state's jurisdiction of that proceeding or matter.

Commission must establish regulations pursuant to section 252(e)(5). Thus, we seek comment on whether in this proceeding we should establish regulations necessary and appropriate to carry out our obligations under section 252(e)(5). We also seek comment on what constitutes notice of failure to act, and what procedures, if any, we should estabilsh for interested parties to notify the FCC that a state commission has failed to act.

* * * *

FCC 96-325

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

CC Docket No. 96-98

IN THE MATTER OF
IMPLEMENTATION OF THE LOCAL COMPETITION
PROVISIONS IN THE TELECOMMUNICATIONS ACT OF 1996

CC Docket No. 95-185

INTERCONNECTION BETWEEN LOCAL EXCHANGE
CARRIERS AND COMMERCIAL MOBILE RADIO
SERVICE PROVIDERS

FIRST REPORT AND ORDER

Adopted: August 1, 1996 Released: August 8, 1996

By the Commission: Chairman Hundt and Commissioners Quello, Ness, and Chong issuing separate statements.

* * * *

14. We also note that many new entrants will not have fully constructed their local networks when they begin to offer service.[9] Although they may provide some of their own facilities, these new entrants will be unable to reach all of their customers without depending on the incumbent's facilities. Hence, in addition to an arrangement for terminating traffic on the incumbent LEC's network, entrants will likely need agreements that enable them to obtain wholesale prices for services they wish to sell at retail and to use at least some portions of the incumbents'

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[9] Joint Managers' Statement, S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 113 (1996) ("Joint Explanatory Statement") at 121.

facilities, such as local loops and end office switching facilities.

* * * *

70. We further tentatively concluded in the NPRM that section 2(b) of the 1934 Act does not require a contrary conclusion.[88] Section 2(b) states that, except as provided in certain enumerated sections not including sections 251 and 252, "nothing in [the 1934] Act shall be construed to apply or to give to the Commission jurisdiction with respect to . . . charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier . . . ."[89] We noted in the NPRM that sections 251 and 252 do not alter the jurisdictional division of authority with respect to matters falling outside the scope of these provisions.[90] For example, rates charged to end users for local exchange service have traditionally been subject to state authority, and will continue to be.

* * * *

80. These parties also reject the claim that section 251 takes precedence over section 2(b).[124] They note that section 2(b) was not amended by the 1996 Act, although prior version of the bills would have done so.[125] Moreover, parties claim that, in other instances, Congress did specifically amend section 2(b) to give the Commission authority over intrastate aspects of specified matters.[126] Bell

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[88] NPRM at para. 39.

[89] 47 U.S.C. § 152(b).

[90] NPRM at para. 40.

[124] *See, e.g.*, Bell Atlantic comments at 4; Connecticut Commission comments at 5; Oregon Commission comments at 12; Indiana Commission Staff comments at 4-5; Iowa Commission comments at 6.

[125] *See, e.g.*, Maryland Commission comments at 16 (*citing* Conf. Rep. No. 104-230 at 78 and H.R. 1555 Rep. No. 104-204 at 53); *accord* NARUC comments at 10 (*citing Russello v. U.S.*, 464 U.S. 16 (1989)); Oregon Commission comments at 15.

[126] California Commission comments at 11; Connecticut Commission comments at 7 (*citing* the Omnibus Budget Reconciliation Act

Atlantic asserts that the failure to amend section 2(b) is "fatal to the notice's proposed federalization of intrastate interconnection and other intrastate matters."[127] The Ohio Commission expressly rejects the suggestion in the NPRM that there was no need to amend section 2(b) because sections 251 and 252 do not affect end user rates.[128]

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84. For the reasons set forth below, we hold that section 251 authorizes the FCC to establish regulations regarding both interstate and intrastate aspects of interconnection, services, and access to unbundled elements. We also hold that the regulations the Commission establishes pursuant to section 251 are binding upon states and carriers and section 2(b) does not limit the Commission's authority to establish regulations governing intrastate matters pursuant to section 251. Similarly, we find that the states' authority pursuant to section 252 also extends to both interstate and intrastate matters. Although we recognize that these sections do not contain an explicit grant of intrastate authority to the Commission or of interstate authority to the states, we nonetheless find that this interpretation is the only reasonable way to reconcile the various provisions of sections 251 and 252, and the statute as a whole. As we indicated in the NPRM, it would make little sense in terms of economics or technology to distinguish between interstate and intrastate components for purposes of sections 251 and 252.[139]

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of 1993 as an example of congressional intent to alter jurisdictional authority); Maryland Commission comments at 20; Ohio Commission comments at 14-15; BellSouth reply at 4.

127 Bell Atlantic comments at 7.

128 Ohio Commission comments at 15 (the 1993 amendments to sections 2(b) expressly reserved to states responsibility for wholesale rates in general).

139 We believe that this interpretation is the most reasonable one in light of our expectation that marketing and product offerings by

94. Some parties find significance in the fact that earlier drafts of the legislation would have amended section 2(b) to make an exception for Part II of Title II, including section 251, but the enacted version did not include that exception. These parties argue that this change in drafting demonstrates an intention by Congress that the limitations of section 2(b) remain fully in force with regard to sections 251 and 252. We find this argument unpersuasive.

95. Parties that attach significance to the omission of the proposed amendment of section 2(b) rely on a rule of statutory construction providing that, when a provision in a prior draft is altered in the final legislation, Congress intended a change from the prior version. This rule of statutory construction has been rejected, however, when changes from one draft to another are not explained.[155] In this instance, the only statement from Congress regarding the meaning of the omission of the section 2(b) amendment appears in the Joint Explanatory Statement of the Conference Report. According to the Joint Explanatory Statement, all differences between the Senate Bill, the House Amendment, and the substitute reached in conference are noted therein "except for clerical corrections, conforming changes made necessary by agreements reached by the conferees, and minor drafting and clerical changes."[156] Because the Joint Explanatory Statement did not address the removal of the section 2(b) amendment from the final bill, the logical inference is that Congress regarded the change as an inconsequential modification rather than a significant alteration. Moreover, it seems implausible that, by selecting the final version, Congress

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telecommunications carriers will diminish or eliminate the significance of interstate-intrastate distinctions.

[155] *Mead Corp v. Tilley*, 490 U.S. 714, 723 (1989); *Rastelli v. Warden*, 782 F.2d 17, 23 (2d Cir. 1986); *Drummond Coal v. Watt*, 735 F.2d 469, 474 (11th Cir. 1984).

[156] Joint Explanatory Statement at 113.

intended a radical alteration of the Commission's authority under section 251, given the total lack of legislative history to that effect. We conclude that elimination of the proposed amendment of section 2(b) was a nonsubstantive change because, as AT&T contends, such amendment was unnecessary in light of the grants of authority under sections 251 and 252, and would have had no practical effect.[157]

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104. In the NPRM, we sought comment on our tentative conclusion that sections 251(c)(2), (c)(3), and (c)(6) establish the Commission's legal authority under section 251(d) to adopt pricing rules to ensure that the rates, terms, and conditions for interconnection, access to unbundled network elements, and collocation are just, reasonable, and nondiscriminatory.[175] We also sought comment on our tentative conclusion that sections 251 (b)(5) and 251(c)(4) establish our authority to define "wholesale rates" for purposes of resale, and "reciprocal compensation arrangements" for purposes of transport and termination of telecommunications services.[176] In addition, we asked parties to comment on our tentative conclusion that the Commission's statutory duty to implement the pricing requirements of section 251, as elaborated in section 252, requires that we establish pricing rules interpreting and further explaining the provisions of section 252(d). The states would then apply these rules in establishing rates pursuant to arbitrations and in reviewing BOC statements of generally available terms and conditions.[177]

105. We further sought comment on our tentative conclusion that national pricing rules would likely reduce or

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[157] AT&T reply at 4 n.5.

[175] NPRM at para. 117.

[176] *Id.* at 118.

[177] *Id.* at para. 118.

eliminate inconsistent state regulatory requirements, increase the predictability of rates, and facilitate negotiation, arbitration, and review of agreements between incumbent LECs and competitive providers.[178] We also sought comment on the potential consequences of the Commission not establishing specific pricing rules.[179]

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126. We further conclude that section 252(e)(6) does not divest the Commission of jurisdiction, in whole or in part, over complaints that a common carrier violated section 251 or 252 of the Act. Section 601(c)(1) of the 1996 Act provides that the 1996 Act "shall not be construed to modify, impair or supersede" existing federal law —which includes the section 208 complaint process— "unless expressly so provided."[235] Sections 251 and 252 do not divest the Commission of its section 208 complaint authority.

127. An aggrieved party could file a section 208 complaint with the Commission, alleging that the incumbent LEC or requesting carrier has failed to comply with the requirements of sections 251 and 252, including Commission rules thereunder, even if the carrier is in compliance with an agreement approved by the state commission. Alternatively, a party could file a section 208 complaint alleging that a common carrier is violating the terms of a negotiated or arbitrated agreement. We plan to initiate a proceeding to adopt expedited procedures for resolving complaints filed pursuant to section 208.

128. We note that, in acting on a section 208 complaint, we would not be directly reviewing the state commission's decision, but rather, our review would be strictly limited to determining whether the common carrier's actions or omissions were in contravention of the Communi-

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178 *Id.* at para. 119.

179 *Id.*

235 47 U.S.C. § 601(c)(1).

cations Act.[236] Thus, consistent with our past decisions in analogous contexts,[237] we conclude that a person aggrieved by a state determination under sections 251 and 252 of the Act may elect to either bring an action for federal district court review or a section 208 complaint to the Commission against a common carrier. Such a person could, as a further alternative, pursuant to section 207, file a complaint against a common carrier with the Commission or in federal district court for the recovery of damages.[238] We are unlikely, in adjudicating a complaint, to examine the consistency of a state decision with sections 251 and 252 if a judicial determination has already been made on the issues before us.[239]

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156. We also find that incumbent LECs may not require requesting carriers to satisfy a "bona fide request" process as part of their duty to negotiate in good faith. Some of the information that incumbent LECs propose to include in a bona fide request requirement may be legiti-

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[236] While we would have authority to review such complaints, we note that we might decline, at least in some instances, to impose financial penalties upon a common carrier that is acting pursuant to state requirements or authorization, even if we sustain the allegations in the complaint.

[237] *See Number Portability Order, supra; Freemon v. AT&T*, 9 FCC Rcd 4032, 4033 (1994) (provision permitting persons aggrieved by violation of prohibition against unauthorized publication of certain communications to "bring a civil action in United States district court or any other court of competent jurisdiction" did not bar a complaint under section 208 of the Communications Act); *see also Policies Governing the Provision of Shared Telecommunications Service*, 3 FCC Rcd 6931 (1988) (the section 208 complaint process is available to resolve any specific problems that might arise regarding shared telecommunications service regulation by a state that impinges upon a federal interest).

[238] *See* 47 U.S.C. § 207.

[239] *Town of Deerfield v. FCC*, 992 F.2d 420, 428-430 (2d Cir. 1993).

mately demanded from the requesting carrier; some of the proposed requirements, on the other hand, exceed the scope of what is necessary for the parties to reach agreement, and imposing such requirements may discourage new entry. For example, parties advocate that a "bona fide request" requirement should require requesting carriers to commit to purchase services or facilities for a specified period of time. We believe that forcing carriers to make such a commitment before critical terms, such as price, have been resolved is likely to impede new entry. Moreover, we note that section 251(c) does not impose any bona fide request requirement. In contrast, section 251(f)(1) provides that a rural telephone company is exempt from the requirements of 251(c) until, among other things, it receives a "bona fide request" for interconnection, services, or network elements. This suggests that, if Congress had intended to impose a "bona fide request" requirement on requesting carriers as part of their duty to negotiate in good faith, Congress would have made that requirement explicit.

D. Applicability of Section 252 to Preexisting Agreements

1. Background

157. Section 252(a)(1) provides that, "[u]pon receiving a request for interconnection, services, or network elements pursuant to section 251, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251 . . . . The agreement, including any interconnection agreement negotiated before the date of enactment of the Telecommunications Act of 1996, shall be submitted to the State commission under subsection (e) of this section." [295]

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[295] 47 U.S.C. § 252(a)(1). Section 252(e) provides that "(a)ny interconnection agreement adopted by negotiation or arbitration

158. In the NPRM, we sought comment on whether sections 252(a)(1) and 252(e) require parties that have negotiated agreements for interconnection, services or network elements prior to the passage of the 1996 Act to submit such agreements to state commissions for approval. We also asked whether one party to such an existing agreement could compel renegotiation and arbitration in accordance with the procedures set forth in section 252.

2. Comments

159. In general, potential local competitors that addressed this issue argue that the plain language of section 251(a)(1) requires such agreements to be filed with the appropriate state commission for review under section 252(e).[296] In addition, these parties assert that, pursuant to section 252(i), the terms of such agreements must be made available to other carriers.[297] These parties claim that filing such agreements also should be required as a matter of public policy, because they provide evidence of existing interconnection terms that may provide the baseline for other negotiations,[298] and ensure that incumbents are not favoring some carriers over others.[299] Parties also

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shall be submitted for approval to the State commission." 47 U.S.C. § 252(e).

[296] *See, e.g.*, ALTS comments at 14-16; CompTel comments at 104; GST comments at 7; Jones Intercable comments at 22-23; Ohio Consumers' Counsel comments at 6; Sprint comments at 12; TCC comments at 9-10; *see also* Louisiana Commission comments at 8 (carriers must submit preexisting agreements upon request by the state commission).

[297] Section 252(i) provides that a LEC "shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement." 47 U.S.C. § 252(i).

[298] AT&T comments at 88-90; Jones Intercable comments at 22-23.

[299] ALTS comments at 14-16, reply at 39-41.

claim that preexisting agreements will provide useful information to the states,[300] and that states should have the ability to review preexisting agreements to ensure that they comply with the 1996 Act.[301]

160. Incumbent LECs allege that the statute does not require that preexisting agreements be filed with state commissions. They contend that Congress only intended parties to file agreements negotiated pursuant to section 251.[302] These parties point out that section 252(a) specifically refers to requests for interconnection, services, or network elements "pursuant to section 251," and contend that an agreement reached prior to the enactment of the 1996 Act, by definition, could not have been negotiated pursuant to section 251.[303] Several parties suggest that the 1996 Act only requires filing of preexisting agreements that have been amended subsequent to the enactment of the 1996 Act, or that have been incorporated by reference into agreements negotiated pursuant to section 251.[304] Some commenters also contend that, as a policy matter, there is no reason to require filing of preexisting agreements. The California Commission asserts that requiring filing and review of preexisting agreements would be burdensome for states, and is unnecessary, because many states already reviewed such agreements prior to the passage of the 1996 Act.[305]

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[300] *See, e.g.*, AT&T comments at 88-90.

[301] *See, e.g.*, Arch comments at 9-10; Time Warner comments at 25.

[302] *See, e.g.*, BellSouth comments at 10-11; Cincinnati Bell comments at 9-10; Home Tel. comments at 2; J. Staurulakis comments at 3; F. Williamson comments at 5.

[303] *See, e.g.*, Ameritech comments at 95-96; BellSouth comments at 10-11; NYNEX reply at 15-16 (section 251(i) also applies only to agreements approved under section 252).

[304] *See, e.g.*, Ameritech comments at 95-96; BellSouth comments at 10-11.

[305] California Commission comments at 33.

161. A related question is whether there should be a distinction between preexisting interconnection agreements between competitors within the same service area and agreements between non-competing or neighboring LECs. Several parties contend that the 1996 Act does not exempt such agreements from the filing requirement.[306] They also claim that it may be difficult to monitor whether parties are competing, and that, in light of the 1996 Act, parties that did not compete in the past may do so in the future.[307] ACTA asserts that such agreements will provide the best information available on technically, economically and operationally feasible interconnection arrangements, because these agreements were reached in a noncompetitive context, where the incumbent was not striving to protect its market from competition, and therefore, as a public policy matter, they should be publicly filed.[308] ALTS states that Wisconsin and other states have already addressed this issue and reached the same conclusion.[309]

162. Incumbent LECs argue that Congress did not contemplate that agreements between non-competing LECs would be used as models for agreements between competitors,[310] and that such agreements bear no relation to

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[306] *See, e.g.*, Colorado Commission comments at 50; MFS comments at 66; Michigan Commission Staff comments at 20; Ohio Consumers' Counsel comments at 34; Oregon Commission comments at 33; ALTS reply at 35; Cox reply at 38-39; WinStar reply at 18-19.

[307] *See, e.g.*, MFS comments at 67; Oregon Commission comments at 34; ALTS reply at 36; Cox reply at 39.

[308] ACTA comments at 6-8; *accord* Cox reply at 38; WinStar reply at 19.

[309] ALTS reply at 35-36. *See, e.g., Investigation of the Implementation of the Federal Telecommunications Act of 1996 in Wisconsin*, 05-TI-140 (Winconsin Commission May 17, 1996); *In re Negotiated Interconnection Agreements of Telecommunications Carriers*, Docket No. 96-098-U (Arkansas Commission rel. Apr. 1, 1996).

[310] *See, e.g.*, NYNEX comments at 27 (*citing* Joint Explanatory Statement at 117, 120; Cong. Rec. S7893 (daily ed. June 7, 1995)

competitive interconnection agreements.[311] Some parties argue that requiring preexisting agreements between non-competing LECs would jeopardize universal service in many areas, especially where extended area service arrangements are in place.[312] NYNEX and the Rural Telephone Coalition contend that agreements between neighboring LECs fall within the provisions of section 259, which give rural LECs that lack economies of scope or scale the right to obtain or continue "infrastructure sharing" with neighboring larger LECs.[313]

163. Several parties recommend that agreements before enactment of the 1996 Act should be subject to a period of renegotiation.[314] For example, Sprint contends that the passage of the 1996 Act constitutes a "changed circumstance" that would justify renegotiation of preexisting agreements.[315] Sprint proposes that parties should be required to file preexisting agreements with the state commission, but that parties should be given a six-month period to renegotiate before the terms of such agreements

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(statement of Sen. Pressler)); Rural Tel. Coalition comments at 16; SBC comments at 53; USTA comments at 68-69.

[311] Cincinnati Bell comments at 9-10; MECA comments at 20-21; Texas Statewide Telephone Cooperative, Inc. reply at 8-9; U S West reply at 29-30.

[312] Home Tel. comments at 2; J. Staurulakis comments at 3; *see also* USTA comments at 69.

[313] NYNEX reply at 15; Rural Tel. Coalition reply at 12.

[314] Intermedia comments at 16; LCI comments at 24-26; Sprint comments at 12-13, reply at 13-14.

[315] Sprint comments at 12 (pre-Act agreements were entered into under a different regulatory scheme, and without contemplation by the parties that the local market might become competitive; in addition, such contracts might be inconsistent with section 251, and states should not expend resources reviewing them); *accord* Time Warner comments at 26 (the Commission should establish "fresh look" period as it has done in other cases involving changed circumstances).

are made available to others under section 252(i). Intermedia Communications advocates that parties that signed long-term contracts with incumbent LECs before additional rights and competitive alternatives were available under the 1996 Act should be permitted to terminate those agreements, with minimal liability, for a period of six months after such competitive alternatives become available.[316] GST advocates that only non-incumbent LECs that are parties to an agreement should have the right to renegotiate contracts.[317] The Texas Commission states that parties should be permitted to renegotiate in the event that the state determines that the preexisting agreement violates section 252.[318]

164. Some parties contend that there is no basis for renegotiating of preexisting contracts.[319] The Illinois Commission maintains that parties have a legal obligation to abide by the terms of their contracts, and the 1996 Act does not affect that obligation.[320] It claims that a unilateral right to abrogate existing contracts could undo progress that has already been made to foster local competition. The Illinois Commerce Commission notes that parties may mutually agree to amend existing contracts, and that a party that already has an agreement with an incumbent may request a new agreement under section 252(i) if the interconnection, services, or access to unbundled elements it seeks are different from those encompassed in the existing agreement. Pacific Telesis asserts that requiring renegotiation and arbitration of existing agreements would waste resources and interfere with parties' settled expectations.[321]

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[316] Intermedia comments at 16; *accord* LCI comments at 24-26.

[317] GST comments at 7.

[318] Texas Commission comments at 7-8.

[319] *See, e.g.*, Illinois Commission comments at 23-24; Louisiana Commission comments at 8; F. Williamson comments at 5.

[320] Illinois Commission comments at 23-24.

[321] PacTel comments at 21.

3. Discussion

165. We conclude that the 1996 Act requires all interconnection agreements, "including any interconnection agreement negotiated before the date of enactment of the Telecommunications Act of 1996," to be submitted to the state commission for approval pursuant to section 252(e).[322] The 1996 Act does not exempt certain categories of agreements from this requirement. When Congress sought to exclude preexisting contracts from provisions of the new law, it did so expressly. For example, section 276(b)(3) provides that "nothing in this section shall affect any existing contracts between location providers and payphone service providers or interLATA or intraLATA carriers that are in force and effect as of the date of enactment of the Telecommunications Act of 1996."[323] Nothing in the legislative history leads us to a contrary conclusion. Congress intended, in enacting sections 251 and 252, to create opportunities for local telephone competition. We believe that this pro-competitive goal is best effected by subjecting all agreements to state commission review.

166. The first sentence in section 252(a)(1) refers to requests for interconnection "pursuant to section 251."[324] The final sentence in section 252(a)(1) requires submission to the state commission of all negotiated agreements, including those negotiated *before* the enactment of the 1996 Act. Some parties have asserted that there is a tension between those two sentences. We conclude that the final sentence of section 252(a)(1), which requires that *any* interconnection agreement must be submitted to the state commission, can and should be read to be independ-

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[322] 47 U.S.C. § 252(a).

[323] 47 U.S.C. § 276(b)(3) (addressing nondiscrimination safeguards and regulations regarding payphone service).

[324] 47 U.S.C. § 252(a)(1).

ent of the prior sentences in section 252(a)(1). The interpretation suggested by some commenters that preexisting contracts need only be filed if they are amended subsequent to the 1996 Act, or incorporated by reference into agreements negotiated pursuant to the 1996 Act, would force us to impose conditions that were not intended by Congress.

167. As a matter of policy, moreover, we believe that requiring filing of all interconnection agreements best promotes Congress's stated goals of opening up local markets to competition, and permitting interconnection on just, reasonable, and nondiscriminatory terms. State commissions should have the opportunity to review *all* agreements, including those that were negotiated before the new law was enacted, to ensure that such agreements do not discriminate against third parties, and are not contrary to the public interest. In particular, preexisting agreements may include provisions that violate or are inconsistent with the pro-competitive goals of the 1996 Act, and states may elect to reject such agreements under section 252(e)(2)(A). Requiring all contracts to be filed also limits an incumbent LEC's ability to discriminate among carriers, for at least two reasons. First, requiring public filing of agreements enables carriers to have information about rates, terms, and conditions that an incumbent LEC makes available to others. Second, any interconnection, service or network element provided under an agreement approved by the state commission under section 252 must be made available to any other requesting telecommunications carrier upon the same terms and conditions, in accordance with section 252(i).[325] In addition, we believe that having the opportunity to review existing agreements may provide state commissions and potential competitors with a starting point for determining what is "technically feasible" for interconnection.[326]

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[325] *See infra*, Section XV.B.

[326] *See, e.g.*, 47 U.S.C. §§ 251(c)(2)(B) and 251(c)(3).

168. Conversely, excluding certain agreements from public disclosure could have anticompetitive consequences. For example, such contracts could include agreements not to compete. In addition, if we exempt agreements between neighboring non-competing LECs, those parties might have a disincentive to compete with each other in the future, in order to preserve the terms of their preexisting agreements. Such a result runs counter to the goal of the 1996 Act to encourage local service competition. Moreover, preserving such "non-competing" agreements could effectively insulate those parties from competition by new entrants. For example, if a new entrant seeking to provide competitive local service in a rural community is unable to obtain from a neighboring BOC interconnection or transport and termination on terms that are as favorable as those the BOC offers to the incumbent LEC in the rural area, the new entrant cannot effectively compete.[327] This is because the new entrant will have to charge its subscribers higher rates than the incumbent LEC charges to place calls to subscribers of the neighboring BOC.

169. We find that section 259 does not compel us to reach a different conclusion regarding the application of section 252 to agreements between neighboring LECs.[328]

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[327] This analysis does not address the separate question of whether an incumbent LEC in a rural area must offer interconnection, resale services, or unbundled network elements. As discussed *infra*, Section XII, Congress provided rural carriers with an exemption from section 251(c) requirements until the state commission removes such exemption. 47 U.S.C. § 251(f)(1).

[328] Section 259 requires the Commission to prescribe, within one year after the date of enactment of the 1996 Act, regulations that require incumbent LECs "to make available to any qualifying carrier such public switched network infrastructure, technology, information, and telecommunications facilities and functions as may be requested by such qualifying carrier to provide telecommunications services, or to provide access to information services . . ." 47 U.S.C. § 259(a). A "qualifying carrier" is a telecommunications carrier that "lacks economies of scale or scope," and that offers telephone exchange service, exchange access, and any other service included

Section 259 is limited to agreements for infrastructure sharing between incumbent LECs and telecommunications carriers that lack "economies of scale or scope," as determined in accordance with regulations prescribed by the Commission.[329] We conclude that the purpose and scope of section 259 differ significantly from the purpose and scope of section 251.[330] Section 259 is a limited and discrete provision designed to bring the benefits of advanced infrastructure to additional subscribers, in the context of the pro-competitive goals and provisions of the 1996 Act. Moreover, section 259(b)(7) requires LECs to file with the Commission or the state "any tariffs, contracts or other arrangements showing the rates, terms, and conditions under which such carrier is making available public switched network infrastructure and functions under this section."[331] We believe that this language further supports our conclusion that Congress intended agreements between neighboring LECs to be filed and available for public inspection. Commenters also have failed to persuade us that universal service is jeopardized by our finding that agreements between neighboring LECs are subject to section 252 filing and review provisions. Concerns regarding universal service should be addressed by the Federal-State Joint Board, empaneled pursuant to section 254 of the 1996 Act.[332] The Joint Board has initiated a comprehensive review of universal service issues and is considering, among other matters, access to telecommunications and information services in rural and high cost areas.[333] In addition, as discussed in Section XII, *infra*, the 1996 Act

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in universal service to all consumers in the service area without preference. 47 U.S.C. § 259(d).

[329] 47 U.S.C. § 259(d)(1).

[330] The Commission plans to initiate a proceeding to establish regulations pursuant to section 259.

[331] 47 U.S.C. § 259(b)(7).

[332] *Universal Service NPRM, supra.*

[333] *See* 47 U.S.C. § 251(f).

provides for exemptions, suspension, or modification of some of the requirements in section 251 for rural or smaller carriers.

170. Some parties have suggested that we provide parties an opportunity to renegotiate preexisting contracts. Parties, of course, may mutually agree to renegotiate agreements, but we decline to mandate that parties renegotiate existing contracts. In addition, as discussed below, commercial mobile radio service (CMRS) providers that are party to preexisting agreements with incumbent LECs that provide for non-mutual compensation have the option of renegotiating such agreements with no termination liabilities or contract penalties.[334] We believe that generally requiring renegotiation of preexisting contracts is unnecessary, however, because state commissions will review preexisting agreements, and may reject any negotiated agreement that "discriminates against a telecommunications carrier not a party to the agreement," or that "is not consistent with the public interest, convenience, and necessity."[335] We recognize that preexisting agreements were negotiated under very different circumstances, and may not provide a reasonable basis for interconnection agreements under the 1996 Act. For example, non-competing neighboring LECs may have negotiated terms that simply are not viable in a competitive market. It would not foster efficient long-term competition to force parties to make available to all requesting carriers interconnection on terms not sustainable in a competitive environment. In such circumstances, a state commission would have authority to reject a preexisting agreement as inconsistent with the public interest. If a state commission approves a preexisting agreement, that agreement will be available to other parties in accordance with section 252(i). Contrary to NYNEX's assertion, once a state approves an agreement under section 252(e), that agreement is "approved under" section 252.

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[334] *See infra*, Section XI.A.

[335] 47 U.S.C. § 252(e)(2)(A).

171. We decline to require immediate filing of pre-existing agreements. States should establish procedures and reasonable time frames for requiring filing of pre-existing agreements in a timely manner. We leave these procedures largely in the hands of the states in order to ensure that we do not impair some states' ability to carry out their other duties under the 1996 Act, especially if a large number of such agreements must be filed and approved by the state commission. We believe, nevertheless, that we should set an outer time period to file with the appropriate state commission agreements that Class A carriers have with other Class A carriers that pre-date the 1996 Act.[336] We conclude that setting such a time limit will ensure that third parties are not prevented indefinitely from reviewing and taking advantage of the terms of pre-existing agreements. We are concerned, however, about the burden that a national filing deadline might impose on small telephone companies that have preexisting agreements with Class A carriers or with other small carriers.[337] We therefore limit the filing deadline requirement to pre-existing agreements between Class A carriers. We encourage all carriers to file preexisting contracts with the appropriate state commission no later than June 30, 1997, but impose this as a *requirement* only with respect to agreements between Class A carriers. We find that requiring preexisting agreements between Class A carriers to be filed no later than June 30, 1997 is unlikely to burden state commissions unduly, and will give parties a reasonable opportunity to renegotiate agreements if they so choose, while at the same time, establishing this outer time limit ensures that third parties will have access to the terms of such agreements, under section 252(i), within a reasonable period. We expect to have completed proceedings on universal service and access charges by this filing

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[336] Class A companies are defined as companies "having annual revenues from regulated telecommunications operations of $100,000,000 or more." 47 C.F.R. § 32.11(a)(1).

[337] *See* Regulatory Flexibility Act, 5 U.S.C. §§ 601 *et seq.*

deadline. States may impose a shorter time period for filing preexisting agreements.

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B. National Interconnection Rules

1. Background

177. In the NPRM, we tentatively concluded that national interconnection rules would facilitate swift entry by competitors in multiple states by eliminating the need to comply with a multiplicity of state variations in technical and procedural requirements.[350] We sought comment on this tentative conclusion.

2. Comments

178. Parties raise many of the same arguments discussed above, in section II.A., regarding the advantages and disadvantages of explicit national rules for interconnection. IXCs, CAPs, cable operators, and others claim that national rules could prevent incumbent LECs from erecting artificial barriers to entry,[351] facilitate comprehensive business and network planning,[352] equalize bargaining power,[353] and expedite and simplify negotiations.[354] Other parties, including several BOCs and state commissions, argue that national rules should only be established for core requirements and should allow for state variations.[355]

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[350] NPRM at paras. 50-51.

[351] *See* MFS comments at 14; Teleport comments at 22; CompTel comments at 21; Ad Hoc Telecommunications Users Committee comments at 5; ACTA comments at 10; ACSI comments at 10; MCI reply at 24.

[352] *See* ACTA comments at 10; Vanguard comments at 10; Omnipoint comments at 17-18; NTIA reply at 3.

[353] *See* Teleport comments at 17; Kansas Commission comments at 5; AT&T reply at 9; MCI reply at 24; Time Warner reply at 6-7.

[354] *See* Intermedia comments at 3; Teleport reply at 8.

[355] *See, e.g.*, Ameritech comments at 11; BellSouth comments at 13-14; Bell Atlantic reply at 6-7; GTE reply at 9; Lincoln Tel. com-

Some parties contend, for example, that the pace of technological change makes it impossible to create immutable and uniform interconnection rules.[356] SBC and PacTel claim that industry standards already exist for interconnection and that national standards would preclude the deployment of new technologies.[357] PacTel also claims that Commission rules requiring untested interconnection methodologies may slow competitive entry.[358]

3. Discussion

179. As discussed more fully above, we conclude that national rules regarding interconnection pursuant to section 251(c)(2) are necessary to further Congress's goal of creating conditions that will facilitate the development of competition in the telephone exchange market.[359] Uniform rules will permit all carriers, including small entities and small incumbent LECs, to plan regional or national networks using the same interconnection points in similar networks nationwide. Uniform rules will also guarantee consistent, minimum nondiscrimination safeguards and "equal in quality" standards in every state. Such rules will also avoid relitigating, in multiple states, the issue of whether interconnection at a particular point is technically feasible.

180. We believe, however, that inflexible or overly detailed national rules implementing section 251(c)(2) may inhibit the ability of the states or the parties to reach

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ments at 3; California Commission comments at 16; Illinois Commission comments at 25; New York Commission comments at 33; Texas Commission comments at 8; TCA comments at 4; Texas Tel. Ass'n comments at 1; F. Williamson comments at 7.

[356] *See* Ad Hoc Telecommunications User Committee comments at 2; Citizens Utilities comments at 6-7; Rural Tel. Coalition comments at 31; Pennsylvania Commission reply at 23.

[357] SBC comments at 33; PacTel comments at 24, 28.

[358] PacTel comments at 23-24.

[359] *See Supra*, Section II.A.

arrangements that reflect technological and market advances and regional differences. We also believe that, on several issues, the record is not adequate at this time to justify the establishment of national rules. Therefore, as required by section 251(d)(3) and as discussed in section II.C. above, our rules will permit states to go beyond the national rules discussed below, and impose additional pro-competitive interconnection requirements, as long as such requirements are otherwise consistent with the 1996 Act and the Commission's regulations. We believe that we can benefit from state experience in our ongoing review of these issues.

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3. Discussion

198. We conclude that the term "technically feasible" refers solely to technical or operational concerns, rather than economic, space, or site considerations. We further conclude that the obligations imposed by sections 251(c)(2) and 251(c)(3) include modifications to incumbent LEC facilities to the extent necessary to accommodate interconnection or access to network elements. Specific, significant, and demonstrable network reliability concerns associated with providing interconnection or access at a particular point, however, will be regarded as relevant evidence that interconnection or access at that point is technically infeasible. We also conclude that preexisting interconnection or access at a particular evidences the technical feasibility of interconnection or access at substantially similar points. Finally, we conclude that incumbent LECs must prove to the appropriate state commission that a particular interconnection or access point is not technically feasible.

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202. Several parties also attempt to draw a distinction between what is "feasible" under the terms of the statute, and what is "possible." The words "feasible" and "possible," however, are used synonymously. Feasible is defined

as "capable of being accomplished or brought about; possible."[435] The statute itself provides a more meaningful distinction. Unlike the "technically *feasible*" terminology included in sections 251(c)(2) and 251(c)(3), section 251(c)(6) uses the term "*practical* for technical reasons" in determining the scope of an incumbent LEC's obligation to provide for physical collocation.[436] "Practical" is defined as "manifested in practice or action . . . not theoretical or ideal"[437] or "adapted or designed for actual use; useful," and connotes similarity to ordinary usage.[438] Thus, it is reasonable to interpret Congress's use of the term "feasible" in sections 251(c)(2) and 251(c)(3) as encompassing more than what is merely "practical" or similar to what is ordinarily done. That is, use of the term "feasible" implies that interconnecting or providing access to a LEC network element may be feasible at a particular point even if such interconnection or access requires a novel use of, or some modification to, incumbent LEC equipment. This interpretation is consistent with the fact that incumbent LEC networks were not designed to accommodate third-party interconnection or use of network elements at all or even most points within the network. If incumbent LECs were not required, at least to some extent, to adapt their facilities to interconnection or use by other carriers, the purposes of section 251(c)(2) and 251(c)(3) would often be frustrated. For example, Congress intended to obligate the incumbent to accommodate the new entrant's network architecture by requiring the incumbent to provide interconnection "for the facilities and equipment" of the new entrant. Consistent with that intent, the incumbent must accept the novel use of, and

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[435] The American Heritage College Dictionary 499 (1993). Webster's Ninth New Collegiate Dictionary 453 (1989). Both "feasible" and "possible" refer to that which is "capable of being realized" *Id.* at 918.

[436] 47 U.S.C. § 251(c)(6) (emphasis added).

[437] Webster's at 923.

[438] Random House College Dictionary 1040 (rev. ed. 1984).

modification to, its network facilities to accommodate the interconnector or to provide access to unbundled elements.

203. We also conclude, however, that legitimate threats to network reliability and security must be considered in evaluating the technical feasibility of interconnection or access to incumbent LEC networks. Negative network reliability effects are necessarily contrary to a finding of technical feasibility. Each carrier must be able to retain responsibility for the management, control, and performance of its own network. Thus, with regard to network reliability and security, to justify a refusal to provide interconnection or access at a point requested by another carrier, incumbent LECs must prove to the state commission, with clear and convincing evidence, that specific and significant adverse impacts would result from the requested interconnection or access. The reports of the Commission's Network Reliability Council discuss network reliability considerations, and establish templates that list activities that need to occur when service providers connect their networks pursuant to defined interconnection specifications or when they are attempting to define a new network interface specification.[439]

204. We further conclude that successful interconnection or access to an unbundled element at a particular point in a network, using particular facilities, is substantial evidence that interconnection or access is technically feasible at that point, or at substantially similar points in networks employing substantially similar facilities. In comparing networks for this purpose, the substantial similarity of network facilities may be evidenced, for example, by their adherence to the same interface or protocol standards. We also conclude that previous successful interconnection at a particular point in a network at a particular level of quality constitutes substantial evidence that inter-

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[439] *Network Reliability: A Report to the Nation* (1993, National Engineering Consortium); *Network Reliability: The Path Forward* (1996, Internet: http://www.fcc.gov/oet/nrc).

connection is technically feasible at that point, or at substantially similar points, at that level of quality. Although most parties agree with this conclusion, some LECs contend that such comparisons are all but impossible because of alleged variability in network technologies, even where the ultimate services offered by separate networks are the same. We believe that, if the facilities are substantially similar, the LECs' contention is adequately addressed.

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251. We observed in the NPRM that the statutory definition of a "network element" draws a distinction between a "facility or equipment used in the provision of a telecommunications service," and the "service" itself.[533] We asked for comment on the meaning of this distinction in general, with respect to requirements for unbundling, and in connection with specific unbundled elements. We noted that the definition of a network element, *i.e.*, a facility, function, or capability, is not dependent on the particular types of services that are provided by means of the element (*e.g.*, interstate access, intrastate local exchange), and asked whether a carrier purchasing access to an element is obligated, pursuant to the definition, to provide all services typically carried or provided by that element.[534]

2. Comments

252. A number of parties, including potential local competitors and state commissions, support the adoption of a flexible method for identifying network elements. They argue that a flexible method is necessary to accomodate future changes in technology.[535] NYNEX, the Texas

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[533] NPRM at para. 51, (*citing* 47 U.S.C. § 153(29)).

[534] NPRM at para. 84.

[535] District of Columbia Commission comments at 21-22; MFS comments at 36; Cable & Wireless comments at 17-19; Ericsson comments at 3; Alabama Commission comments at 19; ACSI com-

Public Utility Counsel, and GVNW contend that, to accommodate such changes, we should not define elements in rigid terms, or by specific technologies, but rather by general function.[536]

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3. Discussion

258. We adopt the concept of unbundled elements as physical facilities of the network, together with the features, functions, and capabilities associated with those facilities. Carriers requesting access to unbundled elements within the incumbent LEC's network seek in effect to purchase the right to obtain exclusive access to an entire element, or some feature, function or capability of that element. For some elements, especially the loop, the requesting carrier will purchase exclusive access to the element for a specific period, such as on a monthly basis. Carriers seeking other elements, especially shared facilities such as common transport, are essentially purchasing access to a functionality of the incumbent's facilities on a minute-by-minute basis. This concept of network elements, as discussed *infra* at section V.G., does not alter the incumbent LEC's physical control or ability or duty to repair and maintain network elements.

259. We conclude that we should identify a particular facility or capability for example, as a single network element, but allow ourselves and the states (where appropriate) the discretion to further identify, within that single facility or capability, additional required network

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ments at 30; Ohio Commission comments at 33; Florida Commission comments at 18; Hyperion comments at 18; GST comments at 16; LDDS comments at 29; Ohio Consumers' Counsel comments at 18; Nextel comments at 8; Time Warner comments at 44-45 (the Commission should identify elements in a way that gives parties maximum flexibility); *but see* Ad Hoc Telecommunications Users Committee comments at 15-16 (define elements narrowly to give maximum flexibility to offer innovative services).

[536] NYNEX comments at 61-64; GVNW comments at 17-18; Texas Public Utility Counsel comments at 8-9.

elements. Thus, for example, in this proceeding, we identify the local loop as a single network element.[553] We also ask the states to evaluate, on a case-by-case basis, whether to require access to subloop elements, which can be facilities or capabilities within the local loop.[554] We agree with those commenters that argue that identifying a particular facility or capability as single network element, but allowing such elements to be further subdivided into additional elements, will allow our rules (as well as the states) to accommodate changes in technology, and thus better serve the interests of new entrants and incumbent LECs, and the procompetitive purposes of the 1996 Act.[555] We are not persuaded by PacTel's argument that it is unnecessary for our rules to permit the identification of additional elements, beyond those specifically referenced in parts of the 1996 Act, because our rules must conform to the definition of a network element, and they must accommodate changes in technology. Nor are we persuaded by BellSouth that identification of network elements should be left solely to the parties. We reject this approach for the same reasons that led us to adopt national unbundling requirements.[556] Finally, we agree with NYNEX and others that we should not identify elements in rigid terms, but rather by function.

260. We agree with MCI and MFS that the definition of the term network element includes physical facilities, such as a loop, switch, or other node, as well as logical features, functions, and capabilities that are provided by, for example, software located in a physical facility such as a switch.[557] We further agree with MCI that the em-

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[553] *See infra*, Section V.J.

[554] *Id.*

[555] *See, e.g.*, District of Columbia Commission comments at 21-22; MFS comments at 36.

[556] *See supra*, Sections II.A, II.B, V.B.

[557] MCI comments at 27-28; MFS comments at 36-37.

bedded features and functions within a network element are part of the characteristics of that element and may not be removed from it. Accordingly, incumbent LECs must provide network elements along with all of their features and functions, so that new entrants may offer services that compete with those offered by incumbents as well as new services.

261. The only limitation that the statute imposes on the definition of a network element is that it must be "used in the provision of a telecommunications service." [558] Incumbent LECs provide telecommunications services not only through network facilities that serve as the basis for a particular service, or that accomplish physical delivery, but also through information (such as billing information) that enables incumbents to offer services on a commercial basis to consumers. Our interpretation of the term "provision" finds support in the definition of the term "network element." That definition provides that the type of information that may constitute a feature or function includes information "used in the transmission, routing or other provision of a telecommunications service." [559] Since "transmission" and "routing" refer to physical delivery, the phrase "or other provision of a telecommunications service" goes beyond mere physical delivery.

262. We conclude that the definition of the term "network element" broadly includes all "facilit[ies] or equipment used in the provision of a telecommunications service," and all "features, functions, and capabilities that are provided by means of such facility or equipment, including subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service." [560] This definition thus includes, but is not limited to, transport trunks, call-related data-

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[558] 47 U.S.C. § 153(29).

[559] *Id.*

[560] *Id.*

bases, software used in such databases, and all other unbundled elements that we identify in this proceeding.[561] The definition also includes information that incumbent LECs use to provide telecommunications services commercially, such as information required for pre-ordering,[562] ordering, provisioning,[563] billing, and maintenance and repair services. This interpretation of the definition of the term "network element" will serve to guide both the Commission and the states in evaluating further unbundling requirements beyond those we identify in this proceeding.

263. We disagree with those incumbent LECs which argue that features that are sold directly to end users as retail services, such as vertical features, cannot be considered elements within incumbent LEC networks.[564] If we were to conclude that any functionality sold directly to end users as a service, such as call forwarding or caller ID, cannot be defined as a network element, then incumbent LECs could provide local service to end users by selling them unbundled loops and switch elements, and thereby entirely evade the unbundling requirement in section 251(c)(3).[565] We are confident that Congress did not intend such a result. We further reject Ameritech's argument that we should not permit carriers to use unbundled elements to provide services that are priced above cost at retail. We agree with those parties that argue that competition will not develop if we find that supracompetitive pricing is protected by the 1996 Act.[566]

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[561] *See infra*, V.J.

[562] *See infra*, Section V.J.5, for a definition of pre-ordering services.

[563] The term "provisioning" includes installation.

[564] *See infra*, Section V.J, discussing vertical features and noting that the Illinois Commission has rejected arguments that vertical features cannot be incorporated into network elements.

[565] *See, e.g.*, CompTel reply at 20-22.

[566] *See, e.g.*, DoJ reply at 23-31; CompTel reply at 13-22. For a discussion of the argument that allowing new entrants to purchase

264. Moreover, we agree with those commenters that argue that network elements are defined by facilities or their functionalities or capabilities, and thus, cannot be defined as specific services. A single network element could be used to provide many different services. For example, a local loop can be used to provision inter- and intrastate exchange access services, as well as local exchange services. We conclude, consistent with the findings of the Ohio and Oregon Commissions, that the plain language of section 251(c)(3) does not obligate carriers purchasing access to network elements to provide all services that an unbundled element is capable of providing or that are typically offered over that element.[567] Section 251(c)(3) does not impose any service-related restrictions or requirements on requesting carriers in connection with the use of unbundled elements.

D. Access to Network Elements

1. Background

265. In the NPRM, we observed that section 251(c)(3) requires incumbent LECs to provide "access" to network elements "on an unbundled basis."[568] We interpreted these terms to mean that incumbent LECs must provide carriers with the functionality of a particular element, separate from the functionality of other elements, and must charge a separate fee for each element. We sought comment on this interpretation and any alternative interpretations.[569]

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vertical features as unbundled elements would nullify section 251(c)(4), *see infra*, Section V.H.

[567] Ohio Commission comments at 33; Oregon Commission comments at 27.

[568] 47 U.S.C. § 251(c)(3).

[569] NPRM at para. 86.

3. Discussion

268. We conclude that we should adopt our proposed interpretation that the terms "access" to network elements "on an unbundled basis" mean that incumbent LECs must provide the facility or functionality of a particular element to requesting carriers, separate from the facility or functionality of other elements, for a separate fee. We further conclude that a telecommunications carrier purchasing access to an unbundled network facility is entitled to exclusive use of that facility for a period of time, or when purchasing access to a feature, function, or capability of a facility, a telecommunications carrier is entitled to use of that feature, function, or capability for a period of time. The specified period may vary depending on the terms of the agreement between the incumbent LEC and the requesting carrier. The ability of other carriers to obtain access to a network element for some period of time does not relieve the incumbent LEC of the duty to maintain, repair, or replace the unbundled network element.[573] We reject PacTel's interpretation of the terms quoted above because it is inconsistent with our definition of the term network element (*i.e.*, an element includes all features and functions embedded in it). Moreover, to the extent that PacTel's argument suggests that the 1996 Act does not require unbundled elements to be provisioned in a way that would make them useful, we find that its statutory interpretation is inconsistent with the statute's goal of providing new entrants with realistic means of competing against incumbents.

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573 We clarify that title to unbundled network elements will not shift to requesting carriers.

E. Standards Necessary to Identify Unbundled Network Elements

1. Background

271. In the NPRM, we raised a number of issues concerning the meaning of technical feasibility in connection with unbundled elements.[680] We also sought comment on the extent to which the Commission should consider the standards set forth in section 251(d)(2) in identifying required unbundled elements, and on how we ought to interpret these standards.[681] Subsection (d)(2) provides that "(i)n determining what network elements should be made available for purposes of subsection (c)(3), the Commission shall consider, at a minimum" the following two standards, "whether (A) access to such network elements as are proprietary in nature is necessary; and (B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer."[682] We further asked about the relationship between the latter standard and the requirement in section 251(c)(3) that carries be able to use unbundled elements to provide a telecommunications service.[683]

2. Comments

272. Commenters raised two issues in interpreting the standard relating to whether access to proprietary elements is necessary. The first issue relates to whether incumbent LECs are required to provide proprietary information contained in network elements (*e.g.*, Customer Premises Network Information contained in databases);

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[680] NPRM at paras. 87-88. *See supra*, Section IV.D, for a discussion of these issues.

[681] NPRM at para. 88.

[682] 47 U.S.C. § 251(d)(2).

[683] NPRM at para. 90.

and the second to whether incumbent LECs are required to provide network elements which are proprietary (*e.g.*, elements with proprietary protocols.) As to the first issue, Ameritech, SBC, BellSouth, PacTel, Texas Statewide Telephone Cooperative, Inc. and the Wyoming Commission argue that the Commission should protect proprietary information contained in incumbent LECs' networks.[584] BellSouth and PacTel further argue that we should prohibit access to elements containing proprietary information unless new entrants meet a heavy burden demonstrating need.[585]

273. As to the second issue, a few incumbent LECs argue generally that the Commission should require unbundling of proprietary network elements only under certain limited circumstances.[586] USTA argues that, if we do not grant incumbent LECs the ability to deny their competitors access to proprietary elements, we will stifle the incumbents' incentives to provide innovative services and thereby inhibit competition.[587] PacTel contends that we should not require unbundling of elements with proprietary protocols unless a new entrant demonstrates a heavy burden of need.[588] Ameritech and GTE assert that we should require unbundling of proprietary elements only when the failure to do so would prevent a carrier from offering a service.[589] GTE adds that, if an element is

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[584] Ameritech comments at 34; SBC comments at 36-37; Texas Statewide Telephone Cooperative, Inc. comments at 5-6; BellSouth comments at 35; PacTel comments at 40-44; Wyoming Commission at 24-26.

[585] BellSouth comments at 35; PacTel comments at 40-44.

[586] Ameritech comments at 34-35, reply at 11; BellSouth comments at 35; PacTel comments at 40-44; GTE comments at 30-31; GTE reply at 16; *see also* USTA comments at 27-28.

[587] USTA comments at 27-28.

[588] PacTel comments at 40-44, reply at 16-17; *see also* BellSouth comments at 35.

[589] Ameritech comments at 34-35; Ameritech reply at 11; GTE comments at 30-31; GTE reply at 16.

available from other sources, unbundling should not be mandated. Moreover, according to GTE, if incumbent LECs do make proprietary elements available, they should be compensated for the use of their intellectual property.[890] In contrast, the Consumer Federation of America asserts that, if we define proprietary elements broadly and require new entrants to demonstrate need before they may obtain them, we would significantly inhibit new entry.[891]

274. Most BOCs and GTE contend that the general obligation imposed by section 251(c)(3) is limited by section 251(d)(2)'s standard of whether the failure to provide access to network elements would impair the ability of carriers to offer a service. They argue that this standard requires incumbent LECs to provide unbundled elements only where the failure to do so would prohibit a carrier from providing a service.[892] Commenters offer two different standards by which we may determine whether a carrier may require an incumbent LEC to provide an unbundled element in order for the carrier to offer a service. First, GTE, PacTel and BellSouth argue that unbundling is not required if a carrier can obtain, or provide itself, the requested element on reasonable terms and conditions.[893] The burden of meeting this standard, according to GTE, falls on the requesting carrier.[894] If a carrier fails to meet this standard, but continues to request an element, BellSouth claims, that carrier must meet a

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[890] GTE comments at 30-31.

[891] CFA/CU reply at 25; *see also* Letter from Bruce K. Cox, Government Affairs Director, AT&T to William F. Caton, Secretary, FCC, July 11, 1996 (AT&T July 11 *Ex Parte*).

[892] BellSouth comments at 31-35; GTE comments at 30-31, GTE reply 16-17; Ameritech comments at 25-33; PacTel comments at 40-44, reply at 16-17; SBC comments at 36-37.

[893] GTE comments at 30-31; PacTel comments at 40-44, reply at 17 n.38; BellSouth comments at 35.

[894] GTE reply at 17.

heavier burden.[595] Second, PacTel and Ameritech argue that, if a carrier can offer a service by purchasing the underlying service from the incumbent LEC and reselling it, pursuant to section 251(c)(4), the carrier is not impaired in its ability to offer the service. Thus, they argue, new entrants cannot use unbundled elements exclusively to offer the same services that new entrants can obtain from an incumbent LEC under the resale provision.[596]

275. The Department of Justice and Comptel reject the BOCs' argument that the general obligation imposed by section 251(c)(3) is limited by consideration of whether the failure to provide access to an element would impair a carrier's ability to offer a service. They argue that the term "impair" does not mean "prevent," and that we should interpret this standard to mean that a carrier's ability to provide a service is impaired if obtaining an element from a third party is more costly than obtaining that same element from the incumbent. They also dispute the incumbent LECs' argument that the "impair" language in this standard means that new entrants cannot exclusively use unbundled elements to provide the same or similar retail services that an incumbent offers. They argue that, if similarity is enough to prevent the use of unbundled elements, then section 251(c)(3) would be nullified. They further contend that, under the BOCs' theory, incumbents could prevent new entry through the use of unbundled elements by offering unbundled loops, switching, and other elements as retail services.[597] CompTel also argues that this standard refers back to the first standard in section 251(d)(2) and means that incumbents must provide proprietary elements only if the failure

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[595] BellSouth comments at 35.

[596] BellSouth comments at 31-33; Ameritech comments at 25-31; *see infra*, Section V.H, for a further discussion of the relationship between sections 251(c)(3) and 251(c)(4).

[597] *See, e.g.*, DoJ comments at 48-51, reply at 23-31; CompTel reply at 13-22; *see also*, AT&T reply at 13-20.

to do so would prevent a requesting carrier from offering a telecommunications service.[598]

276. AT&T argues that the plain language of section 251(c)(3) means that incumbent LECs must provide unbundled elements that new entrants request, and that the factors in section 251(d)(2) are minimum considerations and not threshold requirements.[599] BellSouth and SBC agree that the "at minimum" language in section 251(d)(2) means the Commission can consider other factors not enumerated in the statute in determining what elements incumbent LECs must offer to requesting carriers.[600] Similarly, several commenters suggest that, in determining which elements must be offered, we should consider a number of additional factors, including, for example, whether there is a demonstrable market demand for a particular element.[601]

3. Discussion

277. Section 251(c)(3) and 251(d)(2) set forth standards the Commission must consider in identifying make available in connection with arbitrations before state unbundled network elements that incumbent LECs must commissions and BOC statements of generally available terms and conditions. These standards guide the unbundling requirements we issue today as well as any different or additional unbundling requirements we may issue in the future. Similarly, the states must follow our interpretation of these standards to the extent they impose additional

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[598] CompTel comments at 24-25; *see also* AT&T July 11 *Ex Parte*.

[599] *See* AT&T reply at 13-20.

[600] BellSouth comments at 17, 26; SBC comments at 18.

[601] *See, e.g.*, SBC comments at 25-37, 84-99; NYNEX comments at 61-64; Ameritech comments at 34; USTA comments at 23; *see also* Texas Public Utility Counsel comments at 9-11; CBT comments at 15; Nortel comments at 6; U S West comments at 45-47; ASCI comments at 32.

unbundling requirements during arbitrations or subsequent rulemaking proceedings.

278. Section 251(c)(3) requires incumbent LECs to provide requesting carriers with "nondiscriminatory access to network elements on an unbundled basis at any technically feasible point."[602] We find that this clause imposes on an incumbent LEC the duty to provide all network elements for which it is technically feasible to provide access on an unbundled basis. Because section 251(d)(1) requires us to "establish regulations to implement the requirements of" section 251(c)(3), we conclude that we have authority to establish regulations that are coextensive with the duty section 251(c)(3) imposes on incumbent LECs.

279. Section 251(d)(2), however, sets forth standards that do not depend on technical feasibility. More specifically, section 251(d)(2) provides that, in identifying unbundled elements, the Commission shall "consider, at a minimum," whether access to proprietary elements is necessary (the "proprietary standard"), and whether requesting carriers' ability to provide services would be impaired if the desired elements were not provided by an incumbent LEC (the "impairment standard.") Thus, section 251(d)(2) gives us the authority to decline to require incumbent LECs to provide access to unbundled network elements at technically feasible points if, for example, we were to conclude that access to a particular proprietary element is not necessary. To give effect to both sections 251(c)(3) and 251(d)(2), we conclude that the proprietary and impairment standards in section 251(d)(2) grant us the authority to refrain from requiring incumbent LECs to provide all network elements for which it is technically feasible to provide access on an unbundled basis. The authority we derive from section 251(d)(2) is limited, however, by our interpretation of these standards, and this section, as set forth below.

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[602] 47 U.S.C. § 251(c)(3).

280. We agree with BellSouth, SBC, and others that the plain import of the "at minimum" language in section 251(d)(2) requires us, in identifying unbundled network elements, to "consider" the standards enumerated there, as well as other standards we believe are consistent with the objectives of the 1996 Act. We conclude that the word "consider" means we must weigh the standards enumerated in section 251(d)(2) in evaluating whether to require the unbundling of a particular element.

281. We further conclude that, in evaluating whether to impose additional unbundling requirements during the arbitration process, states must apply our definition of technical feasibility, discussed above in section IV.D. A determination of technical feasibility would then create a presumption in favor of requiring an incumbent LEC to provide the element. If providing access to an unbundled element is technically feasible, a state must then consider the standards set forth in section 251(d)(2), as we interpret them below. Similarly, the Commission will apply this analysis where we must arbitrate specific unbundling issues, under section 252(e)(5), and in future rulemaking proceedings that may consider additional or possibly different unbundling requirements.

282. Section 251(d)(2)(A) requires the Commission and the states to consider whether access to proprietary elements is "necessary." "Necessary" means, in this context, that an element is a prerequisite for competition. We believe that, in some instances, it will be "necessary" for new entrants to obtain access to proprietary elements (*e.g.*, elements with proprietary protocols or elements containing proprietary information), because without such elements, their ability to compete would be significantly impaired or thwarted.[603] Thus, as an initial matter, we

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[603] As noted *supra*, Section V.E.2, a number of commenters argue that section 251(d)(2)(A) requires us to protect proprietary information, such as CPNI information, contained in network ele-

decline to adopt a general rule, as suggested by some incumbents, that would prohibit access to such elements, or make access available only upon a carrier demonstrating a heavy burden of need. We acknowledge that prohibiting incumbents from refusing access to proprietary elements could reduce their incentives to offer innovative services. We are not persuaded, however, that this is a sufficient reason to prohibit generally the unbundling of proprietary elements, because the threat to competition from any such prohibition would far exceed any costs to consumers resulting from reduced innovation by the incumbent LEC.[604] Moreover, the procompetitive effects of our conclusion generally will stimulate innovation in the market, offsetting any hypothetical reduction in innovation by the incumbent LECs.

283. We further conclude that, to the extent new entrants seek additional elements beyond those we identify herein, section 251(d)(2)(A) allows the Commission and the states to require the unbundling of such elements unless the incumbent can prove to a state commission that: (1) the element is proprietary, or contains proprietary information that will be revealed if the element is provided on an unbundled basis; and (2) a new entrant could offer the same proposed telecommunications service through the use of other, nonproprietary unbundled elements within the incumbent's network. We believe this interpretation of section 251(d)(2)(A) will best advance the procompetitive purposes of the 1996 Act. It allows

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ments. We intend to treat issues regarding CPNI in our rulemaking proceeding on CPNI information. *Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, CC Docket No. 96-115, Notice of Proposed Rulemaking, FCC 96-221 (rel. May 17, 1996).

[604] In this proceeding, for example, we are requiring incumbent LECs to provide the local switching element which includes vertical features that some carriers contend are proprietary. *See infra*, Section V.J.

new entrants to obtain proprietary elements from incumbent LECs where they are necessary to offer a telecommunications service, and, at the same time, it gives incumbents the opportunity to argue, before the states or the Commission, against unbundling proprietary elements where a new entrant could offer the same service using other unbundled elements in the incumbent's network. We decline to adopt the interpretation of section 251 (d)(2)(A) advanced by some incumbents that incumbent LECs need not provide proprietary elements if requesting carriers can obtain the requested proprietary element from a source other than the incumbent. Requiring new entrants to duplicate unnecessarily even a part of the incumbent's network could generate delay and higher costs for new entrants, and thereby impede entry by competing local providers and delay competition, contrary to the goals of the 1996 Act.

284. We further conclude that, to the extent new entrants do not need access to all the proprietary information contained within an element in order to provide a telecommunications service, the Commission and the states may take action to protect the proprietary information. For example, to provide a telecommunications service, a new entrant might need access to information about a particular customer that is in an incumbent LEC database. The database to which the new entrant requires access, however, may contain proprietary information about all of the incumbent LECs' customers. In this circumstance, the new entrant should not have access to proprietary information about the incumbent LEC's other customers where it is not necessary to provide service to the new entrant's particular customer. Accordingly, we believe the Commission and the states have the authority to protect the confidentiality of proprietary information in an unbundled network element, such as a database, where that information is not necessary to enable a new entrant to

offer a telecommunications service to its particular customer.

285. Section 251(d)(2)(B) requires us to consider whether the failure to provide access to an element would "impair" the ability of a new entrant to provide a service it seeks to offer. The term "impair" means "to make or cause to become worse; diminish in value." [605] We believe, generally, that an entrant's ability to offer a telecommunications service is "diminished in value" if the quality of the service the entrant can offer, absent access to the requested element, declines and/or the cost of providing the service rises. We believe we must consider this standard by evaluating whether a carrier could offer a service using other unbundled elements within an incumbent LEC's network. Accordingly, we interpret the "impairment" standard as requiring the Commission and the states, when evaluating unbundling requirements beyond those identified in our minimum list, to consider whether the failure of an incumbent to provide access to a network element would decrease the quality, or increase the financial or administrative cost of the service a requesting carrier seeks to offer, compared with providing that service over other unbundled elements in the incumbent LEC's network.

286. We decline to adopt the interpretation of the "impairment" standard advanced by most BOCs and GTE. Under their interpretation, incumbent LECs must provide unbundled elements only when the failure to do so would prevent a carrier from offering a service. We also reject the related interpretations that carriers are not impaired in their ability to provide a service if they can obtain elements from another source, or if they can provide the proposed service by purchasing the service at wholesale rates from a LEC. In general, and as discussed above, section 251(c)(3) imposes on incumbent LECs

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[605] *See* Random House College Dictionary 665 (rev. ed. 1984).

the obligation to offer on an unbundled basis all network elements for which it is technically feasible to provide access. We believe the plain language of section 251 (d)(2), and the standards articulated there, give us the discretion to limit the general obligation imposed by subsection 251(c)(3), but they do not require us to do so. The standards set forth in section 251(d)(2) are minimum considerations that the Commission shall take into account in evaluating unbundling requirements. Accordingly, we conclude that the statute does not require us to interpret the "impairment" standard in a way that would significantly diminish the obligation imposed by section 251(c)(3).

287. The interpretation advanced by most of the BOCs and GTE, described above, means that, if a requesting carrier could obtain an element from a source other than the incumbent, then the incumbent need not provide the element. We agree with the reasoning advanced by some of the commenters that this interpretation would nullify section 251(c)(3) because, in theory, any new entrant could provide all of the elements in the incumbents' networks. Congress made it possible for competitors to enter local markets through the purchase of unbundled elements because it recognized that duplication of an incumbent's network could delay entry, and could be inefficient and unnecessary.[606] The interpretation proffered by the BOCs and GTE would inhibit new entry and thus restrict the potential for meaningful competition, which would undermine the procompetitive goals of the 1996 Act. As a practical matter, if it is more efficient and less costly for new entrants to obtain network elements from a source other than an incumbent LEC, new entrants will likely pursue the more efficient and less costly approach. Additionally, as discussed above at section IV.C, we believe that allowing incumbent LECs to deny access to

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[606] *See* LDDS comments at 37, reply at 14-15.

unbundled elements on the grounds that an element is equivalent to a service available at resale would lead to impractical results, because incumbents could completely avoid section 251(c)(3)'s unbundling obligations by offering unbundled elements to end users as retail services.[607]

288. Finally, we decline at this time to adopt any of the additional criteria proposed by commenters. We conclude that none of the additional factors suggested by commenters enhances our ability to identify unbundled network elements consistent with the procompetitive goals of the 1996 Act.[608] These additional considerations would limit unbundling requirements or make it administratively more difficult for new entrants to obtain additional unbundled elements beyond those identified in our minimum list of required elements. For example, we believe that the proposal that new entrants must provide detailed estimates regarding projected market demand is not necessary for incumbent LECs to efficiently plan for network growth.

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307. We agree with those commenters, including the Florida, Illinois and Washington Commissions, that to achieve the procompetitive goals of the 1996 Act, it is necessary to establish rules that define the obligations of incumbent LECs to provide nondiscriminatory access to unbundled network elements, and to provide such elements on terms and conditions that are just, reasonable and nondiscriminatory.[671] As discussed above at sections II.A,

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[607] *See infra*, Section V.H, for a further discussion on the relationship between sections 251(c)(3) and 251(c)(4).

[608] *See, e.g.*, Texas Public Utility Counsel comments at 9-11; Cincinnati Bell comments at 15; Nortel comments at 6 (the diversion of research and development efforts to facilities that new entrants do not really want will stifle innovation); SBC comments at 25-37, 84-99.

[671] *See infra*, Section VII, for a discussion of just, reasonable and nondiscriminatory rates for unbundled network elements.

II.B. and V.B., we believe that incumbent LECs have little incentive to facilitate the ability of new entrants, including small entities, to compete against them and, thus, have little incentive to provision unbundled elements in a manner that would provide efficient competitors with a meaningful opportunity to compete. We are also cognizant of the fact that incumbent LECs have the incentive and the ability to engage in many kinds of discrimination. For example, incumbent LECs could potentially delay providing access to unbundled network elements, or they could provide them to new entrants at a degraded level of quality.

308. Consistent with arguments advanced by the Florida and Washington Commissions, incumbent LECs, and potential competitors, and as more fully discussed in the specific sections below, we adopt general, national rules defining "nondiscriminatory access" to unbundled network elements, and "just, reasonable, and nondiscriminatory" terms and conditions for the provision of such elements. We have chosen this approach, rather than allowing states exclusively to consider these issues, because we believe that some national rules regarding nondiscriminatory access will reduce the costs of entry and speed the development of competition.[672]

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a. Nondiscriminatory Access to Unbundled Network Elements

312. We conclude that the obligation to provide "nondiscriminatory access to network elements on an unbundled basis"[674] refers to both the physical or logical connection to the element and the element itself. In considering how to implement this obligation in a manner that would achieve the 1996 Act's goal of promoting

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[672] *See supra*, Section V.B.

[674] 47 U.S.C. § 251(c)(3).

local exchange competition, we recognize that new entrants, including small entities, would be denied a meaningful opportunity to compete if the quality of the access to unbundled elements provided by incumbent LECs, as well as the quality of the elements themselves, were lower than what the incumbent LECs provide to themselves. Thus, we conclude it would be insufficient to define the obligation of incumbent LECs to provide "nondiscriminatory access" to mean that the quality of the access and unbundled elements incumbent LECs provide to all requesting carriers is the same. As discussed above with respect to interconnection,[675] an incumbent LEC could potentially act in a nondiscriminatory manner in providing access or elements to all requesting carriers, while providing preferential access or elements to itself. Accordingly, we conclude that the phrase "nondiscriminatory access" in section 251(c)(3) means at least two things: first, the quality of an unbundled network element that an incumbent LEC provides, as well as the access provided to that element, must be equal between all carriers requesting access to that element; second, where technically feasible, the access and unbundled network element provided by an incumbent LEC must be at least equal-in-quality to that which the incumbent LEC provides to itself.[676]

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3. Discussion

328. The language of section 251(c)(3) is cast exclusively in terms of obligations imposed on incumbent LECs, and it does not discuss, reference, or suggest a limitation or requirement in connection with the right of new en-

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675 *See supra*, Sections IV.G, IV.H.

676 We note that providing access or elements of lesser quality than that enjoyed by the incumbent LEC would also constitute an "unjust" or "unreasonable" term or condition.

trants to obtain access to unbundled elements. We conclude, therefore, that Congress did not intend section 251(c)(3) to be read to contain any requirement that carriers must own or control some of their own local exchange facilities before they can purchase and use unbundled elements to provide a telecommunications service. We note that the Illinois Commission has reached the same conclusion.[707]

329. We reject the arguments advanced by Bell Atlantic and NYNEX that the language of section 251(c)(3) requires carriers seeking access to unbundled elements to own some local exchange facilities, and that this serves to distinguish section 251(c)(3) from section 251(c)(4). The "at any technically feasible point" language in section 251(c)(3) refers to points in an incumbent LEC's network where new entrants may obtain access to elements. It does not, however, require that new entrants interconnect local exchange facilities which they own or control at that technically feasible access point. If we were to conclude otherwise, then new entrants would be prohibited from requesting two network elements that are connected to each other because the new entrant would be required to connect a single network element to a facility of its own. The 1996 Act, however, does not impose any limitations on carriers' ability to obtain access to unbundled network elements. Moreover, we conclude that Congress did not intend to limit access to unbundled elements in this manner because such a limit would seriously inhibit the ability of potential competitors to enter local markets through the use of unbundled elements, and thus would retard the development of local exchange competition. We also reject NYNEX's argument that the phrase "such telecommunications service" excludes services provided by the incumbent. This interpretation is inconsistent with the

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[707] AT&T Communications of Illinois, Inc. *et al.*, Petition for a Total Local Exchange Wholesale Service Tariff from Illinois Bell Telephone Company, Nos. 95-0458 and 95-0531 (consol.) at 63-65 (Illinois Commission June 26, 1996).

1996 Act's definition of a telecommunications service, which includes all telecommunications services provided by an incumbent.

330. We also reject the argument that language in the Joint Explanatory Statement requires us to conclude that carriers must own facilities to obtain access to unbundled elements. Congress may have recognized that carriers that own some of their own facilities will more likely benefit by entering local markets through unbundled elements rather than resale, but this consideration does not imply that carriers must own their own facilities to obtain access to unbundled elements.[708]

331. We are not persuaded that, in order to give meaning and effect to section 251(c)(4), we must require new entrants to own some local exchange facilities in order to obtain access to unbundled elements. We disagree with the premise that no carrier would consider entering local markets under the terms of section 251(c)(4) if it could use recombined network elements solely to offer the same or similar services that incumbents offer for resale. We believe that sections 251(c)(3) and 251 (c)(4) present different opportunities, risks, and costs in connection with entry into local telephone markets, and that these differences will influence the entry strategies of potential competitors. We therefore find that it is unnecessary to impose a limitation on the ability of carriers to enter local markets under the terms of section 251(c)(3) in order to ensure that section 251(c)(4) retains functional validity as a means to enter local phone markets.

332. The principal distinction between sections 251 (c)(3) and 251(c)(4), in terms of the opportunities each section presents to new entrants, is that carriers using solely unbundled elements, compared with carriers purchasing services for resale, will have greater opportunities to offer services that are different from those offered by

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[708] *See* Joint Explanatory Statement at 148.

incumbents. More specifically, carriers reselling incumbent LEC services are limited to offering the same service an incumbent offers at retail. This means that resellers cannot offer services or products that incumbents do not offer. The only means by which a reseller can distinguish the services it offers from those of an incumbent is through price, billing services, marketing efforts, and to some extent, customer service. The ability of a reseller to differentiate its products based on price is limited, however, by the margin between the retail and wholesale price of the product.

333. In contrast, a carrier offering services solely by recombining unbundled elements can offer services that differ from those offered by an incumbent. For example, some incumbent LECs have capabilities within their networks, such as the ability to offer Centrex, which they do not use to offer services to consumers. Carriers purchasing access to unbundled elements can offer such services. Additionally, carriers using unbundled elements can bundle services that incumbent LECs sell as distinct tariff offerings, as well as services that incumbent LECs have the capability to offer, but do not, and can market them as a bundle with a single price. The ability to package and market services in ways that differ from the incumbent's existing service offerings increases the requesting carrier's ability to compete against the incumbent and is likely to benefit consumers.[709] Additionally, carriers solely using unbundled network elements can offer exchange access services. These services, however, are not available for resale under section 251(c)(4) of the 1996 Act.[710]

334. If a carrier taking unbundled elements may have greater competitive opportunities than carriers offering services available for resale, they also face greater risks.

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[709] *See* AT&T comments at 25-31.

[710] *See infra*, Section VII; *see also* Letter from Bernard J. Ebbers, President LDDS WorldCom, to Rachelle B. Chong, Commissioner, Federal Communications Commission, July 11, 1996.

A carrier purchasing unbundled elements must pay for the cost of that facility, pursuant to the terms and conditions agreed to in negotiations or ordered by states in arbitrations.[711] It thus faces the risk that end-users customers will not demand a sufficient number of services using that facility for the carrier to recoup its cost. (Many network elements can be used to provide a number of different services.) A carrier that resells an incumbent LEC's services does not face the same risk. This distinction in the risk borne by carriers entering local markets through resale as opposed to unbundled elements is likely to influence the entry strategies of various potential competitors. Some new entrants will be unable or unwilling to bear the financial risks of entry by means of unbundled elements and will choose to enter local markets under the terms of section 251(c)(4) irrespective of the fact that they can obtain access to unbundled elements without owning any of their own facilities.[712] Moreover, some markets may never support new entry through the use of unbundled elements because new entrants seeking to offer services in such markets will be unable to stimulate sufficient demand to recoup their investment in unbundled elements. Accordingly, in these markets carriers will enter through the resale of incumbent LEC services, irrespective of the fact that they could enter exclusively through the use of unbundled elements.[713]

335. We are not persuaded by the argument set forth by Ameritech, NYNEX, and MFS that allowing carriers to use solely recombined network elements would eviscerate the joint marketing restriction in section 271 (e)(1).[714] It is true that the terms of section 271(e) do

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711 *See infra*, Section VII, describing the terms under which new entrants will pay for the cost of unbundled elements.

712 *See, e.g.*, AT&T reply at 13-20.

713 *See, e.g.*, Comptel reply at 13-16.

714 Section 271(e)(1) provides that "[u]ntil a Bell operating company is authorized pursuant to subsection (d) to provide inter-

not restrict joint marketing through the use of unbundled elements pursuant to section 251(c)(3). As discussed above, differences in opportunities and risk will cause some new entrants to consider entering local telephone markets through resale of incumbent LEC services, even if they could enter solely through the use of unbundled elements. Thus, we conclude that section 271(e)(1) will impose a meaningful limitation on joint marketing.

336. We note, moreover, that the 1996 Act does not prohibit all forms of joint marketing. For example, it does not prohibit carriers who own local exchange facilities from jointly marketing local and interexchange service. Nor does it prohibit joint marketing by carriers who provide local exchange service through a combination of local facilities which they own or possess, and unbundled elements. Because the 1996 Act does not prohibit all forms of joint marketing, we see no principled basis for reading into section 721(e)(1) a further limitation on the ability of carriers to jointly market local and long distance services without concluding that this section prohibits all forms of joint marketing. In other words, we see no basis upon which we could conclude that section 271(e)(1) restricts joint marketing of long distance services, and local services provided solely through the use of unbundled network elements, without also concluding that the section restricts the ability of carriers to jointly market long distance services and local services that are provided through a combination of a carriers' own facilities and unbundled network elements.[715] Moreover, we do not believe that we have

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LATA services in an in-region State, or until 36 months have passed since the date of enactment . . . a telecommunications carrier that serves greater than 5 percent of the Nation's presubscribed access lines may not jointly market in such State telephone exchange service obtained from such company pursuant to section 251(c)(4) with interLATA services." 47 U.S.C. § 271(e)(1).

[715] *See also* AT&T reply at 14-15 (the added risk of unbundled elements also means that new entrants are not circumventing section 271's joint marketing restriction because the additional risk

the discretion to read into the 1996 Act a restriction on competition which is not required by the plain language of any of its sections.

337. We also reject the argument advanced by BellSouth and Ameritech that allowing carriers to use solely unbundled elements to provide services available through resale would allow carriers to evade a possible prohibition, which is reserved to the discretion of the states, on the sale of certain services to certain categories of consumers. Under section 251(c)(4)(B) states are permitted to restrict resellers from offering certain services to certain consumers, in the same manner that states restrict incumbent LECs.[716] For example, states that prohibit incumbent LECs from selling to business consumers residential services priced below cost have the ability to restrict resellers from selling such services to business consumers.

338. We do not believe, however, that carriers using solely unbundled elements to provide local exchange services will be able to evade any potential restrictions states may impose under section 251(c)(4)(B). In this section Congress granted the states the discretion to impose certain limited restrictions on the sale of services available for resale. It did not, however, grant states, in section 251(c)(3), the same discretion to impose similar restrictions on the use of unbundled elements. Accordingly, we are not persuaded that allowing carriers to use solely unbundled elements to provide services that incumbent LECs offer for resale would allow competing carriers to evade a possible marketing restriction that Congress intended to reserve to the discretion of the states.

339. We agree with those commenters who argue that it would be administratively impossible to impose a re-

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justifies allowing carriers more flexibility to jointly market services); LDDS reply at 28-30.

[716] 47 U.S.C. § 251(c)(4)(B).

quirement that carriers must own some of their own local exchange facilities in order to obtain access to unbundled elements, and they must use these facilities, in combination with unbundled elements, for the purpose of providing local services. We conclude that it would not be possible to identify the elements carriers must own without creating incentives to build inefficient network architectures that respond not to marketplace factors, but to regulation. We further conclude that such a requirement could delay possible innovation. These effects would diminish competition for local telephone services, and thus any local exchange facilities requirement would be inconsistent with the 1996 Act's goals of promoting competition. Moreover, if we imposed a facilities ownership requirement that attempted to avoid these competitive pitfalls, it would likely be so easy to meet it would ultimately be meaningless.

340. We reject the argument that requiring carriers to own some local exchange facilities would promote competition for local exchange services, or that we should impose such a requirement for other policy reasons. To the contrary, we conclude that allowing carriers to use unbundled elements as they wish, subject only to the maintenance of the key elements of the access charge regime, described below at section VII, will lead to more efficient competition in local phone markets. If we were to limit access to unbundled network elements to those markets where carriers already own, or could efficiently build, some local exchange facilities, we would limit the ability of carriers to enter local markets under the pricing standard for unbundled elements to those markets that could efficiently support duplication of some or all of the incumbent LECs' networks. We believe that such a result could diminish competition, and that allowing new entrants to take full advantage of incumbent LECs' scale and scope economies will promote more rapid and efficient entry and will result in more robust competition.

341. Finally, we conclude that a new entrant may offer services to one group of consumers using unbundled network elements, and it may offer services to a separate group of consumers by reselling an incumbent LEC's services. With the exception noted in Section VII, *infra*, we do not address the issue of whether the 1996 Act permits a new entrant to offer services to the same set of consumers through a combination of unbundled elements and services available for resale.

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3. Discussion

356. We confirm our tentative conclusion in the NPRM that section 251(c)(3) permits interexchange carriers and all other requesting telecommunications carriers, to purchase unbundled elements for the purpose of offering exchange access services, or for the purpose of providing exchange access services to themselves in order to provide interexchange services to consumers.[761] Although we conclude below that we have discretion under the 1934 Act, as amended by the 1996 Act, to adopt a limited, transitional plan to address public policy concerns raised by the bypass of access charges via unbundled elements, we believe that our interpretation of section 251(c)(3) in the NPRM is compelled by the plain language of the 1996 Act. As we observed in the NPRM, section 251 (c)(3) provides that requesting telecommunications carriers may seek access to unbundled elements to provide a "telecommunications service," and exchange access and interexchange services are telecommunications services. Moreover, section 251(c)(3) does not impose restrictions on the ability of requesting carriers "to combine such elements in order to provide such telecommunications service[s]."[762] Thus, we find that there is no statutory basis upon which we could reach a different conclusion for the long term.

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761 *See* NPRM at paras. 159-65.

762 47 U.S.C. § 251(c)(3).

357. We also confirm our conclusion in the NPRM that, for the reasons discussed below in section V.J, carriers purchase rights to exclusive use of unbundled loop elements, and thus, as the Department of Justice and Sprint observe, such carriers, as a practical matter, will have to provide whatever services are requested by the customers to whom those loops are dedicated. This means, for example, that, if there is a single loop dedicated to the premises of a particular customer and that customer requests both local and long distance service, then any interexchange carrier purchasing access to that customer's loop will have to offer both local and long distance services. That is, interexchange carriers purchasing unbundled loops will most often not be able to provide solely interexchange services over those loops.

358. We reject the argument advanced by a number of incumbent LECs that section 251(i) demonstrates that requesting carriers using unbundled elements must continue to pay access charges. Section 251(i) provides that nothing in section 251 "shall be construed to limit or otherwise affect the Commission's authority under section 201."[763] We conclude, however, that our authority to set rates for these services is not limited or affected by the ability of carriers to obtain unbundled elements for the purpose of providing interexchange services. Our authority to regulate interstate access charges remains unchanged by the 1996 Act. What has potentially changed is the volume of access services, in contrast to the number of unbundled elements, interexchange carriers are likely to demand and incumbent LECs are likely to provide. When interexchange carriers purchase unbundled elements from incumbents, they are not purchasing exchange access "services." They are purchasing a different product, and that product is the right to exclusive access or use of an entire element. Along this same line of reasoning, we reject the argument that our conclusion would place the

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763 47 U.S.C. § 251(i).

administration of interstate access charges under the authority of the states. When states set prices for unbundled elements, they will be setting prices for a different product than "interstate exchange access services." Our exchange access rules remain in effect and will still apply where incumbent LECs retain local customers and continue to offer exchange access services to interexchange carriers who do not purchase unbundled elements, and also where new entrants resell local service.[764]

359. We also reject the incumbent LECs' arguments that language contained in bills that were not enacted, or legislative history connected to such bills, demonstrates that carriers cannot purchase access to unbundled elements to provide exchange access services to themselves, for the purpose of providing long distance services to consumers. The incumbent LECs are arguing in effect, that we should read into the current statute a limitation on the ability of carriers to use unbundled network elements, despite the fact that no such limitation survived the Conference Committee's amendments to the 1996 Act. We conclude, however, that the language of section 251(c)(3), which provides that telecommunications carriers may purchase unbundled elements in order to provide a telecommunications service [765] is not ambiguous. Accordingly, we must interpret it pursuant to its plain meaning and not by referencing earlier versions of the statute that were ultimately not adopted by Congress.

360. Moreover, we do not believe that the Joint Explanatory Statement, which describes the House and Senate versions of the statute, and the 1996 Act as enacted, compels a different conclusion. The Joint Explanatory Statement states that the statute incorporates provisions

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[764] The application of our exchange access rules in the circumstances described will continue beyond the transition period described at *infra*, Section VII.

[765] 47 U.S.C. § 251(c)(3).

from the Senate Bill and the House Amendment in connection with the interconnection model adopted in section 251.[766] It notes that the provision in the Senate Bill relating to interconnection did not apply to interconnection arrangements between local and long distance carriers for the purpose of providing long distance services.[767] The text of section 251 of the Senate Bill is consistent with this comment because it states that a local exchange carrier must offer interconnection to other carriers to allow such carriers to provide telephone exchange or exchange access services.[768] The Joint Explanatory Statement, however, does not describe any restriction in the House Amendment regarding the ability of carriers to use unbundled elements to provide long distance service.[769] Indeed, the House Amendment specifically states that carriers may obtain access to unbundled elements to offer "a telecommunications service," which is not limited to telephone exchange and exchange access services.[770] We observe that the Conference Committee incorporated language from the House Amendment and not the Senate Bill in describing in section 251(c)(3) the services carriers may offer using unbundled elements. Accordingly, we do not believe that the Joint Explanatory Statement's description of the provision in the Senate Bill controls our interpretation of section 251(c)(3) as enacted.

361. We also reject the argument that allowing carriers to use unbundled elements to provide originating and terminating toll services is inconsistent with the purposes of the 1996 Act. Congress intended the 1996 Act to promote competition for not only telephone exchange services

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766 Joint Explanatory Statement at 117-123.

767 *Id.* at 117.

768 S. 652, 104th Cong., 1st Sess. § 251 (1995).

769 Joint Explanatory Statement at 120-121.

770 H.R. 1555, 104th Cong., 1st. Sess. § 242 (1995).

and exchange access services, but also for toll services. Section 251(b)(3), for example, imposes a duty on LECs to provide dialing parity for telephone toll service.

362. We disagree with the incumbent LECs which argue that section 251(g) requires requesting carriers using unbundled elements to continue to pay federal and state access charges indefinitely. Section 251(g) provides that the federal and state equal access rules applicable before enactment, including the "receipt of compensation," will continue to apply after enactment, "until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after such date of enactment." [771] We believe this provision does not apply to the exchange access "services" requesting carriers may provide themselves or others after purchasing unbundled elements. Rather, the primary purpose of section 251(g) is to preserve the right of interexchange carriers to order and receive exchange access services if such carriers elect not to obtain exchange access through their own facilities or by means of unbundled elements purchased from an incumbent.

363. We affirm our tentative conclusion in the NPRM that, telecommunications carriers purchasing unbundled network elements to provide interexchange services or exchange access services are not required to pay federal or state exchange access charges except as described in section VII, *infra*, for a temporary period. As we explained in the NPRM, if we were to require indefinitely carriers purchasing unbundled elements to also pay access charges, then incumbent LECs would receive compensation in excess of their underlying network costs. This result would be inconsistent with the pricing standard for unbundled elements set forth in section 252(d)(1).[772] In addition,

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[771] 47 U.S.C. § 251(g).

[772] *See infra*, Section VII. We also note that where new entrants purchase access to unbundled network elements to provide exchange

we believe this conclusion is consistent with Congress's overriding goal of promoting efficient competition for local telephony services, because it will allow, in the long term, new entrants using unbundled elements to compete on the basis of the economic costs underlying the incumbent LEC's networks. The facilities used to provide exchange access services are the same as those used to provide local exchange services. We note, however, as discussed below,[773] that certain additional charges are necessary for a specific, limited duration to smooth the transition to a competitive marketplace.

364. We further conclude that when a carrier purchases a local loop for the purpose of providing interexchange services or exchange access services,[774] incumbent LECs may not recover the subscriber line charge (SLC) now paid by end users. The SLC recovers the portion of loop costs allocated to the interstate jurisdiction, but as discussed in Section II.C, *supra*, we conclude that the 1996 Act creates a new jurisdictional regime outside of the current separations process. The unbundled

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access services, whether or not they are also offering toll services through such elements, the new entrants may assess exchange access charges to IXCs originating or terminating toll calls on those elements. In these circumstances, incumbent LECs may not assess exchange access charges to such IXCs because the new entrants, rather than the incumbents, will be providing exchange access services, and to allow otherwise would permit incumbent LECs to receive compensation in excess of network costs in violation of the pricing standard in section 252(d). *See* 47 U.S.C. § 252. We further note, however, that in these same circumstances the new entrant purchasing access to an unbundled switch element must pay to the incumbent LEC the charges included in the transitional mechanism, described *infra*, at Section VII, for a temporary period.

773 *See infra*, Section VII, discussing an interim mechanism addressing near-term access charge bypass.

774 As discussed at *infra*, Section VIII, a different result will occur when interconnecting carriers purchase LEC retail services at wholesale rates under section 251(c)(4).

loop charges paid by new entrants under section 251 (c)(3) will therefore recover the unseparated cost of the loop, including the interstate component now recovered through the SLC. If end users or carriers purchasing access to local loops were required to pay the SLC in this situation, LECs would enjoy double recovery, and the effective price of unbundled loops would exceed the cost-based levels required under section 251(d)(1).

365. Finally, we have considered the economic impact on small incumbent LECs of our conclusion that carriers purchasing access to unbundled network elements to provide interexchange or exchange access services are not required to pay federal or state access charges, except as described in Section VII, *infra*, for a temporary period. For example, the Rural Telephone Coalition argues that rural ratepayers could be subject to higher local service rates if interexchange carriers are allowed to bypass access charges through the purchase of unbundled elements before proceedings regarding access reform and universal service are completed. We reject the Rural Telephone Coalition's argument, however, because our rules, as discussed in Section VII, *infra*, provide for a limited, transitional plan to address public policy concerns raised by the bypass of access charges through unbundled network elements.

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c. Discussion

377. We conclude that incumbent LECs must provide local loops on an unbundled basis to requesting carriers. We note that the Joint Explanatory Statement lists local loops as an example of an unbundled network element.[816] As discussed below, the record demonstrates that it is technically feasible for incumbent LECs to provide access to unbundled local loops, and that such access is

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[816] Joint Explanatory Statement at 116.

critical to encouraging market entry. Further, the competitive checklist contained in section 271 requires BOCs to offer unbundled loops separate from switching as a precondition to entry into the in-region, interLATA services market.[817]

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380. We further conclude that the local loop element should be defined as a transmission facility between a distribution frame, or its equivalent, in an incumbent LEC central office, and the network interface device at the customer premises. This definition includes, for example, two-wire and four-wire analog voice-grade loops, and two-wire and four-wire loops that are conditioned to transmit the digital signals needed to provide services such as ISDN, ADSL, HDSL, and DS1-level signals.[823] We note that a number of parties proposed definitions of the local loop that encompassed some or all of these loop types.[824] In addition, we agree with ITIC that the ability to offer various digital loop functions in competition with incumbent LECs may be particularly beneficial to small entities by allowing them to serve niche markets.[825]

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[817] 47 U.S.C. § 271(c)(2)(B).

[823] ISDN (Integrated Services Digital Network) at the Basic Rate Interface level permits the transmission of digital signals over the loop at the rate of 144 kbps, which provides two standard 64 kbps voice or data channels and a 16 kbps data channel. ISDN at the Primary Rate Interface permits 23 standard 64 kbps channels plus one 16 kbps data channel. ADSL (Asynchronous Digital Subscriber Line) is a transmission path that facilitates 6 Mbps digital signal downstream and 640 kbps digital signal upstream, while simultaneously carrying an analog voice signal. Two-wire HDSL (High-bit-rate Digital Subscriber Line) permits the transmission of a 768 kbps digital signal over a copper loop, while four-wire HDSL allows the transmission of 1,544 Mbps over two two-wire pairs.

[824] *See, e.g.*, MFS comments at 43-44; ALTS comments at 27; GST comments at 21-22; ACSI comments, Att. 1 at 2.

[825] ITIC comments at 7-8.

382. Our definition of loops will in some instances require the incumbent LEC to take affirmative steps to condition existing loop facilities to enable requesting carriers to provide services not currently provided over such facilities. For example, if a competitor seeks to provide a digital loop functionality, such as ADSL, and the loop is not currently conditioned to carry digital signals, but it is technically feasible to condition the facility, the incumbent LEC must condition the loop to permit the transmission of digital signals. Thus, we reject BellSouth's position that requesting carriers "take the LEC networks as they find them" with respect to unbundled network elements.[828] As discussed above, some modification of incumbent LEC facilities, such as loop conditioning, is encompassed within the duty imposed by section 251 (c)(3).[829] The requesting carrier would, however, bear the cost of compensating the incumbent LEC for such conditioning.[830]

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384. We find that it is technically feasible to unbundle IDLC-delivered loops. One way to unbundle an individual loop from an IDLC is to use a demultiplexer to separate the unbundled loop(s) prior to connecting the remaining loops to the switch. Commenters identify a number of other methods for separating out individual loops from IDLC facilities, including methods that do not require demultiplexing.[831] Again, the costs associated with these mechanisms will be recovered from requesting carriers.

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[828] BellSouth comments at 39.

[829] *See supra* Section IV.D., interpreting the term "technically feasible." *See also* MFS comments at 43 (arguing that incumbent LECs condition loops in order to provide particular digital loop functionalities to their customers).

[830] *See supra* Section VII, discussing the recovery of costs under section 252(d)(1).

[831] Under more recent standards for IDLC facilities, a competitor's loop traffic could be separated from the incumbent LEC's loop

388. Section 251(d)(2)(A) requires the Commission to consider whether "access to such network elements as are proprietary in nature is necessary."[835] Most parties did not identify any proprietary concerns associated with providing unbundled access to local loops. Ericsson notes that some "active" loop equipment, such as channel banks and remote terminal equipment, is often proprietary in nature, and that manufacturers would require time to modify such equipment to create end-to-end network compatibility on a national basis.[836] Ericsson does not contend, however, that any proprietary information would be revealed if loops using such equipment were unbundled, or that use of such equipment should prevent loop unbundling in general.[837] Thus, we conclude that loop elements are, in general, not proprietary in nature under our interpretation of section 251(d)(2)(A). Even if loop elements were proprietary in nature, however, Ericsson does not meet the second consideration in our section 251(d)(2)(A) standard, which requires a showing that a new entrant can offer the proposed telecommunications service through the use of other, nonproprietary elements in the incumbent LEC's network.[838] Ericsson merely contends that manufacturers may need time to establish compatibility between its proprietary equipment and equipment of other manufacturers.[839] Therefore, we find that Ericsson's concerns do not justify withholding unbun-

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traffic without the use of multiplexers. *See, e.g.*, MCI comments at 30 (IDLC loops can be moved onto other loop carrier links, or alternatively, can be removed from the multiplexed signal through "hair pinning").

[835] 47 U.S.C. § 251(d)(2)(A).

[836] Ericsson comments at 4.

[837] Ericsson's comments were in response to a question in the NPRM seeking comment on the need to accommodate new loop technologies or services. Ericsson comments at 4.

[838] *See supra* Section V.E.3.

[839] Ericsson comments at 4-5.

dled loops from requesting carriers pursuant to section 251(d)(2)(A).

389. Section 251(d)(2)(B) directs the Commission to consider whether "the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer." [840] We have interpreted the term "impair" to mean either increased cost or decreased service quality that would result from using network elements of the incumbent LEC other than the one sought.[841] Commenters do not identify alternative facilities that would fulfill requesting carriers' need for transmission between the central office and the customer premises at the same cost and same quality of service. Accordingly, we conclude that competitors' ability to provide telephone exchange, exchange access, or other telecommunications services would be significantly impaired if they did not have the opportunity to purchase unbundled loops from incumbent LECs.

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392. We require incumbent LECs to offer unbundled access to the network interface device (NID),[852] as a network element, as described below. When a competitor deploys its own loops, the competitor must be able to connect its loops to customers' inside wiring in order to provide competing service, especially in multi-tenant buildings. In many cases, inside wiring is connected to the incumbent LEC's loop plant at the NID. In order to provide service, a competitor must have access to this facility. Therefore, we conclude that a requesting carrier

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840 47 U.S.C. § 251(d)(2)(B).

841 *See supra* Section V.E.3.

852 The NID is a cross-connect device used to connect loop facilities to inside wiring.

is entitled to connect its loops, via its own NID, to the incumbent LEC's NID.[853]

393. Pursuant to section 251(c)(3), we find that this arrangement clearly is technically feasible. Ameritech notes that it currently maintains such connections with competitors that have deployed their own loop facilities.[854] This is persuasive evidence that unbundled access at the NID, in this manner, does not raise network reliability concerns. Under section 251(d)(2)(A), the record contains no evidence of proprietary concerns with unbundled access to the NID. In addition, under our interpretation of the "impair" test of section 251(d)(2)(B), commenters do not contend that new entrants could obtain the same functionality at the same cost and service quality through other network elements of the incumbent LEC. Moreover, the record indicates that certain network architectures used by new entrants, such as fiber rings, can most efficiently connect end users to the new entrant's switching office without use of the incumbent LEC's facilities.[855] Thus, we conclude that the unavailability of access to incumbent LECs' NIDs would impair the ability of carriers deploying their own loops to provide service. Further, we believe that unbundled access to the NID will facilitate entry strategies premised on the deployment of loops. As discussed in section VII, above, the new

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853 We emphasize that access to inside wiring through the incumbent LEC's NID does not entitle a competitor to deliver its loop facilities into a building without the permission of the building owner. Similarly, access to an incumbent LEC's NID does not entitle the competitor to the riser and lateral cables between the NID and individual units within the building, which may be owned or controlled, for example, by the premises owner.

854 Letter from James K. Smith, Director-Federal Relations, Ameritech, to William F. Caton, Acting Secretary, FCC, July 15, 1996 (Ameritech July 15 *Ex Parte*).

855 Letter from Don Sussman, MCI, to William F. Caton, FCC, July 12, 1996 (MCI July 12 *Ex Parte*).

entrant bears the costs connecting its NID to the incumbent LEC's NID.

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2. Switching Capability

a. Background

397. In the NPRM, we tentatively concluded that incumbent LECs should be required to make available local switching capability as an unbundled network element. We sought comment on how a local switching element should be defined, and we identified two possible models: the switch "platform" approach, which would entitle and require a requesting carrier to purchase all of the features and functions of the switch on a per-line basis and the port approach used by the New York Commission, which offers local switching capability through the purchase of a port at a retail rate. We also sought comment on other definitions of a local switching element. In addition, we requested that commenters address whether vertical switching functions, such as those enabling the provision of custom local area signaling service (CLASS) features and call waiting, should be considered individual network elements separate from the basic switching functionality.

b. Comments

398. The vast majority of commenters support the Commission's tentative conclusion that local switching should be an unbundled network element.[865] Such parties note that the section 271 competitive checklist includes unbundled local switching and the legislative history of the 1996 Act identifies local switching as a possible ele-

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[865] *See, e.g.*, GCI comments at 12; TIA comments at 11-12; Citizens Utilities comments at 15; Intermedia comments at 13; Bay Springs, *et al.* comments at 18; Wyoming Commission comments at 22.

ment.[866] Several potential local competitors contend that unbundled local switching functionality is very important to promote entry into the local exchange market.[867]

399. Some incumbent LECs support a definition of local switching as a switching port.[868] These LECs favor a definition of a port that focuses on *providing access* to additional switching features, rather than on the switching features themselves.[869] PacTel, for example, asserts that a port provides dialtone and a telephone number, but does not include local usage or vertical features such as custom calling.[870] Bell Atlantic contends that the 1996 Act requires incumbent LECs to *provide access* to unbundled network elements, and that a switch port meets this directive by providing access to the switch.[871]

400. Sprint, USTA, SBC, NYNEX, and MECA, on the other hand, favor a definition of the unbundled local switching element that includes the basic function of connecting network access lines to other lines or trunks.[872]

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[866] *See, e.g.*, Ameritech comments at 43; LDDS comments at 44; USTA comments at 32; BellSouth comments at 40.

[867] LDDS reply at 18; TIA comments at 18; AT&T March 21 Letter 18 at 17-18; *but see* SBC reply at 23 ("Given that 'high margin' services are made possible through the switch, new entrants will likely purchase their own switching facilities.").

[868] BellSouth comments at 41; Cincinnati Bell comments at 18; U S West comments at 54-55; Bell Atlantic comments at 25; GTE comments at 37.

[869] BellSouth comments at 41; Cincinnati Bell comments at 18; USTA comments at 33; U S West comments at 54-55; Bell Atlantic comments at 25; GTE comments at 37; NYNEX comments at 69-70.

[870] PacTel comments at 55 (local usage should be excluded from the definition of a port because it is a tariffed service and should therefore be available to requesting carriers only through resale); *see also* SBC comments at 43 (the port should be separate from the switch).

[871] Bell Atlantic reply at 12.

[872] Sprint comments at 34; USTA reply at 16-17; SBC reply at 20; NYNEX reply at 31; MECA comments at 29.

These parties would expressly exclude from this local switching definition vertical features such as custom calling.[873] Sprint and SBC argue that vertical features are retail services offered to end users today, and therefore, must be purchased by the competitor under the wholesale rate provisions of the Act.[874] USTA suggests that this approach best comports with the Act and is a reasonable compromise between the more limited port approach and the switching platform proposal.[875]

401. A number of commenters support a definition of the local switch that has been referred to as the "local switching platform."[876] These parties recommend defining the local switching element as encompassing all functions performed by the local switch, including basic switching functionality and vertical features.[877] Supporters

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[873] Sprint comments at 36; USTA reply at 16; SBC reply at 20; MECA comments at 29. Exemples of vertical features include call waiting and three-way calling, which are custom calling features, and caller ID and call forwarding, which are custom local area signaling service (CLASS) features that rely on the transmission of signaling information between the calling and called parties.

[874] USTA reply at 16-17; PacTel reply at 19; SBC reply at 21; *see also* Sprint comments at 37-38 (although it is not technically feasible to unbundle vertical services, the costs of such services can be identified and should be excluded from the charge for the local switching element).

[875] USTA reply at 16.

[876] MCI comments at 30-32; AT&T comments at 20-21; LDDS comments at 44-46; Texas Commission reply at 8; TCC comments at 37-38; ACTA comments at 18-20; ACSI comments at 40-41; CompTel comments at 33-35; Ad Hoc Telecommunications Users Committee reply at 8.

[877] Functions listed by proponents of the switch platform include local usage, exchange access, access to operators, announcements, recognition of customer requests for service, obtaining call-specific information, data analysis, selection of traffic routes, call signaling, recording for billing and network management, tests required for network maintenance and call processing, custom calling features (*e.g.* call forwarding, call waiting), and CLASS features (*e.g.* caller

of the switching platform approach contend that, because the requesting carrier would pay for all local switching functionality on a per-line basis, it would have the incentive and ability to combine features and services more effectively than it would under more limited definitions of the local switching element.[878]

402. LDDS and AT&T argue that the switch platform approach is more consistent with the Act than the port approach. These carriers argue that, under the port approach, local switching has not been "unbundled" because a competitor cannot combine a port with loop and trunking facilities to provide telephone service. Instead, the competitor must also purchase basic switching functionality from the incumbent LEC at wholesale rates.[879] According to AT&T and LDDS, the switching platform does not raise technical feasibility problems because requesting carriers would not have direct access to the switching hardware or software. Instead, the requesting carrier would "designate" the features to be associated with its own lines and the routing of its customers' calls, and the incumbent LEC would actually perform that function.[880]

403. Opponents of the local switching platform assert that implementing a switch platform would cause technical problems. U S West and GVNW argue that the

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ID, call return). LDDS comments at 44; ACSI comments at 40-41; MCI comments at 30. AT&T and LDDS also propose to include in the local switching definition Centrex, carrier identification code determination, and access to databases and adjunct processors for the purpose of offering advanced intelligent network (AIN) services. LDDS comments at 45; AT&T Mar. 21 Letter at 18.

[878] LDDS comments at 45; AT&T comments at 21.

[879] LDDS comments at 55; AT&T reply at 18. The Texas Commission notes that Ameritech's unbundled port tariffs in Illinois expressly exclude basic switching functionality. Texas Commission comments at 13-14.

[880] AT&T reply at 19; LDDS reply at 19.

only technically feasible way to implement the switching platform would be physically to partition the switch which, according to U S West, would greatly reduce the switch's efficiency.[881] AT&T characterizes this argument as frivolous and asserts that physical partitioning of the switch has not been proposed by any party.[882] NYNEX contends that incumbent LECs would need to add capacity to their switches to accommodate competitors' demand for switch platforms.[883] AT&T responds that, because the requesting carrier is likely to be serving former customers of the incumbent LEC, the switching resources needed by the incumbent and competitor, at least initially, are likely to balance out.[884] GTE, U S West, and USTA also argue that the switching platform approach would discourage incumbent LECs from upgrading their switches because all new features would be immediately available to competitors at a discounted rate.[885]

404. Incumbent LECs argue that the switch platform would allow a requesting carrier to circumvent the statutory scheme that requires incumbent LECs to offer local exchange service at wholesale rates for resale by requesting carriers.[886] These commenters also contend that vertical features, such as custom calling and call waiting, are retail services, not network elements, and should be obtained by requesting carriers pursuant to section 251

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[881] U S West comments at 55.

[882] AT&T reply at 19.

[883] NYNEX reply at 32.

[884] Letter from Bruce Cox, Government Affairs Director, AT&T, to William Caton, Secretary, FCC, June 28, 1996 (AT&T June 28 *Ex Parte*).

[885] GTE comments at 38; SBC comments at 43; USTA reply at 17.

[886] PacTel comments at 54; Bell Atlantic comments at 26; GTE reply at 20; *see also* Sprint comments at 38 (the local switching platform does not create incentives for competitors to build out facilities).

(c)(4).[887] Ad Hoc Telecommunications Users maintains that the switch platform approach raises entry costs by forcing competitive providers to purchase switching functions they may never need or use.[888] MCI and TCC contend that the local switching element should specifically include vertical features such as CLASS features and custom calling because incumbent LECs do not incur the costs for these services on a usage basis.[889] ACSI and LCI also support the availability of vertical switching functionalities on an unbundled basis.[890]

405. Incumbent LECs contend that the switch platform approach is impractical because standard measures of switching, such as the number of line or trunk terminations, would not capture the dynamic nature of switching.[891] In response, MCI and LDDS state that a requesting carrier would commit to purchasing a minimum level of trunk port capacity and a minimum level of busy hour switch capacity for at least one year.[892] Several BOCs and Sprint contend that the Commission should not adopt the switch platform because there is insufficient understanding of what it would entail.[893]

406. Most parties support the Commission's proposal to require incumbent LECs to unbundle tandem switching as a network element.[894] AT&T notes that the availability

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[887] USTA comments at 34-35; Cincinnati Bell comments at 18.

[888] Ad Hoc Telecommunications Users Committee comments at 23.

[889] MCI comments at 31; TCC comments at 31.

[890] ACSI comments at 41; LCI comments at 18.

[891] USTA comments at 34; MECA comments at 30.

[892] MCI comments at 30; LDDS comments at 44-45.

[893] Ameritech comments at 45; SBC comments at 42; Bell Atlantic reply at 11; Sprint comments at 39; NYNEX reply at 31.

[894] *See, e.g.*, AT&T comments at 22; New York Commission comments at 27; U S West comments at 48; MCI comments at 17; Competition Policy Institute comments at 16; GST comments at 24; TIA comments at 13.

of unbundled tandem switches is critical to the connection of its own switches to incumbent LECs' switches.[895] AT&T argues that unbundled tandem switching is technically feasible because IXCs currently interconnect with incumbent LECs' tandem switches through standard specifications.[896] Other commenters indicate that tandem switching is available today through access tariffs, and therefore it is unnecessary for the Commission to unbundle tandem switching.[897] SBC states that the Commission should not apply the same unbundling requirements for tandem and end office switches because tandem switches only offer trunk interfaces and do not contain switching features on a per-line basis.[898]

407. AT&T, MCI, and TCC also ask that the local switching element be defined to include data switching by packet switches.[899] MCI asserts that it is technically feasible for the requesting carrier's own facilities to interface with an incumbent LEC's packet switch through a connection at a DS1 frame or patch panel.[900] PacTel supports the unbundling of data switches as network elements.[901]

408. Several potential local competitors argue that the Commission should require incumbent LECs, in providing unbundled local switching, to enable requesting carriers to designate the trunk assignment for its local exchange customers.[902] CompTel states that this would maximize

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[895] AT&T Mar. 21 Letter at 21.

[896] AT&T comments at 22; ALTS comments at 30.

[897] Bell Atlantic comments at 27; TIA comments at 13.

[898] SBC comments at 34 n.67.

[899] AT&T comments at 20; TCC comments at 39; MCI comments at 18.

[900] MCI comments at 18.

[901] PacTel reply at 21.

[902] ALTS comments, Attachment A at 20-21; LCI comments at 18; TCC reply at 17; *see also* CompTel comments at 34 (the Com-

competitors' ability to create new services.[903] PacTel argues that it is not technically feasible to route local calls originating on unbundled loops onto particular outgoing trunks connected to that switch.[904]

409. ALTS argues that incumbent LECs should be required to make local switching available so that all signaling information necessary to complete a call is passed to the connecting carrier, such as an IXC or a competing provider.[905] The Wyoming Commission is considering adoption of a rule that would require incumbent LECs to pass on signaling information to interconnected carriers, and would also prohibit incumbent LECs from claiming a proprietary right to signaling protocols.[906]

c. Discussion

(1) Local Switching Capability

410. We conclude that incumbent LECs must provide local switching as an unbundled network element. The record supports a finding that it is technically feasible for incumbent LECs to provide access to an unbundled local switching element, and that denying access to a local switching element would substantially impair the ability of many competing carriers to provide switched telecommunications services. We also note that section 271 re-

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mission should enable requesting carriers to establish routing parameters for the following categories of traffic: domestic interLATA, presubscribed intraLATA, non-presubscribed intraLATA, 800/888, 900, interLATA operator traffic, intraLATA/0-/0+ operator traffic, and international direct dialed).

[903] CompTel comments at 34.

[904] PacTel reply at 20.

[905] ALTS comments at 29 (claiming that some carriers strip certain signaling information and end offices and tandem offices, thereby undermining the ability of new entrants to receive and aggregate traffic for various IXCs).

[906] Wyoming Commission comments at 24.

quires BOCs to offer or provide "[l]ocal switching unbundled from transport, local loop transmission, or other services" as a precondition to providing in-region inter-LATA services.[907] As discussed below, we identify a local switching element that includes the basic function of connecting lines and trunks as well as vertical switching features, such as custom calling and CLASS features.[908] We agree with the Illinois Commission that defining the switching element in this way will permit competitors to compete more effectively by designing new packages and pricing plans.[909]

411. In the United States, there are over 23,000 central office switches, the vast majority of which are operated by incumbent LECs.[910] It is unlikely that consumers would receive the benefits of competition quickly if new entrants were required to replicate even a small percentage of incumbent LECs' existing switches prior to entering the market. The Illinois Commission staff presented evidence in a recent proceeding indicating that it takes between nine months and two years for a carrier to purchase and install a switch.[911] We find this to be persuasive evi-

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[907] 47 U.S.C. § 271(c)(2)(B)(vi).

[908] Custom calling features, such as call waiting, three-way calling, and call forwarding, are switch-based calling functions. CLASS features, such as caller ID, are number translation services that are based on the availability of interoffice signaling.

[909] *AT&T Communications of Illinois, Petition for a Total Local Exchange Wholesale Service Tariff from Illinois Bell Telephone Company Pursuant to Section 13-505.5 of the Illinois Public Utilities Act*, Order, Docket Nos. 95-0458 and 95-0531, June 26, 1996 (Illinois Wholesale Order) at 63-66.

[910] *Statistics of Communications Common Carriers*, Federal Communications Commission, 1994/1995 Edition, at Table 2.4. This figure is derived from carriers filing with the FCC, which represent approximately 92 percent of the industry.

[911] Supplemental Rebuttal Testimony of Jake Jennings, Office of Policy and Planning, Illinois Commerce Commission, ICC Staff Ex. 1.04, Docket No. 95-0458, at 11-12 (Mar. 11, 1996).

dence of the entry barrier that would be created if new entrants were unable to obtain unbundled local switching from the incumbent LEC. The ability to purchase unbundled switching will also promote competition in an area until the new entrant has built up a sufficient customer base to justify investing in its own switch. We expect that the availability of unbundled local switching is likely to increase the number of carriers that will successfully enter the market, and thus should accelerate the development of local competition.

412. We define the local switching element to encompass line-side and trunk-side facilities plus the features, functions, and capabilities of the switch.[912] The line-side facilities include the connection between a loop termination at, for example, a main distribution frame (MDF), and a switch line card.[913] Trunk-side facilities include the connection between, for example, trunk termination at a trunk-side cross-connect panel and a trunk card. The "features, functions, and capabilities" of the local switch include the basic switching function of connecting lines to lines, lines to trunks, trunks to lines, trunks to trunks. It also includes the same basic capabilities that are available to the incumbent LEC's customers, such as a telephone number, directory listing, dial tone, signaling, and access to 911, operator services, and directory assist-

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[912] The NPRM used the terms "switch platform" and "port," as they had been developed by the Illinois and New York Commissions, respectively, to describe two possible approaches to establishing an unbundled local switching element. Parties commenting on the unbundled switching element attributed a variety of functionalities to each of these terms. To avoid confusion, we will not use these terms in discussing the unbundled local switching element. Instead, we will address commenters' proposals according to the functionality that they recommend be included in the definition of an unbundled local switching element.

[913] A line card is a plug-in electronic printed circuit card that operates ringing, holding, and other features associated with one or several telephone lines.

ance.[914] In addition, the local switching element includes all vertical features that the switch is capable of providing, including custom calling, CLASS features, and Centrex, as well as any technically feasible customized routing functions. Thus, when a requesting carrier purchases the unbundled local switching element, it obtains all switching features in a single element on a per-line basis. A requesting carrier will deploy individual vertical features on its customers' lines by designating, via an electronic ordering interface, which features the incumbent LEC is to activate for particular customer lines.

413. We disagree with commenters who argue that vertical switching features should be classified exclusively as retail services, available to competing providers only through the resale provision of section 251(c)(4).[915] The 1996 Act defines network element as "a facility or equipment used in the provision of a telecommunications service" and "the features, functions, and capabilities that are provided by means of such facility or equipment."[916] Vertical switching features, such as call waiting, are provided through operation of hardware and software comprising the "facility" that is the switch, and thus are "features" and "functions" of the switch.[917] We note that

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[914] Purchasing the local switching element does not entitle a requesting carrier to connect its own AIN call processing database to the incumbent LEC's switch, either directly or via the incumbent LEC's signal transfer point or database. Section V.I.4, which discusses the unbundling of incumbent LECs' signaling systems and databases. We also note that E911 and operator services are further unbundled from local switching. *See infra* Section V.I.6.

[915] Section 251(c)(4)(A) requires incumbent LECs "to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers." 47 U.S.C. § 251(c)(4)(A).

[916] 47 U.S.C. § 153(29).

[917] In some cases vertical features may be provided using hardware and software external to the actual switch. In those instances, the functionality of such external hardware and software is a sepa-

the Illinois Commission recently defined an unbundled local switching element to include vertical switching features.[918] Although we find that vertical switching features should be available to competitors through the resale provision of section 251(c)(4), we reject the view that Congress intended for section 251(c)(4) implicitly to remove vertical switching features from the definition of "network element."[919] Therefore, we find that vertical switching features are part of the unbundled local switching element.[920]

414. At this time we decline to require further unbundling of the local switch into a basic switching element and independent vertical feature elements. Such unbundling does not appear to be necessary to promote local competition. Indeed, most potential local competitors do not recommend that vertical switching features be available as separate network elements. MCI, AT&T and LDDS believe that such features should be available to new entrants as part of the local switching element.[921] We also note that additional unbundling of the local switching would not result in a practical difference in the way the local switching element is provisioned. As discussed below, when a competing provider orders the unbundled basic switching element for a particular customer line, it will designate which vertical features should be activated by the incumbent LEC for that line. In addition, the

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rate element under section 251(c)(3), and is available to competing providers. *See infra* Section V.I.4, discussing unbundled signaling and databases.

[918] *Illinois Wholesale Order* at 63-66.

[919] *See supra* Section V.H, rejecting arguments that services available for resale under section 251(c)(4) cannot be provided via unbundled elements.

[920] *See infra* Section VII.C.2.b.2, concerning the pricing of an unbundled switching element.

[921] AT&T June 28 *Ex Parte* at 1-2; MCI comments at 31; LDDS comments at 44.

record indicates that the incremental costs associated with vertical switching features on a per-line basis may be quite small,[922] and may not justify the administrative difficulty for the incumbent LEC or the arbitrator to determine a price for each vertical element. Thus, states can investigate, in arbitration or other proceedings, whether vertical switching features should be made available as separate network elements. We will continue to review and revise our rules in this area as necessary.

415. We conclude that providing access to an unbundled local switching element at a LEC central office is technically feasible. We are not persuaded by the argument that shared use of an unbundled switching element would jeopardize network security and reliability by permitting competitors independently to activate and deactivate various switching features. A competing provider will purchase and obtain the local switching element the same way it obtains an unbundled local loop, that is, by ordering, via electronic interfaces,[923] the local switching element and particular vertical switching features.[924] The incumbent LEC will receive the order and activate (or deactivate) the particular features on the customer line designated by the competing provider. Consequently, the incumbent LEC is not required to relinquish control over operations of the switch.

416. We also reject the argument that a definition of local switching that incorporates shared use of a local switch would involve physical partitioning of the switch.[925]

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[922] LDDS comments at 57, Letter from Bruce Cox, Government Affairs Director, AT&T, to Elliot Maxwell, FCC, June 25, 1996 (AT&T June 25 *Ex Parte*).

[923] *See infra* Section V.I.4, *infra*, addressing requesting carriers' access to incumbent LECs' ordering and provisioning systems.

[924] Section V.I.5 addresses the arrangements for ordering unbundled network elements.

[925] U S West comments at 55-57.

The requirements we establish for local switch unbundling do not entail physical division of the switch, and consequently do not impose the inefficiency or technical difficulties identified by some commenters.

417. Nor are we persuaded by the arguments of some incumbent LECs that an unbundled switching element based on shared use of the local switch is technically infeasible because incumbent LECs lack significant excess capacity at any given time. Thus, at least initially, an increase in the use of the local switching element by the requesting carrier is not likely to lead to an enormous, immediate increase in switch use by the incumbent LEC. If incumbent LECs and competing providers believe that they would benefit by quantifying their anticipated demand for switch resources, they are free to do so in the negotiation and arbitration processes. Such planning may be necessary when a competitor anticipates that usage of the local switching element by its customers will place demands on the incumbent LEC's switch that exceed the usage levels anticipated by the incumbent LEC.[926]

418. We conclude that customized routing, which permits requesting carriers to designate the particular outgoing trunks that will carry certain classes of traffic originating from the competing provider's customers, is technically feasible in many LEC switches. Customized routing will enable a competitor to direct particular classes of calls to particular outgoing trunks, which will permit a new entrant to self-provide, or select among other providers of, interoffice facilities, operator services, and directory assistance.[927] Bell Atlantic notes that customized

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[926] Bell Atlantic, for example, notes that a competitor's service or pricing packages could stimulate greater switch usage than previously experienced by the incumbent. Letter from Patricia Koch, Assistant Vice President, Bell Atlantic, to William Caton, Acting Secretary, FCC, June 21, 1996 (Bell Atlantic June 21 *Ex Parte*).

[927] *See, e.g.*, AT&T June 28 *Ex Parte*. In addition, we note that the Illinois Commission recently directed Ameritech and Centel to

routing is generally technically feasible for local calling, although it notes that the technology and capacity constraints vary from switch to switch.[928] SBC contends that customized routing is technically infeasible for older switches, such as the 1AESS switch.[929] AT&T acknowledges that, although the ability to establish customized routing in 1AESS switches may be affected by the "call load" in each office, only 9.8% of the switches used by the seven RBOCs, GTE and SNET are 1AESS switches.[930] We recognize that the ability of an incumbent LEC to provide customized routing to a requesting carrier will depend on the capability of the particular switch in question. Thus, our requirement that incumbent LECs provide customized routing as part of the "functionality of the local switching element applies, by definition, only to those switches that are capable of performing customized routing. An incumbent LEC must prove to the state commission that customized routing in a particular switch is not technically feasible.

419. Section 251(d)(2)(A) requires the Commission, in determining which network elements should be made available to competing providers, to consider "whether access to such network elements as are proprietary in na-

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permit a carrier purchasing wholesale local exchange service to designate a provider of operator services and directory assistance other than that of the incumbent LEC. Such access is accomplished through the routing of such calls from the incumbent LEC's switch to the competing provider of the operator service or directory assistance. *See Illinois Wholesale Order* at 45.

[928] Letter from Patricia Koch, Assistant Vice President, Bell Atlantic, to William Caton, Acting Secretary, FCC, June 24, 1996 (Bell Atlantic June 24 *Ex Parte*); *see also* BellSouth comments at 41-42 n.89 (the ability to provide customized routing depends on the quantity of customized routing requests from other competitors).

[929] SBC comments at 41-42.

[930] Letter from Bruce Cox, Government Affairs Director, AT&T, to William F. Caton, Secretary, FCC, July 11, 1996 (AT&T July 11 *Ex Parte*).

ture is necessary."[931] To withhold a proposed network element from a competing provider, an incumbent LEC must demonstrate that the element is proprietary and that gaining access to that element is not necessary because the competing provider can use other, nonproprietary elements in the incumbent LEC's network to provide service.[932] U S West asserts that switch unbundling could raise concerns involving, among other things, "licensing of intellectual property." It cites a request by one interconnector to be the exclusive provider of particular features in U S West's generic switching software.[933] Bell Atlantic states that it is not at liberty to sub-license the software that operates vertical switching features.[934] We note, however, that these incumbent LECs do not object to providing vertical switching functionalities to requesting carriers under the resale provision of section 251(c)(4).[935] In addition, the vast majority of parties that discuss unbundled local switching do not raise proprietary concerns with the unbundling of either basic local switching or vertical switching features. Even if we accept the claim of U S West and Bell Atlantic that vertical features are proprietary in nature, these carriers do not meet the second consideration in our section 251(d)(2)(A) standard, which requires an incumbent LEC to show that a new entrant could offer the proposed telecommunications service through the use of other, nonproprietary elements in the incumbent LEC's network.[936] Accordingly, we find that access to unbundled local switching is clearly "necessary" under our interpretation of section 251(d)(2)(A).[937]

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[931] 47 U.S.C. § 251(d)(2)(A).

[932] *See supra* Section V.E.

[933] U S West comments at 55 n.117.

[934] Bell Atlantic comments, Albers Attachment at 17-18.

[935] U S West reply at 26-27; Bell Atlantic comments at 26.

[936] *See supra* Section V.E.

[937] *Id.*

420. Section 251(d)(2)(B) directs the Commission to consider whether the failure to provide access to an unbundled element "would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer." [938] We have interpreted the term "impair" to mean either increased cost or decreased service quality that would result from using network elements of the incumbent LEC other than the one sought.[939] SBC and MFS contend that access to unbundled local switching may not be essential for new entrants because competitors are likely to deploy their own switches.[940] These parties present no evidence that competitors could provide service using another element in the LEC's network at the same cost and at the same level of quality. In addition, most commenters that address this issue generally argue that local switching is essential for the provision of competing local service,[941] and we agree. We thus conclude that a requesting carrier's ability to offer local exchange services would be impaired, if not thwarted, without access to an unbundled local switching element.

421. Section 251(c)(3) requires that incumbent LECs provide access to unbundled network elements on terms and conditions that are "just, reasonable, and nondiscriminatory." [942] We agree with CompTel and LDDS that new entrants will be disadvantaged if customer switchover is not rapid and transparent. We also note that the Michigan Commission has recognized the significance of customer switchover intervals and has directed Ameritech and GTE to file proposals on how they will "ensure the

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[938] 47 U.S.C. § 251(d)(2)(B).

[939] *See supra* Section V.E.

[940] SBC reply at 23; MFS comments at 46.

[941] *See, e.g.*, LDDS reply at 18 (unbundled local switching is "critical" to local competition); TIA comments at 18; AT&T Mar. 21 Letter at 17-18.

[942] 47 U.S.C. § 251(c)(3).

equal availability of expeditious processing of local, inter-LATA, and intraLATA carrier changes."[943] Therefore, we require incumbent LECs to switch over customers for local service in the same interval as LECs currently switch end users between interexchange carriers. This requirement applies to switchovers that only require the incumbent LEC to make changes to software. Switchovers that require the incumbent LEC to make physical modifications to its network, such as connecting a competitor's loop to its switch, are not subject to this requirement, and instead are governed by our terms and conditions for all unbundled elements.[944] Today, incumbent LECs routinely change customers' presubscribed interexchange carriers quickly and transparently, thereby contributing to the competitiveness of the interexchange market. We expect that a similar requirement for local exchange switchovers that require only a software change will similarly contribute to local exchange competition.

422. We reject the proposal by some incumbent LECs to define unbundled local switching as the facilities that provide a *point of access* to the switch, but that would not actually include switching functionality. Under this definition, the purchaser of the local switching element would not actually obtain local switching, only the right to purchase local switching functionality and other switching features at wholesale rates. We believe that the unbundled local switching element must include the functionality of connecting lines and trunks. The definition proposed by these incumbent LECs would contravene the requirement in section 251(c)(3) that incumbent LECs provide network elements "in a manner that allows requesting

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[943] *In the Matter, On the Commission's Own Motion, To Establish Permanent Interconnection Arrangements Between Basic Local Exchange Service Providers*, Opinion and Order, Mich. Pub. Serv. Comm'n, Case No. U-10860, at 36-37 (June 5, 1996).

[944] *See supra* Section V.G., discussing provisioning intervals for unbundled network elements.

carriers to combine such elements in order to provide such telecommunications service." [945] If a competing provider combined its own loops and transport with the local switching element ("point of access"), it would be unable to provide telecommunications service without separately purchasing, at wholesale rates, switching functionality from the incumbent LEC.

423. We also disagree with the proposal to define local switching as a point of access plus basic switching functionality, but that would exclude vertical switching features.[946] As a legal matter, this definition is inconsistent with the 1996 Act's definition of "network element," which includes all the "features, functionalities, and capabilities provided by means of such facility or equipment." [947] In addition, this definition would not fulfill the pro-competitive objectives of the 1996 Act as effectively as the per-line definition we adopt. A competitor that obtains basic and vertical switching features at cost-based rates will have maximum flexibility to distinguish its offerings from those of the incumbent LEC by developing a variety of service packages and pricing plans.[948] Moreover, an upfront purchase of all local switching features may speed entry by simplifying practical issues such as the pricing of individual switching features.

424. We also address the impact on small incumbent LECs. For example, the Illinois Independent Telephone Association and the Rural Telephone Coalition favor rules that recognize the differences between larger and smaller LECs.[949] We have considered the economic impact of

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[945] 47 U.S.C. § 251(c)(3).

[946] Sprint comments at 34; USTA reply at 16-17; SBC reply at 20; NYNEX reply at 31; MECA comments at 29.

[947] 47 U.S.C. § 153(29); *see supra* section V.C., which interprets the Act's definition of "network element."

[948] *See, e.g.*, LDDS comments at 33; AT&T comments at 21.

[949] Illinois Ind. Tel. Ass'n comments at 1; Rural Tel. Coalition reply at 37.

our rules in this section on small incumbent LECs. In this section, for example, we expressly provide for the fact that certain LECs may possess switches that are incapable of performing customized routing for competitors that purchase unbundled local switching. As noted by Rural Telephone Coalition and the Illinois Independent Telephone Coalition, this approach is necessary to accommodate the different technical capabilities of large and small carriers. We also note that section 251(f) of the 1996 Act provides relief for certain small LECs from our regulations under section 251.

(2) Tandem Switching Capability

425. We also affirm our tentative conclusion in the NPRM that it is technically feasible for incumbent LECs to provide access to their tandem switches unbundled from interoffice transmission facilities. We note that some states already have required incumbent LECs to unbundle tandem switching.[950] Parties do not contend, pursuant to section 251(d)(2)(A), that tandem switches are proprietary in nature. With regard to section 251(d)(2)(B), we find that competitors' ability to provide telecommunications service would be impaired without unbundled access to tandem switching. Therefore, we find that the availability of unbundled tandem switching will ensure that competitors can deploy their own interoffice facilities and connect them to incumbent LECs' tandem switches where it is efficient to do so.

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c. Discussion

439. We conclude that incumbent LECs must provide interoffice transmission facilities on an unbundled basis to requesting carriers. The record supports our conclusion

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950 *See, e.g.*, Ameritech comments at 43, Cincinnati Bell comments at 18, GTE comments at 38, AT&T March 21 Letter at 23.

that such access is technically feasible and would promote competition in the local exchange market. We note that the 1996 Act requires BOCs to unbundle transport facilities prior to entering the in-region, interLATA market.[986]

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441. The ability of new entrants to purchase the interoffice facilities we have identified will increase the speed with which competitors enter the market. By unbundling various dedicated and shared interoffice facilities, a new entrant can purchase all interoffice facilities on an unbundled basis as part of a competing local network, or it can combine its own interoffice facilities with those of the incumbent LEC. The opportunity to purchase unbundled interoffice facilities will decrease the cost of entry compared to the much higher cost that would be incurred by an entrant that had to construct all of its own facilities. An efficient new entrant might not be able to compete if it were required to build interoffice facilities where it would be more efficient to use the incumbent LEC's facilities. We recognize that there are alternative suppliers of interoffice facilities in certain areas. We are convinced, however, that entry will be facilitated if competitors have greater, not fewer, options for procuring interoffice facilities as part of their local networks, and that Congress intended for competitors to have those options available from competitors. Thus, the rules we establish for the unbundled interoffice facilities should maximize a competitor's flexibility to use new technologies in combination with existing LEC facilities.

442. We find that it is technically feasible for incumbent LECs to unbundle the foregoing interoffice facilities as individual network elements. The interconnection and unbundling arrangements among the larger LECs, IXCs, and CAPs that resulted from our *Expanded Interconnec-*

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986 47 U.S.C. § 271(c)(2)(B)(v).

tion rules confirm the technical feasibility of unbundling interoffice facilities used by incumbent LECs to provide special access and switched transport.[988] As AT&T and Telecommunications Resellers Association point out, IXCs currently interconnect with incumbent LECs' transport facilities pursuant to standard specifications.[989] We also note that commenters do not identify technical feasibility problems with unbundling interoffice facilities.

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482. Under section 251(d)(2)(B), the Commission must consider whether "the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer."[1122] Access to signaling systems continues to be a critical element to providing competing local exchange and exchange access service. The vast majority of calls made over incumbent LEC networks are set-up and controlled by separate signaling networks. Incumbent LECs argue that access to signaling systems and associated databases is already available from other providers and therefore, they should not have to unbundle them for access by competitors.[1123] As discussed above, section 251(d)(2)(B) only relieves an incumbent LEC of its unbundling obligation if other unbundled elements in its network could provide the same service without diminution of quality. Because alternative signaling methods, such as in-band signaling, would provide a lower quality of service,[1124] we conclude that a competitor's ability

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[988] *See, e.g.*, MCI comments at 32; NCTA comments at 42; GST comments at 24; TIA comments at 13; MFS comments at 47-48.

[989] AT&T comments at 22; Telecommunications Resellers Ass'n comments at 35.

[1122] 47 U.S.C. § 251(d)(2)(B).

[1123] *See, e.g.*, Bell Atlantic comments at 27-28; BellSouth comments at 44; GTE comments at 40-41; NYNEX comments at 71.

[1124] SS7 network signaling is critical in the provision of modern telecommunications services, allowing signaling messages to travel

to provide service would be significantly impaired if it did not have access to incumbent LECs' unbundled signaling links and STPs.

483. The purchase of unbundled elements of the SS7 network gives the competitive provider the right to use those elements for signaling between its switches (including unbundled switching elements), between its switches and the incumbent LEC's switches, and between its switches and those third party networks with which the incumbent LEC's SS7 network is interconnected. When a competitive provider purchases unbundled switching from the incumbent LEC, the incumbent LEC must provide nondiscriminatory access to its SS7 network from that switch in the same manner in which it obtains such access itself. Carriers that provide their own switching facilities should be able to access the incumbent LEC's SS7 network for each of their switches via a signaling link between their switch and an incumbent LEC's STP.[1128] Competitive carriers should be able to make this connection in the same manner as an incumbent LEC connects one of its own switches to the STP. This could be accomplished by the incumbent providing an unbundled signal-

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separately from the voice path for individual calls, increasing efficiency and making possible a host of new signaling-based services. AT&T comments at 23. Popular features like Calling Number Identification (Caller ID) and Calling Name Identification, as well as enhanced call set-up functions and such Custom Calling features as Repeat Call and Return Call, would be unavailable without SS7 capabilities. Bell Atlantic comments at Attachment 3, 17.

[1128] Competitors should be able to interconnect their own switches to the incumbent LEC's signaling system in any technically feasible manner. Competitors may bring a signaling "A" link from their switch to the incumbent LEC's STP. CAPs use this type of connection today to connect their tandem switches to incumbent LECs' STPs. AT&T comments at 24 n.26. Competitors might also link their switch to their own STP, and then connect to an incumbent LEC's STP via a signaling "D" or "B" link.

ing link from its STP to the competitor's switch or by a competitor bringing a signaling link from its switch to the incumbent LEC's STP.

(2) Call-Related Databases

484. We conclude that incumbent LECs, upon request, must provide nondiscriminatory access on an unbundled basis to their call-related databases[1126] for the purpose of switch query and database response through the SS7 network.[1127] Thus, for example, we find that it is technically feasible for incumbent LECs to provide access to the Line Information Database (LIDB), the Toll Free Calling Database and Number Portability downstream databases.[1128] The vast majority of parties, including incumbent LECs, agree that it is technically feasible to provide access to the LIDB and the Toll Free Calling databases at an STP

[1126] Call-related databases are those SS7 databases used for billing and collection or used in the transmission, routing, or other provision of a telecommunications service.

[1127] Query and response access to a call-related database is intended to require the incumbent LEC only to provide access to its call-related databases as is necessary to permit a competing provider's switch (including the use of unbundled switching) to access the call-related database functions supported by that database. The incumbent LEC may mediate or restrict access to that necessary for the competing provider to provide such services as are supported by the database.

[1128] AT&T indicates that for LIDB and 800/888 database queries standard TCAP messages have been established, and reliability, security, provisioning, and billing issues have been addressed. Letter from Karen Weis, Division Manager, AT&T to William Caton, Acting Secretary, FCC, July 16, 1996 (AT&T July 16 *Ex Parte*). Bell Atlantic states that it currently provides interconnection for LIDB and 800 databases. Bell Atlantic comments at 2. Number portability "downstream databases" are defined in Part 51 of our rules as adopted by this Order. *See In the Matter of Telephone Number Portability*, First Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 95-116, FCC 96-286 (rel. July 2, 1996).

linked to the database.[1129] Several state commissions also report that they have ordered incumbent LECs' to provide such access to the LIDB and the Toll Free Calling databases.[1130] We require incumbent LECs to provide this access to their call-related databases by means of physical access at the STP linked to the unbundled database. We find that such access is critical to entry in the local exchange market.

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486. Several commenters also identified access to call-related databases used in the incumbent's AIN to be critical to fair competition in the local market, [1133] and some state commissions have ordered incumbent LECs to provide access to AIN databases.[1134] We conclude that such access is technically feasible via an STP for those call-related databases used in the incumbent LEC's AIN.[1135] First, of course, when a new entrant purchases an incumbent's local switching element it is technically feasible for the new entrant to use the incumbent's SCP element in the same manner, and via the same signaling links, as the incumbent itself. Thus, we find no technical impediments in the record with regard to such access when a requesting

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[1129] *See, e.g.*, Ameritech comments at 47; AT&T comments at 24; ALTS comments at 31; GTE comments at 40; MCI comments at 34-35; NYNEX comments at 71; US West comments at 48.

[1130] Louisiana Commission comments at 5; Michigan Commission comments at 12; PacTel comments at Appendix A, 7 (California Commission has required such access).

[1133] Cable & Wireless comments at 24; Citizens Utilities comments at 15; MCI comments at 32-33; TIA comments at 14; CompTel comments at 43; AT&T comments at 23-26.

[1134] Louisiana Commission comments at 5; Wyoming Commission comments at 23-24; *see also Illinois Wholesale Order.*

[1135] AT&T comments at 23-26; CompTel comments at 43; MCI comments at 36; Letter from Wendy Blueming, Regulatory Affairs and Public Policy, SNET to William Caton, Acting Secretary, FCC, July 23, 1996 (SNET July 23 *Ex Parte*); AT&T July 16 *Ex Parte.*

carrier is also purchasing a local switching element associated with the AIN call-related database.

487. Further, we conclude that when a new entrant deploys its own switch, and links it to the incumbent LEC's signaling system, it is technically feasible for the incumbent to provide access to the incumbent's SCP to provide AIN-supported services to customers served by the new entrant's switch. Some SS7 network services resellers currently provide such access.[1136] Other potential local competitors present additional evidence supporting the technical feasibility of such access.[1137] Unlike the situation where a competitor's SCP would control the incumbent's switch (which is discussed below in section V.I.4.c.(4)), in this scenario, the incumbent's SCP will respond to and control the competitor's switch, and potential competitors that have commented in the record do not express network reliability concerns with regard to such control.[1138] Further, like the software resident in a switch, the incumbent LEC's applications resident in an SCP are merely part of the overall software and hardware making up the SCP facility. Thus, carriers purchasing access under either scenario above may use the incumbent's service applications in addition to their own.[1139]

488. Although we conclude that access to incumbent AIN SCPs is technically feasible, we agree with BellSouth

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[1136] SNET July 23 *Ex Parte*; Letter from Stephen Kraskin, Illuminet (USTN) to Office of the Secretary, FCC July 23, 1996 (USTN July 23 *Ex Parte*).

[1137] *See* AT&T July 16 *Ex Parte; see also* AT&T comments at 23-26; CompTel comments at 43; MCI comments at 36.

[1138] *See* AT&T July 16 *Ex Parte*. AT&T asserts that no additional or unique reliability problems would be created that have not already been addressed and resolved by those incumbent LECs who have proposed SMS access for third parties in the Intelligent Networks proceeding. *Id.*

[1139] *See infra*, Section V.I.4.c.(3) on unbundled access to the incumbent LEC's SCE and SMS.

that such access may present the need for mediation mechanisms to, among other things, protect data in incumbent AIN SCPs and ensure against excessive traffic volumes.[1140] In addition, there may be mediation issues a competing carrier will need to address before requesting such access.[1141] Accordingly, if parties are unable to agree to appropriate mediation mechanisms through negotiations, we conclude that during arbitration of such issues the states (or the Commission acting pursuant to section 252(a)(5)) must consider whether such mediation mechanisms will be available and will adequately protect against intentional or unintentional misuse of the incumbent's AIN

[1140] Letter from W.W. Jordan, Executive Director—Federal Regulatory, BellSouth to William Caton, Acting Secretary, FCC, July 16, 1996 (BellSouth July 16 *Ex Parte*) ("With a BellSouth SCP to a ALEC SSP [switch] interconnection arrangement, network reliability and security concerns, from BellSouth's perspective, would largely be limited to issues associated with traffic management."); Letter from James Smith, Director—Federal Relations, Ameritech to William Caton, Acting Secretary, FCC, July 17, 1996 (Ameritech July 17 *Ex Parte*) ("The volume of queries sent from the CLEC SSP [switch] could overload the LEC SCP, interfering with the operation of the service provided to that CLEC, or with other services which may operate on the LEC's SCP."); Letter from Joseph Mulieri, Director—FCC Relations, Bell Atlantic to Robert S. Tanner, Attorney Advisor, FCC, July 18, 1996 (Bell Atlantic July 18 *Ex Parte*). BellSouth also raises the need for mediation to prevent unauthorized modification of information within an incumbent LEC's AIN SCP database. BellSouth July 16 *Ex Parte*. Incumbent LEC's comments in this proceeding and in the IN docket generally focus on the need for mediation to prevent a competitor's database from sending inappropriate AIN signaling information to the incumbent LEC's switch (*see infra* Section V.I.4.c.(4)). *See* PacTel comments at 61-62; BellSouth comments at 45-46; Bell Atlantic comments at Appendix 3, 18-19; U S West comments in CC Docket No. 91-346 at 73-74, 84; NYNEX comments in CC Docket No. 91-346 at 14-15; SBC comments in CC Docket No. 91-346 at 8-9.

[1141] Mediation may be necessary for requesting carriers to ensure that inadvertent feature interactions, network management control and customer privacy concerns do not arise from such access. *See e.g.*, Ameritech July 17 *Ex Parte*.

facilities. We encourage incumbent LECs and competitive carriers to participate in industry fora and industry testing to resolve outstanding mediation concerns.[1142] Incumbent LECs may establish reasonable certification and testing programs for carriers proposing to access AIN call related databases in a manner similar to those used for SS7 certification.[1143]

489. We recognize that providing unbundled access to AIN call-related databases at cost, and in particular providing access to the incumbent LEC's software applications that reside in the AIN databases, may reduce the incumbent's incentive to develop new and advanced services using AIN. In the near term, however, requiring entrants to bear the cost of deploying a fully redundant network architecture, including AIN databases and their application software, would constitute a significant barrier to market entry for competitive carriers. As local service markets develop, however, competition may reduce the incumbent LEC's control over bottleneck facilities and increase the importance of innovation. In those circumstances it is important that incumbent LECs have the incentive to develop unique and innovative services supported by AIN. Therefore at a later date, we will revisit the proper balance between providing unbundled access and maintaining the incentives of incumbent LECs to innovate.

490. Parties generally do not identify proprietary concerns when access to call-related databases is provided via STPs. In general, signaling protocols used to access call-related databases adhere to open Bellcore standards.

[1142] *See, e.g.*, Christine Maglott, *Information Industry Liaison Committee Wrestles with Mediation Issues*, ATIS News, 3 Vol. 11, No.3, May-June, 1996.

[1143] SBC notes that carriers proposing to gain access to its SS7 network and gather information from its SCP must be certified and enter into contractual agreements for information access and proper billing. SBC comments at 47-48.

Parties also do not raise proprietary concerns with specific call-related databases themselves. Today, many separate carriers access incumbent LEC Toll Free Calling and LIDB databases for the proper routing and billing of calls.[1144] Thus, we conclude that, in general, unbundled access to call-related databases does not present proprietary concerns with respect to section 251(d)(2)(A). Incumbent LECs may, however, present such proprietary concerns in the arbitration process with regard to specific databases, and states (or the Commission acting pursuant to section 252(e)(5)) may take action to limit unnecessary access to proprietary information.

491. We also conclude that denying access to call-related databases would impair the ability of a competing provider to offer services such as Alternative Billing Services and AIN-based services. AIN-based services represent the cutting edge of telephone exchange services, and competitors would be at a significant disadvantage if they were forced to develop their own AIN capability immediately. In addition, the record indicates that deployment of call-related databases in the near term would represent a substantial cost to new entrants. As mentioned above, incumbent LECs argue that access to certain call-related databases is already competitively available and therefore they should not have to unbundle access to them.[1145] As discussed above, however, section 251(d)(2)(B) would only relieve an incumbent LEC of its unbundling obligation if other unbundled elements in its network could provide the same service without diminution of quality. Because of the absence of such elements, we conclude that a competitor's ability to provide service would be significantly impaired if it did not have unbundled access to incumbent LECs' call-related databases, including the LIDB, Toll

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[1144] *See* AT&T July 16 *Ex Parte*.

[1145] We note that competitive provision of AIN SCP database services is not evidenced in the record.

Free Calling, and AIN databases for the purpose of switch query and database response through the SS7 network.

492. We also conclude that access to call-related databases as discussed above, and access to the service management system discussed below, must be provided to, and obtained by, requesting carriers in a manner that complies with section 222 of the Act. Section 222, which was effective upon adoption, sets out requirements for privacy of customer information. Section 222(a) provides that all telecommunications carriers have a duty to protect the confidentiality of proprietary information of other carriers, including resellers, equipment manufacturers, and customers. Section 222(b) requires that telecommunications carriers that use proprietary information obtained from another telecommunications carrier in providing any telecommunications service "shall use that information only for such purpose, and shall not use such information for its own marketing purposes." [1146] Section 222(c) and (d) provide protection for, and limitations on the use of, and access to, customer proprietary network information (CPNI).[1147] We note that we have initiated a proceeding to clarify the obligations of carriers with regard to section 222(c) and (d).[1148]

(3) Service Management Systems

493. Finally, we conclude that incumbent LECs should provide access, on an unbundled basis, to the service man-

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[1146] 47 U.S.C. § 222(b).

[1147] Section 222(f)(1) defines CPNI as "information that relates to the quantity, technical configuration, type, destination, and amount of use of a telecommunications service subscribed to by any customer of a telecommunications carrier, and that is made available to the carrier by the customer solely by virtue of the carrier-customer relationship." 47 U.S.C. § 222(f)(1)(A).

[1148] *See Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and other Customer Information*, Notice of Proposed Rulemaking, CC Docket No. 96-115, FCC 96-221 (rel. May 17, 1996).

agement systems (SMS), which allow competitors to create, modify, or update information in call-related databases. We believe it is technically feasible for incumbent LECs to provide access to the SMS in the same manner and method that they provide for their own access. We find that such access is necessary for competitors to effectively use call-related databases, which we have already found to be critical to entry in the local exchange market.

494. Commenters argue that they need equal access to incumbent LECs' SMSs to write or populate their own information in call-related databases.[1149] As discussed above, information bound for many call-related databases is entered first at an off-line SMS, which then downloads the information to the call-related database for real time use on the network. We find that competing provider access to the SMS is technically feasible if it is provided in the same or equivalent manner that the incumbent LEC currently uses to provide such access to itself.[1150] For example, if the incumbent LEC inputs information into the SMS using magnetic tapes, the competitive carrier must be able to create and submit magnetic tapes for the incumbent to input into the SMS in the same way the incumbent inputs its own magnetic tapes. If the incumbent accesses the SMS through an electronic interface, the competitive carrier should be able to access the SMS through an equivalent electronic interface.[1151] We further conclude that, whatever method is used, the incumbent LEC must provide the competing carrier with the information necessary

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[1149] AT&T comments at 26; MCI comments at 34-35.

[1150] Many carriers currently submit such information to incumbent LECs or third party SMSs. USTN reply at 1-4; Bell Atlantic comments at Attachment 3, 16; GTE comments at 40-41 n.61.

[1151] For example, access to the AIN SMS is accomplished through the SCE, which is a computer environment for the design and test of AIN based services.

to correctly enter or format for entry the information relevant for input into the particular incumbent LEC SMS.

495. Specifically with respect to AIN, we find that the record in the *Intelligent Networks* proceeding supports access to the SMS.[1152] A competing carrier seeking access to the SMS that is part of the incumbent LEC's AIN would do so through the incumbent LEC's service creation environment (SCE), an interface used to design, create, and test AIN supported services. Software successfully tested in the SCE is transferred to the SMS, where it is then downloaded into an SCP database for active deployment on the network. We are persuaded that the risk of harm to the public switched network from such access to the SMS is minimized by the technical safeguards inherent in the SCE and SMS. As described in comments filed in the *Intelligent Networks* docket, competitors accessing the SCE and SMS would not communicate directly with the LEC's database or switch.[1153] We therefore conclude that

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[1152] *See Intelligent Networks*, Notice of Proposed Rulemaking, 8 FCC Rcd 6813 (1993). In the *Intelligent Networks* proceeding, most incumbent LECs supported SMS access. *See* GTE comments in CC Docket No. 91-346 at 21; United and Central comments in CC Docket No. 91-346 at 12; SNET comments in CC Docket No. 91-346 at 5; NYNEX comments in CC Docket No. 91-346 at 3 n.3, 10-11; BellSouth update comments in CC Docket No. 91-346 at 6; Bell Atlantic comments in CC Docket No. 91-346 at 6. Other parties, including potential competitors and manufacturers, also supported SMS access. *See* Siemens comments in CC Docket No. 91-346 at 2; TIA comments in CC Docket No. 91-346 at 2; MCI comments in CC Docket No. 91-346 at 10; Ericsson reply in CC Docket No. 91-346 at 2-3. Many commenters asserted that SMS access through the SCE would provide a valuable opportunity for third parties to create services. *See* GSA comments in CC Docket No. 91-346 at 3; SNET comments in CC Docket No. 91-346 at 2; Siemens comments in CC Docket No. 91-346 at 2; Ericsson reply in CC Docket No. 91-346 at 2-3; TIA comments in CC Docket No. 91-346 at 2; MCI comments in CC Docket No. 91-346 at 10.

[1153] In their comments, BellSouth and Bell Atlantic describe the way they provide or plan to provide access to the SMS for third

such access is technically feasible, and that incumbent LECs should provide requesting carriers with the same access to design, create, test, and deploy AIN-based services at the SMS that the incumbent LEC provides for itself.[1154] While many incumbent LECs express concerns with the technical feasibility of access to AIN, we conclude that those concerns deal primarily with the interconnection of third party AIN SCP databases to the incumbent LEC's AIN and not access to the SCE and SMS.[1155]

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parties. Bell Atlantic proposes to first develop and deploy AIN services based on customer request and then subsequently to allow third parties themselves to create AIN services at a terminal either in a Bell Atlantic office or a third party office. Bell Atlantic comments in CC Docket No. 91-346 at 6. BellSouth proposes to permit third parties to use the service logic resident on BellSouth's service creation environment to create AIN services. BellSouth update reply in CC Docket No. 91-346 at 10.

[1154] Incumbent LECs that have deployed AIN must provide such access to competing carriers that will allow them to develop call processing applications pursuant to the same parameters the incumbent LEC uses itself, such as the time-of-day and origination of call parameters. BellSouth's recently proposed service to provide access to its SCE and SMS appears to be an example of the type of access to the SMS that incumbent LECs must provide to competitors upon request. *Pleading Cycle Established for Comments on BellSouth Telecommunications, Inc's Petition for Expedited Waiver of Part 69 Rules*, Public Notice, DA 96-27 (Jan. 17, 1996) (*BellSouth Part 69 Waiver Petition*).

[1155] Of the three potential points of access to AIN proposed in the *Intelligent Networks* NPRM, LEC commenters generally agree that SMS access poses the least risk of harm to the public switched telephone network. *See* Bell Atlantic comments in CC Docket No. 91-346 at 6-7; BellSouth comments in CC Docket No. 91-346 at 12, 13; GTE comments in CC Docket No. 91-346 at 19, 21; NYNEX comments in CC Docket No. 91-346 at 3; PacTel comments in CC Docket No. 91-346 at 20-21; SBC comments in CC Docket No. 91-346 at 5, 8; U S West comments in CC Docket No. 91-346 at 52; United and Central comments in CC Docket No. 91-346 at 1. Competitors also support such access. *See* MCI Comments at 6; Siemens Comments at 2; TIA Comments at 2.

496. We recognize that, although technically feasible, providing nondiscriminatory access to the SMS and SCE for the creation and deployment of AIN services may require some modifications, including appropriate mediation, to accommodate such access by requesting carriers. We note that Bell South is currently prepared to tariff and offer such access to third parties, and other incumbent LECs, including Bell Atlantic and Ameritech, indicate that they have made significant progress towards implementing such access.[1156] Therefore, if parties are unable to agree to appropriate mediation mechanisms through negotiations, we conclude that during arbitration of such issues the states (or the Commission acting pursuant to section 252(e)(5)) must consider whether such mediation mechanisms will be available and will adequately protect against intentional or unintentional misuses of the incumbent's AIN facilities. We again encourage incumbent LECs and competitive carriers to participate in industry fora and industry testing to resolve outstanding mediation concerns.

497. Parties did identify some proprietary concerns regarding access to the SCE and SMS used in the incumbent LEC's AIN. Some incumbent LECs contend that the interface used at the SCE is proprietary in nature.[1157] GVNW argues that specific AIN-based services designed

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[1156] *BellSouth Part 69 Waiver Petition.* BellSouth proposes to tariff services that permit third parties to create and administer AIN services through access to the SCE and SMS. Bell South's SCE/SMS service will support third-party service development with the following AIN triggers: off-hook immediate, off-hook delay, public office dialing plan, customized dialing plan, feature code and terminating attempt triggers. *Id. See* Bell Atlantic comments in CC Docket No. 91-346 at 6, 8; Ameritech July 17 *Ex Parte.*

[1157] U S West comments at 58 n.124 (for example, BellSouth uses DESIGNedge for such access which utilizes a proprietary database technology tailored to its network); Bell Atlantic comments at 28-29.

by carriers should be proprietary in nature.[1158] Competitors correctly argue that AIN can be used, not only for telecommunication services traditionally supported by the switch, but as a means to deploy advanced services not otherwise possible.[1159] We find that competing providers without access to AIN would be at a significant disadvantage to incumbent LECs, because they could not necessarily offer the same services to the customer. This access will help competing providers without imposing costs on incumbent LECs because the entrants will pay the cost.[1160] We therefore conclude, under section 251(d)(2)(A), that access to AIN, including those elements that may be proprietary, is necessary for successful entry into the local service market.

498. Most parties generally did not identify proprietary concerns with access to those SMSs used other than for AIN. Some parties, however, argue that there are proprietary interfaces used to enter information into various databases.[1161] Competing carriers counter that competitive providers would not need to have direct access to the proprietary methods of data entry used by incumbent LECs, and as a result we conclude that the unbundled access to SMSs used for other than AIN does not present proprietary concerns with respect to section 251(d)(2)(A).[1162]

499. We also conclude that unbundled access to all SMSs is necessary for a competing provider to effectively use unbundled call-related databases. We find that the

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[1158] GVNW comments at 30 (incumbent LECs should be able to copyright AIN based services that they create or incumbents will have much less incentive to develop such services).

[1159] AT&T comments at 23-25; Cable & Wireless comments at 24; MCI comments at 18, 33.

[1160] *See supra*, Section VII.

[1161] AT&T June 13 *Ex Parte*.

[1162] AT&T comments at 26.

inability of competing carriers to use the SMS in the same manner that an incumbent LEC uses to input data itself would impair the ability of a competing carrier to effectively offer services to its customers using unbundled call-related databases. Commenters in the record point out that access to call-related databases alone would not allow the competing carrier to provide such services to its customers without access to an SMS.[1163] We also conclude that AIN-based services are important to a new entrant's ability to compete effectively for customers with the incumbent LEC, and in developing new business by introducing new AIN based services. Thus we conclude that a competitor's ability to provide service would be significantly impaired if it did not have unbundled access to an incumbent LEC's SMS, including access to the SMS(s) used to input data to the LIDB, Toll Free Calling, Number Portability and AIN call-related databases.

500. We reject the contention by several incumbent LECs that signaling and database access was meant by the 1996 Act to apply only to such access as is necessary for call routing and completion. Although the competitive checklist for BOC entry into in-region interLATA services under section 271 requires "nondiscriminatory access to databases and associated signaling necessary for call routing and completion"[1164] the definition of a network element is more comprehensive in scope. A network element as defined by the 1996 Act includes "databases" and in particular "databases sufficient for billing and collection or used in the transmission, routing, or *other* provision of a telecommunications service."[1165] We find that the inclusion of "other provision of a telecommunications service" meant Congress intended the unbundling of databases to be read broadly and could include databases beyond

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[1163] Ericsson comments at 6.

[1164] 47 U.S.C. § 271(c)(2)(B)(x).

[1165] 47 U.S.C. § 153(29).

those directly used in the transmission or routing of a telecommunications service.

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506. In contrast, most incumbent LECs argue that operations support systems do not qualify as network elements under the 1996 Act.[1182] Ameritech argues that competitors have not demonstrated that they need access to such systems in order to provide telecommunications services.[1183] Several incumbent LECs assert that an incumbent LEC may negotiate with a competitor to provide such support services, but that the 1996 Act does not require them to unbundle these systems as network elements.[1184] Other parties argue that such access is not currently technically feasible and should be resolved through the negotiations process.[1185] SBC contends that its provisioning processes are neutral with respect to competing providers of service and that provisioning for competitors

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[1182] BellSouth comments at 45; GTE comments at 44; U S West comments at 48; Lincoln Tel. reply at 12-14; Ameritech reply at 19-20 (only for routing, terminating, billing or providing telecommunications service); Bell Atlantic reply at 12-23 n.15 (not necessary to offer service and numerous resellers have operated in Bell Atlantic territory without such direct access); BellSouth reply at 24, n.45; GTE reply at 23; NYNEX reply at 33-34; PacTel reply at 22 (operations support systems not used in the provision of a telecommunications service). Letter from Michael Glover, General Attorney, Bell Atlantic, to William Kennard, General Counsel, FCC, April 15, 1996 (Bell Atlantic April 15 *Ex Parte*).

[1183] Ameritech comments at 19-20; NYNEX comments at 33-34 (administrative databases are not used in routing or completion of calls); Bell Atalntic reply at 14; U S West reply at 27.

[1184] NYNEX comments at 33-34; Ameritech reply at 19-20; Lincoln Tel. reply at 14 (competitors must provide their own ordering systems); Bell Atlantic April 15 *Ex Parte* at 9.

[1185] Lincoln Tel. comments at 9 (re-engineering customer service systems only for purpose of supporting competitors would be extremely profligate); GVNW comments at 10-12.

does not take longer than provisioning for its own customers.[1186]

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510. Since the passage of the 1996 Act, several states have proceeded to implement rules for local competition, several of which include provisions concerning electronic interfaces.[1204] The Georgia Commission ordered BellSouth to establish electronic operational interfaces by July 15, 1996, and ordered both incumbent BellSouth and requesting carrier AT&T to submit a joint report to the commission within thirty days concerning the implementation schedule necessary to deploy such interfaces.[1205] After a motion for reconsideration, the Georgia Commission provided BellSouth with an additional month to establish these interfaces and added additional deadlines for the deployment and operation of such interfaces.[1206] The Illinois Commission ordered Ameritech and Centel to provide competitors with "all operational interfaces at

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[1186] Letter from Sandra Wagner, Director, Federal Regulatory, SBC Communications, Inc. to William Caton, Acting Secretary, FCC, June 4, 1996 (SBC June 4 *Ex Parte*).

[1204] Letter from Bruce Cox, Government Affairs Director, AT&T to William Caton, Acting Secretary, FCC, July 11, 1996 (AT&T July 11 *Ex Parte*). AT&T submitted orders or rules from eight states that have taken action on the issue of electronic interfaces. *Id.*

[1205] Petition of AT&T for the Commission to Establish Resale Rules, Rates, Terms and Conditions and the Initial Unbundling of Services, Docket No. 6352-U at 11-12, 15 (Georgia Commission May 29, 1996). The Georgia Commission ordered BellSouth to establish interfaces for "pre-service ordering, service ordering and provisioning, directory listing and line information databases, service trouble reporting, and daily usage data." *Id.* at 15.

[1206] Motion for Reconsideration in Docket No. 6352-U (Georgia Commission July 2, 1996). The Georgia Commission directed that most electronic interfaces must be fully operational by the end of 1996, and established March 31, 1997 as an absolute deadline. *Id.*

parity with those provided their own retail customers." [1207] The Louisiana Commission has proposed rules on local competition that require incumbent LECs to deploy systems for competitors that are equivalent to those used by incumbents for their own retail exchange services.[1208] Under those rules, such access must be equal to that provided to an incumbent LECs' own personnel.[1209] The California Commission adopted interim rules ordering incumbent LECs to deploy automated on-line systems for access by competitors.[1210] The Indiana Commission concluded that a competitor's ability to utilize "electronic access, technical interfaces, or access to databases to place service orders, receive phone number assignments, receive information necessary to bill [its] customers and to inform the incumbent LEC of cases of trouble" is essential to the development of resale competition.[1211] Indiana

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1207 *Illinois Wholesale Order.* The Illinois Commission ordered both incumbent LECs, to the extent they could not "fully and immediately" implement operational parity, to submit a plan with specific timetables for achieving compliance. *Id.* at 51.

1208 Substitute Proposed Regulations for Competition in the Local Telecommunications Market, Docket No. U-20883 (Louisiana Commission March 5, 1996). The Louisiana Commission further requires "direct on-line access" to incumbent LECs' mechanized order entry system, number administration system, trouble reporting and monitoring system, customer usage data, and local listing databases. *Id.*

1209 *Id.*

1210 Order Instituting Rulemaking on the Commission's Own Motion into Competition for Local Exchange Service, R. 95-04-043 and I. 95-04-044 (California Commission April 26, 1995). The California Commission ordered such access for "service ordering and implementation scheduling." *Id.* at Appendix E, 14.

1211 In the Matter of the Investigation on the Commission's Own Motion into Any and All Matters Relating to Local Telephone Exchange Competition Within the State of Indiana, Cause No. 39983, Interim Order on Bundled Resale and Other Issues (Indiana Commission July 1, 1996).

ordered incumbent LECs to provide all operational interfaces at parity with those the incumbent provides to its own retail customers.[1212] The Ohio Commission's rules on local competition require all LECs to provide "nondiscriminatory, automated operational support systems" that support access by competing carriers to such functions as pre-ordering, ordering, provisioning, repair and maintenance, number assignment, and billing.[1213] The Oklahoma Commission has proposed rules that require an incumbent LEC, to the extent it provides itself, its affiliates or subsidiaries, automated interfaces for the purpose of service ordering, maintenance or repair, to make such interfaces available to competitors.[1214]

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c. Discussion

516. We conclude that operations support systems and the information they contain fall squarely within the definition of "network element" and must be unbundled upon request under section 251(c)(3), as discussed below. Congress included in the definition of "network element" the terms "databases" and "information sufficient for billing and collection or used in the transmission, routing, *or*

1212 *Id.* at 49. The Commission also ordered incumbents Ameritech and GTE, to the extent they contend that they are unable to fully and immediately implement operational parity, to submit a comprehensive plan with specific timetables for achieving compliance. *Id.*

1213 In the Matter of the Commission Investigation Relative to the Establishment of Local Exchange Competition and Other Competitive Issues, Case No. 95-845-TP-COI (Ohio Commission June 12, 1996).

1214 All Sources Proposed Rules, Docket No. RM950000019 (Local Telephone Competition) (Oklahoma Commission March 7, 1996). Oklahoma rules clarify that such interfaces should not permit competitors to directly access the incumbent's underlying systems. *Id.* at 79.

other provision of a telecommunications service."[1253] We believe that the inclusion of these terms in the definition of "network element" is a recognition that the massive operations support systems employed by incumbent LECs, and the information such systems maintain and update to administer telecommunications networks and services, represent a significant potential barrier to entry. It is these systems that determine, in large part, the speed and efficiency with which incumbent LECs can market, order, provision, and maintain telecommunications services and facilities. Thus, we agree with Ameritech that "[o]perational interfaces are essential to promote viable competitive entry."[1254]

517. Nondiscriminatory access to operations support systems functions can be viewed in at least three ways. First, operations support systems themselves can be characterized as "databases" or "facilit[ies] . . . used in the provision of a telecommunications service," and the functions performed by such systems can be characterized as "features, functions, and capabilities that are provided by means of such facilit[ies]."[1255] Second, the information contained in, and processed by operations support systems can be classified as "information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service."[1256] Third, nondiscriminatory access to the functions of operations support systems, which would include access to the information they contain, could be viewed as a "term or condition" of unbundling other network elements under section 251(c)(3), or resale under section 251(c)(4). Thus, we conclude that, under any of these interpretations, operations support systems functions are subject to the

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[1253] 47 U.S.C. § 153(29) (emphasis added).

[1254] Ameritech July 10 *Ex Parte* at 5.

[1255] 47 U.S.C. § 153(29).

[1256] *Id.*

nondiscriminatory access duty imposed by section 251 (c)(3), and the duty imposed by section 251(c)(4) to provide resale services under just, reasonable, and nondiscriminatory terms and conditions.

518. Much of the information maintained by these systems is critical to the ability of other carriers to compete with incumbent LECs using unbundled network elements or resold services. Without access to review, *inter alia*, available telephone numbers, service interval information, and maintenance histories, competing carriers would operate at a significant disadvantage with respect to the incumbent. Other information, such as the facilities and services assigned to a particular customer, is necessary to a competing carrier's ability to provision and offer competing services to incumbent LEC customers.[1257] Finally, if competing carriers are unable to perform the functions of pre-ordering, ordering, provisioning, maintenance and repair, and billing for network elements and resale services in substantially the same time and manner that an incumbent can for itself, competing carriers will be severely disadvantaged, if not precluded altogether, from fairly competing. Thus providing nondiscriminatory access to these support systems functions, which would include access to the information such systems contain, is vital to creating opportunities for meaningful competition.

519. As noted in the comments above, several state commissions have ordered real-time access or have ongoing proceedings working to develop and implement it within their jurisdictions. The New York Commission, building on its pioneering experience with the Rochester Telephone "Open Market Plan," has facilitated a working group on electronic interfaces comprised of both in-

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[1257] For these reasons, it is most important that incumbent LECs, which currently own the overwhelming majority of local facilities in any market, provide this information to those new entrants who initially will rely to varying degrees on incumbent LEC facilities. *See e.g.*, AT&T comments at 33-34.

cumbent LECs and potential competitors.[1258] The New York Commission focused on these issues in response to the frustrations and concerns of resellers in the Rochester market.[1259] In particular, AT&T alleged that it was "severely disadvantaged due to the fact that [Rochester Telephone] has failed to provide procedures for resellers to access [their] databases for on-line queries needed to perform basic service functions [such] as scheduling customer appointments."[1260] The New York Commission has concluded that wherever possible NYNEX will provide new entrants with real-time electronic access to its systems.[1261] As another example, the Georgia Commission recently ordered BellSouth to provide electronic interfaces such that resellers have the same access to operations support systems and informational databases as BellSouth does, including interfaces for pre-ordering, ordering and provisioning, service trouble reporting, and customer daily usage.[1262] In testimony before the Georgia Commission, a BellSouth witness acknowledged that "[n]o one is happy,

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[1258] Order Declaring Resale Prohibitions Void and Establishing Tariff Terms, Case 94-C-0095, *et al.* (New York Commission June 25, 1996).

[1259] Order Declaring Resale Prohibitions Void and Establishing Tariff Terms, Case 94-C-0095, *et al.* (New York Commission June 25, 1996). In New York proceeding, resellers argued that interfaces were as important to competition as the level of the wholesale discount. *Id.*

[1260] AT&T Communications of New York, Inc. Complaint, Petition fer Declaratory Judgment and for Reconsideration of Opinion No. 94-25 New York Commission, page 12.

[1261] *Id.* at 13-14. The New York Commission operations working group has focused on five areas for implementation: (1) service ordering, (2) trouble administration, (3) credit and collection, (4) billing and usage detail, (5) local exchange company requirements. *Id.* at 13-17.

[1262] *See* In Re Petition of AT&T for the Commission to Establish Resale Rules, Rates, Terms and Conditions and the Initial Unbundling of Services, Docket 6352, (Georgia Commission May 29, 1996).

believe me, with a system that is not fully electronic." [1263] As noted above, Georgia ordered BellSouth to establish these interfaces within two months of its order (by July 15, 1996), but recently extended the deadline an additional month (to August 15th).[1264] Both the Illinois and Indiana Commissions ordered incumbent LECs immediately to provide to competitors access to operational interfaces at parity with those provided to their own retail customers, or submit plans with specific timetables for achieving such access.[1265] Several other states have passed laws or adopted rules ordering incumbent LECs to provide interfaces for access equal to that the incumbent provides itself.[1266] We recognize the lead taken by these states and others, and we generally rely upon their conclusions in this Order.

520. We conclude that providing nondiscriminatory access to operations support systems functions is technically feasible. Incumbent LECs today provide IXCs with different types of electronic ordering or trouble interfaces that demonstrate the feasibility of such access, and perhaps also provide a basis for adapting such interfaces for

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[1263] *Id.*

[1264] Motion for Reconsideration in Docket No. 6352-U (Georgia Commission July 2, 1996).

[1265] In the Matter of the Investigation on the Commission's Own Motion into Any and All Matters Relating to Local Telephone Exchange Competition Within the State of Indiana, Cause No. 39983, Interim Order on Bundled Resale and Other Issues (Indiana Commissions July 1, 1996); *Illinois Wholesale Order.*

[1266] *See e.g.*, Texas Commission comments at 19; In the Matter of the Commission Investigation Relative to the Establishment of Local Exchange Competition and Other Competitive Issues, Case No. 95-845-TP-COI (Ohio Commission June 12, 1996); Order Instituting Rulemaking on the Commission's Own Motion into Competition for Local Exchange Service, R. 95-04-043 and I. 95-04-044 (California Commission April 26, 1995).

use between local service providers.[1267] Further, as discussed above, several incumbent LECs, including NYNEX and Bell Atlantic, are already testing and operating interfaces that support limited functions, and are developing the interfaces to support access to the remaining functions identified by most potential competitors.[1268] Some incumbent LECs acknowledge that nondiscriminatory access to operations support systems functions is technically feasible.[1269] Finally, several industry groups are actively establishing standards for inter-telecommunications company transactions.[1270]

521. Section 251(d)(2)(A) requires the Commission to consider whether "access to such network elements as are proprietary in nature is necessary."[1271] Incumbent LECs argue that there are proprietary interfaces used to access these databases and information. Parties seeking to compete with incumbent LECs counter that access to such databases and information is vitally important to the ability to broadly compete with the incumbent. As discussed above, competitors also argue that such access is necessary to order, provision, and maintain unbundled network elements and resold services, and to market competing services effectively to an incumbent LEC's customers. We find that it is absolutely necessary for competitive carriers to have access to operations support systems functions in order to successfully enter the local service market.

[1267] *See, e.g.*, Bell Atlantic June 21 *Ex Parte*; NYNEX July 12 *Ex Parte*; NYNEX July 17 *Ex Parte*; U S West June 28 *Ex Parte*; U S West July 9 *Ex Parte*.

[1268] Bell Atlantic June 21 *Ex Parte*; NYNEX July 17 *Ex Parte*.

[1269] *See* NYNEX reply at 33-34; GTE reply at 23 n.28; Bell Atlantic reply at 14.

[1270] Industry standards committees include ECIC, EDI, OBF and T1M1. *See* Ameritech July 10 *Ex Parte*, Sprint June 25 *Ex Parte*, NYNEX July 17 *Ex Parte*.

[1271] 47 U.S.C. § 251(d)(2)(A).

522. Section 251(d)(2)(B) requires the Commission to consider whether "the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer."[1272] As mentioned above, parties identified access to operations support systems functions as critical to the provision of local service. We find that such operations support systems functions are essential to the ability of competitors to provide services in a fully competitive local service market. Therefore, we conclude that competitors' ability to provide service successfully would be significantly impaired if they did not have access to incumbent LEC's operations support systems functions.

523. We thus conclude that an incumbent LEC must provide nondiscriminatory access to their operations support systems functions for pre-ordering, ordering, provisioning, maintenance and repair, and billing available to the LEC itself.[1273] Such nondiscriminatory access necessarily includes access to the functionality of any internal gateway systems[1274] the incumbent employs in performing the above functions for its own customers. For example, to the extent that customer service representatives of the incumbent have access to available telephone numbers or service interval information during customer contacts, the incumbent must provide the same access to competing

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[1272] 47 U.S.C. § 251(d)(2)(B).

[1273] We adopt the definition of these terms as set forth in the *AT&T-Bell Atlantic Joint Ex Parte* as the minimum necessary for our requirements. We note, however, that individual incumbent LEC's operations support systems may not clearly mirror these definitions. Nevertheless, incumbent LECs must provide nondiscriminatory access to the full range of functions within pre-ordering, ordering, provisioning, maintenance and repair and billing enjoyed by the incumbent LEC.

[1274] A gateway system refers to any electronic interface the incumbent LEC has created for its own use in accessing support systems for providing pre-ordering, ordering, provisioning, repair and maintenance, and billing.

providers. Obviously, an incumbent that provisions network resources electronically does not discharge its obligation under section 251(c)(3) by offering competing providers access that involves human intervention, such as facsimile-based ordering.[1275]

524. We recognize that, although technically feasible, providing nondiscriminatory access to operations support systems functions may require some modifications to existing systems necessary to accommodate such access by competing providers.[1276] Although, as discussed above, many incumbent LECs are actively developing these systems, even the largest and most advanced incumbent LECs have not completed interfaces that provide such access to all of their support systems functions. State commissions such as Georgia, Illinois, and Indiana, however, have ordered that such access be made available to requesting carriers in the near term. As a practical matter, the interfaces developed by incumbents to accommodate nondiscriminatory access will likely provide such access for services and elements beyond a particular state's boundaries, and thus we believe that requirements for such access by a small number of states representing a cross-section of the country will quickly lead to incumbents providing access in all regions.

525. In all cases, however, we conclude that in order to comply fully with section 251(c)(3) an incumbent LEC must provide, upon request, nondiscriminatory access to operations support systems functions for preordering, provisioning, maintenance and repair, and billing of unbundled network elements under section 251

[1275] Such access was all that Rochester Telephone provided to AT&T, when AT&T attempted to compete as a reseller of Rochester Telephone service. *See* Letter from Bruce Cox, Government Affairs Director, AT&T to William Caton, Acting Secretary, FCC, July 10, 1996 (AT&T July 10 *Ex Parte*).

[1276] *See supra*, Section V.G. regarding accommodation of unbundling.

(c)(3) and resold services under section 251(c)(4). Incumbent LECs that currently do not comply with this requirement of section 251(c)(3) must do so as expeditiously as possible, but in any event no later than January 1, 1997.[1277] We believe that the record demonstrates that incumbent LECs and several national standards-setting organizations have made significant progress in developing such access. This progress is also reflected in a number of states requiring competitor access to these transactional functions in the near term. Thus, we believe that it is reasonable to expect that by January 1, 1997, new entrants will be able to compete for end user customers by obtaining nondiscriminatory access to operations support systems functions.

526. We have considered the economic impact of our rules in this section on small incumbent LECs. For example, RTC urges us to recognize the differences between carriers in regards to computerized network administration and operational interfaces. Our requirement of nondiscriminatory access to operations support systems recognizes that different incumbent LECs possess different existing systems. We also note, however, that sections 251(f) of the 1996 Act provides relief for certain small LECs from our regulations implementing section 251.

527. Ideally, each incumbent LEC would provide access to support systems through a nationally standardized gateway. Such national standards would eliminate the need for new entrants to develop multiple interface systems, one for each incumbent. We believe that the progress made by standards-setting organizations to date evidences a strong national movement toward such a uniform standard.[1278] For example, both AT&T and Bell Atlantic agree that, given appropriate guidance from the Commis-

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[1277] *See infra*, Section VII.B. for a discussion of exemptions and suspensions for small and rural incumbent LECs.

[1278] *See* Sprint June 25 *Ex Parte*; AT&T comments at 38; BellSouth reply at 27.

sion, the industry can achieve consensus on national standards such that within 12 months 95% of all inter-telecommunications company transactions may be processed via nationally standardized electronic gateways.[1279]

528. In order to ensure continued progress in establishing national standards, we propose to monitor closely the progress of industry organizations as they implement the rules adopted in this proceeding. Depending upon the progress made, we will make a determination in the near future as to whether our obligations under the 1996 Act require us to issue a separate notice of proposed rulemaking or take other action to guide industry efforts at arriving at appropriate national standards for access to operations support systems.

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c. Discussion

(1) Operator Services and Directory Assistance

534. We conclude that incumbent LECs are under the same duty to permit competing carriers nondiscriminatory access to operator services and directory assistance facilities as all LECs are under section 251(b)(3).[1300] We further conclude that, if a carrier requests an incumbent LEC to unbundle the facilities and functionalities providing operator services and directory assistance as separate network elements, the incumbent LEC must provide the competing provider with nondiscriminatory access to such facilities and functionalities at any technically feasible point. We believe that these facilities and functionalities are important to facilitate competition in the local exchange market. Further, the 1996 Act imposes upon BOCs, as a condition of entry into in-region interLATA services the duty to provide nondiscriminatory access to

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[1279] *AT&T-Bell Atlantic Joint Ex Parte.*

[1300] *See Dialing Parity Order supra,* Section I.

directory assistance services and operator call completion services.[1301] We therefore conclude that unbundling facilities and functionalities providing operator services and directory assistance is consistent with the intent of Congress.

535. As discussed in our section on nondiscriminatory access under section 251(b)(3),[1302] the provision of nondiscriminatory access to operator services and directory assistance must conform to the requirements of section 222, which restricts carrier's use of CPNI.[1303] In particular, access to directory assistance and underlying directory information does not require incumbent LECs to provide access to unlisted or unpublished telephone numbers, or other information that the incumbent LEC's customer has requested the LEC not to make available. In conforming to section 222, we anticipate that incumbent LECs will provide such access in a manner that will protect against the inadvertent release of unlisted customer names and numbers.

536. We note that several competitors advocate unbundling the facilities and functionalities providing operator services and directory assistance from particular resold services or the unbundled local switching element, so that a competing provider can provide these services to its customers supported by its own systems rather than those of the incumbent LEC.[1304] Some incumbent LECs argue that

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[1301] 47 U.S.C. § 271(c)(2)(B)(vii)(II)-(III).

[1302] *See Dialing Parity Order supra*, Section I.

[1303] *See Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and other Customer Information*, CC Docket No. 96-115, Notice of Proposed Rulemaking, FCC 96-221 (rel. May 17, 1996).

[1304] *See, e.g.*, AT&T comments at 26; Cable & Wireless comments at 20; Colorado Commission comments at 24; DOJ comments at 21; Frontier comments at 17 n.32; MCI comments at 18-20; Jones Intercable reply at 30.

such unbundling, however, is not technically feasible because of their inability to route individual end user calls to multiple systems.[1305] We find that unbundling both the facilities and functionalities providing operator services and directory assistance as separate network elements will be beneficial to competition and will aid the ability of competing providers to differentiate their service from the incumbent LECs. We also note that the Illinois Commission has recently ordered such access.[1306] We therefore find that incumbent LECs must unbundle the facilities and functionalities providing operator services and directory assistance from resold services and other unbundled network elements to the extent technically feasible. As discussed above in our section on unbundled switching, we require incumbent LECs, to the extent technically feasible, to provide customized routing, which would include such routing to a competitor's operator services or directory assistance platform.[1307]

537. We also note that some competitors seek access to operator services and directory assistance in order to serve their own customers.[1308] Some of these parties argue that nondiscriminatory access to such network elements requires incumbent LECs to provide rebranded operator call completion services and directory assistance to the competing carrier's customers.[1309] Incumbent LECs argue that the provision of these services on an unbranded or rebranded basis is not technically feasible because of their inability at the operator services or directory assistance platforms to identify the carrier serving the end user.[1310] As we concluded in our discussion on section 251(b)(3),

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[1305] SBC reply at 22-23.

[1306] *See Illinois Wholesale Order.*

[1307] *See infra*, Section V.I.2.

[1308] AT&T comments at 26.

[1309] ACSI comments at 47-48; AT&T comments at 26; Comcast comments at 20; GCI comments at 12.

[1310] SBC reply at 22-23.

we find that incumbent LECs must permit nondiscriminatory access to both operator services and directory assistance in the same manner required of all LECs.[1311] We make no finding on the technical feasibility of providing branded or unbranded service to competitors based on the record before us. We note, however, that the Illinois Commission has ordered incumbent LECs to provide rebranded operator call completion services and directory assistance to requesting competitive carriers.[1312]

538. As discussed above, incumbent LECs must provide access to databases as unbundled network elements.[1313] We find that the databases used in the provision of both operator call completion services and directory assistance must be unbundled by incumbent LECs upon a request for access by a competing provider. In particular, the directory assistance database must be unbundled for access by requesting carriers.[1314] Such access must include both entry of the requesting carrier's customer information into the database, and the ability to read such a database, so as to enable requesting carriers to provide operator services and directory assistance concerning incumbent LEC customer information. We clarify, however, that the entry of a competitor's customer information into an incumbent LEC's directory assistance database can be mediated by the incumbent LEC to prevent unauthorized use of the database. We find that the arrangement ordered by the California Commission concerning the shared use of such a database by Pacific Bell and GTE is one possible method of providing such access.[1315]

[1311] *See Dialing Parity Order supra*, Section I.

[1312] *See Illinois Wholesale Order.*

[1313] *See supra*, Section V.J.

[1314] We find the joint directory assistance database used by Pacific Bell and GTE to be one method of such access. MCI comments at 38.

[1315] *See Re GTE California Incorporated*, 31 CPUC 2d 370 (1989).

539. Section 251(d)(2)(A) requires the Commission to consider whether "access to such network elements as are proprietary in nature is necessary." [1316] Parties generally did not identify proprietary concerns with unbundling access to operator call completion services or directory assistance. Incumbent LECs generally did not claim a proprietary interest in their directory assistance databases. Many parties contend that proprietary interests leading to restrictions on use or sharing of such database information would injure their ability to compete effectively for local service.[1317] For the reasons described below, we find that access to the systems supporting both operator call completion services and directory assistance is necessary for new entrants to provide competing local exchange service.

540. Section 251(d)(2)(B) requires the Commission to consider whether "the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer." [1318] Parties identified access to operator call completion services and directory assistance as critical to the provision of local service.[1319] Therefore we conclude that competitors' ability to provide service would be significantly impaired if they did not have access to incumbent LECs' operator call completion services and directory assistance.

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554. Finally, in accordance with our interpretation of the term "technically feasible," we conclude that, if a particular method of interconnection is currently employed between two networks, or has been used successfully in the past, a rebuttable presumption is created that such a

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[1316] 47 U.S.C. § 251(d)(2)(A).

[1317] MCI comments at 37-38.

[1318] 47 U.S.C. § 251(d)(2)(B).

[1319] MCI comments at 37-38.

method is technically feasible for substantially similar network architectures. Moreover, because the obligation of incumbent LECs to provide interconnection or access to unbundled elements by any technically feasible means arises from sections 251(c)(2) and 251(c)(3), we conclude that incumbent LECs bear the burden of demonstrating the technical infeasibility of a particular method of interconnection or access at any individual point.

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(3). Discussion

585. We believe that incumbent LECs have the incentive and capability to impede competitive entry by minimizing the amount of space that is available for collocation by competitors. Accordingly, we adopt our *Expanded Interconnection* space allocation rules for purposes of section 251, except as indicated herein. LECs will thus be required to make space available to requesting carriers on a first-come, first-served basis. We also conclude that collocators seeking to expand their collocated space should be allowed to use contiguous space where available. We further conclude that LECs should not be required to lease or construct additional space to provide physical collocation to interconnectors when existing space has been exhausted. We find such a requirement unnecessary because section 251(c)(6) allows incumbent LECs to provide virtual collocation where physical collocation is not practical for technical reasons or because of space limitations. Consistent with the requirements and findings of the *Expanded Interconnection* proceeding, we conclude that incumbent LECs should be required to take collocator demand into account when renovating existing facilities and constructing or leasing new facilities, just as they consider demand for other services when undertaking such projects. We find that this requirement is necessary in order to ensure that sufficient collocation space will be available in the future. We decline, however, to adopt a general rule requiring LECs to file reports on the status and planned

increase and use of space. State commissions will determine whether sufficient space is available for physical collocation, and we conclude that they have authority under the 1996 Act to require incumbent LECs to file such reports. We expect individual state commissions to determine whether the filing of such reports is warranted.

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VII. PRICING OF INTERCONNECTION AND UNBUNDLED ELEMENTS

A. Overview

618. The prices of interconnection and unbundled elements, along with prices of resale and transport and termination, are critical terms and conditions of any interconnection agreement. If carriers can agree on such prices voluntarily without government intervention, these agreements will be submitted directly to the states for approval under section 252. To the extent that the carriers, in voluntary negotiations, cannot determine the prices, state commissions will have to set those prices. The price levels set by state commissions will determine whether the 1996 Act is implemented in a manner that is *pro-competitor* and favors one party (whether favoring incumbents or entrants) or, as we believe Congress intended, *pro-competition*. As discussed more fully in Section II.D. above, it is therefore critical to implementing Congress's pro-competitive, de-regulatory national policy framework to establish among the states a common, pro-competition understanding of the pricing standards for interconnection and unbundled elements, resale, and transport and termination. While such a common interpretation might eventually emerge through judicial review of state arbitration decisions, we believe that such a process could delay competition for years and require carriers to incur substantial legal costs.[1490] We therefore conclude that, to ex-

[1490] For a discussion of our legal authority to adopt national pricing rules, *see supra*, Section II.D.

pedite the development of fair and efficient competition, we must set forth rules now establishing this common, pro-competition understanding of the 1996 Act's pricing standards. Accordingly, the rules we adopt today set forth the methodological principles for states to use in setting prices. This section addresses interconnection and unbundled elements, and subsequent sections address resale and transport and termination, respectively.

619. While every state should, to the maximum extent feasible, immediately apply the pricing methodology for interconnection and unbundled elements that we set forth below, we recognize that not every state will have the resources to implement this pricing methodology immediately in the arbitrations that will need to be decided this fall. Therefore, so that competition is not impaired in the interim, we establish default proxies that a state commission shall use to resolve arbitrations in the period before it applies the pricing methodology. In most cases, these default proxies for unbundled elements and interconnection are ceilings, and states may select lower prices. In one instance, the default proxy we establish is a price range. Once a state sets prices according to an economic cost study conducted pursuant to the cost-based pricing methodology we outline, the defaults cease to apply. In setting a rate pursuant to the cost-based pricing methodology, and especially when setting a rate above a default proxy ceiling or outside the default proxy range, the state must give full and fair effect to the economic costing methodology we set forth in this Order and must create a factual record, including the cost study, sufficient for purposes of review after notice and opportunity for the affected parties to participate.

620. In the following sections, we first set forth generally, based on the current record, a cost-based pricing methodology based on forward-looking economic costs, which we conclude is the approach for setting prices that best furthers the goals of the 1996 Act. In dynamic competitive markets, firms take action based not on embedded

costs, but on the relationship between market-determined prices and forward-looking economic costs. If market prices exceed forward-looking economic costs, new competitors will enter the market. If their forward-looking economic costs exceed market prices, new competitors will not enter the market and existing competitors may decide to leave. Prices for unbundled elements under section 251 must be based on cost under the law, and that should be read as requiring that prices be based on forward-looking economic costs. New entrants should make their decisions whether to purchase unbundled elements or to build their own facilities based on the relative economic costs of these options. By contrast, because the cost of building an element is based on forward-looking economic costs, new entrants' investment decisions would be distorted if the price of unbundled elements were based on embedded costs. In arbitrations of interconnection arrangements, or in rulemakings the results of which will be applied in arbitrations, states must set prices for interconnection and unbundled network elements based on the forward-looking, long-run, incremental cost methodology we describe below. Using this methodology, states may not set prices lower than the forward-looking increment costs directly attributable to provision of a given element. They may set prices to permit recovery of a reasonable share of forward-looking joint and common costs of network elements.[1491] In the aftermath of the arbitrations and relying on the state experience, we will continue to review this costing methodology, and issue additional guidance as necessary.

621. We reject various arguments raised by parties regarding the recovery of costs other than forward-looking economic costs in section 251(c)(2) and (c)(3) prices,

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[1491] We define these and other forward-looking cost concepts *infra*, Section VII.B.2.a. We define what we consider to be a reasonable share of forward-looking joint and common costs *infra*, Section VII.B.2.a.

including the possible recovery of: (1) embedded or accounting costs in excess of economic costs; (2) incumbent LECs' opportunity costs; (3) universal service subsidies; and (4) access charges. As discussed in Section VII.B.2.a. below, certain portions of access charges may continue to be collected for an interim period in addition to section 251(c)(3) prices.

622. With respect to prices developed under the forward-looking, cost-based pricing methodology, we conclude that incumbent LECs' rates for interconnection and unbundled elements must recover costs in a manner that reflects the way they are incurred. We adopt certain rules that states must follow in setting rates in arbitrations. These rules are designed to ensure the efficient cost-based rates required by the 1996 Act.

623. In the next section of the Order, we establish default proxies that states may elect to use prior to utilizing an economic study and developing prices using the cost-based pricing methodology. We recognize that certain states may find it difficult to apply an economic costing methodology within the statutory time frame for arbitrating interconnection disputes. We therefore set forth default proxies that will be relatively easy to apply on an interim basis to interconnection arrangements. We discuss with respect to particular unbundled elements the reasonable rate structure for those elements and the particular default proxies we are establishing for use pending our adoption of a generic forward-looking cost model. Finally, we discuss the following additional matters: generic forward-looking costing models that we intend to examine further by the first quarter of 1997 in order to determine whether any of those models, with modifications, could serve as better default proxies; the future adjustment of rates; the relationship of unbundled element prices to retail prices; and the meaning of the statutory prohibition against discrimination in sections 251 and 252.

624. Those states that have already established methodologies for setting interconnection and unbundled rates must review those methodologies against the rules we are adopting in this Order. To the extent a state's methodology is consistent with the approach we set forth herein, the state may apply that methodology in any section 252 arbitration. However, if a state's methodology is not consistent with the rules we adopt today, the state must modify its approach. We invite any state uncertain about whether its approach complies with this Order to seek a declaratory ruling from the Commission.

B. Cost-Based Pricing Methodology

625. As discussed more fully in Section II.D. above, although the states have the crucial role of setting specific rates in arbitrations, the Commission must establish a set of national pricing principles in order to implement Congress's national policy framework. For the reasons set forth in the preceding section and as more fully explained below, we are adopting a cost-based methodology for states to follow in setting interconnection and unbundled element rates. In setting forth the cost-based pricing methodology for interconnection and access to unbundled elements, there are three basic sets of questions that must be addressed. First, does the 1996 Act require that the same standard apply to the pricing of interconnection provided pursuant to section 251(c)(2), and unbundled elements provided pursuant to section 251(c)(3)? Second, what is the appropriate methodology for establishing the price levels for interconnection and for each unbundled element, how should costs be defined, and is the price based on economic costs, embedded costs, or other costs? Third, what are the appropriate rate structures to be used to set prices designed to recover costs, including a reasonable profit? We address each of these questions in the following sections.

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664. In contrast, several incumbent LECs and state public utility commissions maintain that incumbent LECs should be permitted to recover their embedded costs in the rates set for interconnection, collocation, and unbundled network elements. These commenters claim that rates based on incremental costs alone fail to account for certain costs historically incurred to accomplish carrier-of-last-resort and universal service social policy objectives.[1655] The Attorneys General caution the Commission not to classify legitimate contributions to joint and common costs as impermissible implicit universal service subsidies.[1656]

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(3) Discussion

672. *Overview.* Having concluded in Section II.D., above, that we have the requisite legal authority and that we should establish national pricing rules, we conclude here that prices for interconnection and unbundled elements pursuant to sections 251(c)(2), 251(c)(3), and 252(d)(1), should be set at forward-looking long-run economic cost. In practice, this will mean that prices are based on the TSLRIC of the network element, which we will call Total Element Long Run Incremental Cost (TELRIC), and will include a reasonable allocation of forward-looking joint and common costs. The 1996 Act encourages competition by removing barriers to entry and providing an opportunity for potential new entrants to purchase unbundled incumbent LEC network elements to compete efficiently to provide local exchange services. We

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1655 *See, e.g.*, Alabama Commission comments at 24-25; Bay Springs, *et al.* comments at 16; BellSouth comments at 57; Matanuska Tel. comments at 2-3; TDS comments at 20; SBC comments at 89; Western Alliance comments at 6-7; *but see* BellSouth comments at 57 (if the universal service proceeding establishes a federal fund or if the states establish explicit funds, there will be no need for subsidies to be built into interconnection and unbundled network element rates).

1656 Attorneys General reply at 10-11.

believe that the prices that potential entrants pay for these elements should reflect forward-looking economic costs in order to encourage efficient levels of investment and entry.

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678. While we are adopting a version of the methodology commonly referred to as TSLRIC as the basis for pricing interconnection and unbundled elements, we are coining the term "total element long run incremental cost" (TELRIC) to describe our version of this methodology. The incumbent LEC offerings to be priced using this methodology generally will be "network elements," rather than "telecommunications services," as defined by the 1996 Act.[1683] More fundamentally, we believe that TELRIC-based pricing of discrete network elements or facilities, such as local loops and switching, is likely to be much more economically rational than TSLRIC-based pricing of conventional services, such as interstate access service and local residential or business exchange service. As discussed in greater detail below, separate telecommunications services are typically provided over shared network facilities, the costs of which may be joint or common with respect to some services. The costs of local loops and their associated line cards in local switches, for example, are common with respect to interstate access service and local exchange service, because once these facilities are installed to provide one service they are able to provide the other at no additional cost. By contrast, the network elements, as we have defined them,[1684] largely correspond to distinct network facilities. Therefore, the amount of joint and common costs that must be allocated among separate offerings is likely to be much smaller using a TELRIC methodology rather than a TSLRIC approach that measures the costs of conventional services. Because it is difficult for regulators to determine an economically-optimal allocation of any such joint and common costs, we believe that pricing

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[1683] 47 U.S.C. §§ 3(29), 3(46).

[1684] *See supra* Section V.

elements, defined as facilities with associated features and functions, is more reliable from the standpoint of economic efficiency than pricing services that use shared network facilities.

679. *Description of TELRIC-Based Pricing Methodology.* Adopting a pricing methodology based on forward-looking, economic costs best replicates, to the extent possible, the conditions of a competitive market. In addition, a forward-looking cost methodology reduces the ability of an incumbent LEC to engage in anti-competitive behavior. Congress recognized in the 1996 Act that access to the incumbent LECs' bottleneck facilities is critical to making meaningful competition possible. As a result of the availability to competitors of the incumbent LEC's unbundled elements at their economic cost, consumers will be able to reap the benefits of the incumbent LECs' economies of scale and scope, as well as the benefits of competition. Because a pricing methodology based on forward-looking costs simulates the conditions in a competitive marketplace, it allows the requesting carrier to produce efficiently and to compete effectively, which should drive retail prices to their competitive levels. We believe that our adoption of a forward-looking cost-based pricing methodology should facilitate competition on a reasonable and efficient basis by all firms in the industry by establishing prices for interconnection and unbundled elements based on costs similar to those incurred by the incumbents, which may be expected to reduce the regulatory burdens and economic impact of our decision for many parties, including both small entities seeking to enter the local exchange markets and small incumbent LECs.[1685]

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682. We conclude that, under a TELRIC methodology, incumbent LECs' prices for interconnection and unbundled network elements shall recover the forward-look-

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[1685] *See* Regulatory Flexibility Act, 5 U.S.C. §§ 601 *et seq.*

ing costs directly attributable to the specified element, as well as a reasonable allocation of forward-looking common costs. Per-unit costs shall be derived from total costs using reasonably accurate "fill factors" (estimates of the proportion of a facility that will be "filled" with network usage); that is, the per-unit costs associated with a particular element must be derived by dividing the total cost associated with the element by a reasonable projection of the actual total usage of the element. Directly attributable forward-looking costs include the incremental costs of facilities and operations that are dedicated to the element. Such costs typically include the investment costs and expenses related to primary plant used to provide that element. Directly attributable forward-looking costs also include the incremental costs of shared facilities and operations. Those costs shall be attributed to specific elements to the greatest extent possible.[1688] For example, the costs of conduits shared by both transport and local loops, and the costs of central office facilities shared by both local switching and tandem switching, shall be attributed to specific elements in reasonable proportions. More broadly, certain shared costs that have conventionally been treated as common costs (or overheads) shall be attributed directly to the individual elements to the greatest extent possible. The forward-looking costs directly attributable to local loops, for example, shall include not only the cost of the installed copper wire and telephone poles but also the cost of payroll and other back office operations relating to the line technicians, in addition to other attributable costs.

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684. Under the second approach, the cost of interconnection and unbundled network elements would be based on existing network design and technology that are cur-

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[1688] *Compare Telephone Company-Cable Television Cross-Ownership Rules*, CC Docket No. 87-266, Memorandum Opinion and Order on Reconsideration and Third Further Notice of Proposed Rulemaking, 10 FCC Rcd 244, 345-46 (1994).

rently in operation.[1689] Because this approach is not based on a hypothetical network in the short run, incumbent LECs could recover costs based on their existing operations, and prices for interconnection and unbundled elements that reflect inefficient or obsolete network design and technology. This is essentially an embedded cost methodology.

685. Under the third approach, prices for interconnection and access to unbundled elements would be developed from a forward-looking economic cost methodology based on the most efficient technology deployed in the incumbent LEC's current wire center locations. This approach mitigates incumbent LECs' concerns that a forward-looking pricing methodology ignores existing network design, while basing prices on efficient, new technology that is compatible with the existing infrastructure. This benchmark of forward-looking cost and existing network design most closely represents the incremental costs that incumbents actually expect to incur in making network elements available to new entrants. Moreover, this approach encourages facilities-based competition to the extent that new entrants, by designing more efficient network configurations, are able to provide the service at a lower cost than the incumbent LEC. We, therefore, conclude that the forward-looking pricing methodology for interconnection and unbundled network elements should be based on costs that assume that wire centers will be placed at the incumbent LEC's current wire center locations, but that the reconstructed local network will employ the most efficient technology for reasonably foreseeable capacity requirements.

686. We agree with USTA, Bell Atlantic, and BellSouth that, as a theoretical matter, the combination of significant sunk investment, declining technology costs, and competitive entry may increase the depreciation costs

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[1689] *See, e.g.*, BellSouth reply at 37; Roseville Tel. reply at 8; USTA reply at 18-19.

and cost of capital of incumbent LECs. We do not agree, however, that TSLRIC does not or cannot account for risks that an incumbent LEC incurs because it has sunk investments in facilities. On the contrary, properly designed depreciation schedules should account for expected declines in the value of capital goods. Both AT&T and MCI appear to agree with this proposition.[1690] For example, AT&T states, "[i]n order to estimate TSLRIC, one must perform a discounted cash flow analysis of the future costs associated with the decision to invest . . . . One-time costs associated with the acquisition of capital goods are amortized over the economic life of the assets using the user cost of capital . . . , which requires accounting for both expected capital good price changes and economic depreciation." [1691] Moreover, we are confident that parties to an arbitration with TELRIC studies can propose specific depreciation rate adjustments that reflect expected asset values over time.

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690. *Summary of TELRIC Methodology.* The following summarizes our conclusions regarding setting prices of interconnection and access to unbundled network elements based on the TELRIC methodology for such elements. The increment that forms the basis for a TELRIC study shall be the entire quantity of the network element provided. As we have previously stated, all costs associated

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1690 *See* Letter from Leonard S. Sawicki, Director, FCC Affairs, MCI Telecommunications Corp. to William F. Caton, Acting Secretary, FCC, July 24, 1996 at Attachment (Depreciation and Capital Recovery Issues: A Response to Professor Hausman), pp. 1-3; *see also* Letter from Richard N. Clarke, AT&T, to William F. Caton, Acting Secretary, FCC, July 19, 1996 at Attachment (Capital Recovery Issues in TSLRIC Pricing: Response to Professor Jerry A. Hausman).

1691 Letter from Richard N. Clarke, AT&T, to William F. Caton, Acting Secretary, FCC, July 19, 1996 at Attachment (Capital Recovery Issues in TSLRIC Pricing: Response to Professor Jerry A. Hausman), p. 8.

with the providing the element shall be included in the incremental cost. Only forward-looking, incremental costs shall be included in a TELRIC study. Costs must be based on the incumbent LEC's existing wire center locations and most efficient technology available.

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695. The incumbent LECs generally argue that common costs are quite significant,[1607] while several other parties maintain that these amounts are minimal.[1608] Because the unbundled network elements correspond, to a great extent, to discrete network facilities, and have different operating characteristics, we expect that common costs should be smaller than the common costs associated with the long-run incremental cost of a service. We expect that many facility costs that may be common with respect to the individual services provided by the facilities can be directly attributed to the facilities when offered as unbundled network elements. Moreover, defining the network elements at a relatively high level of aggregation, as we have done,[1609] should also reduce the magnitude of the common costs. A properly conducted TELRIC methodology will attribute costs to specific elements to the greatest possible extent, which will reduce the common costs. Nevertheless, there will remain some common costs that must be allocated among network elements and interconnection services. For example, at the sub-element level of study (*e.g.*, identifying the respective costs of 2-wire loops, 4-wire loops, ISDN loops, and so on), common costs may be a significant proportion of all the costs that must be recovered from sub-elements. Given the likely asymmetry of information regarding network costs, we conclude that,

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[1607] *See, e.g.*, PacTel reply at 27-28; *see also* Cincinnati Bell reply at 10; USTA comments at Attachment 1 (Affidavit of Jerry A. Hausman), p.4 n.1.

[1608] *See, e.g.*, Competition Policy Institute comments at 19; MCI comments at 66; Texas Public Utility Counsel comments at 24.

[1609] *See supra*, Section V., discussing unbundling requirements.

in the arbitration process, incumbent LECs shall have the burden to prove the specific nature and magnitude of these forward-looking common costs.

696. We conclude that forward-looking common costs shall be allocated among elements and services in a reasonable manner, consistent with the pro-competitive goals of the 1996 Act. One reasonable allocation method would be to allocate common costs using a fixed allocator, such as a percentage markup over the directly-attributable forward-looking costs. We conclude that a second reasonable allocation method would allocate only a relatively small share of common costs to certain critical network elements, such as the local loop and collocation, that are most difficult for entrants to replicate promptly (*i.e.*, bottleneck facilities). Allocation of common costs on this basis ensures that the prices of network elements that are least likely to be subject to competition are not artificially inflated by a large allocation of common costs. On the other hand, certain other allocation methods would not be reasonable. For example, we conclude that an allocation methodology that relies exclusively on allocating common costs in inverse proportion to the sensitivity of demand for various network elements and services may not be used.[1700] We conclude that such an allocation could unreasonably limit the extent of entry into local exchange markets by allocating more costs to, and thus raising the prices of, the most critical bottleneck inputs, the demand for which tends to be relatively inelastic. Such an alloca-

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[1700] *See* Frank P. Ramsey, *A Contribution to the Theory of Taxation*, 37 Econ. J. 47 (1927); *see generally* Kenneth E. Train, *Optimal Regulation: The Economic Theory of Natural Monopoly* 115-40 (1992) (discussing efficiency properties of Ramsey prices); Bridger M. Mitchell & Ingo Vogelsang, *Telecommunications Pricing: Theory and Practices* 43-61 (1991). The sensitivity of demand is measured by the elasticity of demand, which is defined as the percentage change in the quantity of a service demanded for a one per cent change in price.

tion of these costs would undermine the pro-competitive objectives of the 1996 Act.

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699. *Reasonable Return on Investment and "Profit."* Section 252(d)(1) states that rates for interconnection and access to unbundled elements "may include a reasonable profit."[1703] We find that the TELRIC pricing methodology we are adopting provides for such a reasonable profit and thus no additional profit is justified under the statutory language. We note there are two types of profit. First, in plain English, profit is defined as "the excess of returns over expenditure in a transaction or a series of transactions."[1704] This is also known as a "normal" profit, which is the total revenue required to cover all of the costs of a firm, including its opportunity costs.[1705] Second, there is "economic" profit, which is any return in excess of normal profit.[1706] Thus, for example, if the normal return in an industry is 10 percent and a firm earns a return of 14 percent, the economic profit for that firm is 4 percent. Economic is also referred to as "supranormal" profit. We conclude that the definition of "normal" profit is embodied in "reasonable profit" under Section 252 (d)(1).

700. The concept of normal profit is embodied in forward-looking costs because the forward-looking cost of capital, *i.e.*, the cost of obtaining debt and equity financing, is one of the forward-looking costs of providing the network elements. This forward-looking cost of capital is equal to a normal profit. We conclude that allowing greater than normal profits would not be "reasonable" under sections 251(c) and 252(d)(1).[1707] Thus, contrary

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[1703] 47 U.S.C. § 252(d)(1).

[1704] *Webster's New Collegiate Dictionary* 931 (10th ed. 1994).

[1705] *See* David W. Pearce, *The MIT Dictionary of Modern Economics* (1994) at 310.

[1706] *Id.* at 415.

[1707] We note that our interpretation is consistent with existing Supreme Court precedent concerning what constitutes a reasonable

to the arguments put forth by several incumbent LECs, we find that adding an additional measure of profit to the risk-adjusted cost of capital [1708] in setting the prices for interconnection and access to unbundled elements would violate the requirements of sections 251(c) and 252 (d)(1) of the 1996 Act.

701. Possible accounting losses from the sale of interconnection and unbundled network elements using a reasonable forward-looking cost-based methodology do not neces-

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rate of return for a regulated public utility. For example, in *Bluefield Water Works*, the Court stated:

> A public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties; but it has no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures.

Bluefield Water Works & Improvement Co. v. Public Service Comm'n of West Virginia, 262 U.S. 679, 692-93 (1923). Similarly, in *FPC v. Hope Natural Gas*, the Court stated:

> . . . it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business. These include service on the debt and dividends on the stock . . . By that standard the return to the equity owner should be commensurate with risks on investments in other enterprises having corresponding risks. That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital.

Federal Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591, 603 (1994) (*Hope Natural Gas*). *Cf.*, Charles F. Phillips, Jr., *The Economics of Regulation* 260 (Rev. ed. 1965) (". . . a regulated company must be afforded the opportunity not only of assuring its financial integrity so that it can maintain its credit standing and attract additional capital as needed, but also for earnings comparable to those of other companies having corresponding risks.").

[1708] *See supra*, this Section, for a discussion of risk-adjusted cost of capital.

sarily indicate that incumbent LECs are being denied a "reasonable profit" under the statute. The use of a forward-looking, economic, cost-based pricing methodology, including a reasonable allocation of legitimate joint and common costs, will permit incumbent LECs the opportunity to earn a reasonable return on their investment in network elements. Finally, contrary to PacTel's argument, and as discussed below in detail, we conclude that our forward-looking cost-based pricing methodology is consistent with the Fifth Amendment and is not confiscatory.

702. Based on the current record, we conclude that the currently authorized rate of return at the federal or state level is a reasonable starting point for TELRIC calculations, and incumbent LECs bear the burden of demonstrating with specificity that the business risks that they face in providing unbundled network elements and interconnection services would justify a different risk-adjusted cost of capital or depreciation rate. These elements generally are bottleneck, monopoly services that do not now face significant competition. We recognize that incumbent LECs are likely to face increased risks given the overall increases in competition in this industry, which generally might warrant an increased cost of capital, but note that, earlier this year, we instituted a preliminary inquiry as to whether the currently authorized federal 11.25 percent rate of return is too high given the current marketplace cost of equity and debt.[1709] On the basis of the current record, we decline to engage in a time-consuming examination to determine a new rate of return, which may well require a detailed proceeding. States may adjust the cost of capital if the party demonstrates to a state commission that either a higher or lower level of cost of capital is warranted, without that commission conducting a "rate-of-return or other rate based proceeding."[1710] We note that the risk-

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[1709] *See Common Carrier Bureau Sets Pleading Schedule in Preliminary Rate of Return Inquiry*, Public Notice, 11 FCC Rcd 3651 (Com. Car. Bur. 1996).

[1710] 47 U.S.C. § 252(d)(1)(A)(i).

adjusted cost of capital need not be uniform for all elements. We intend to re-examine the issue of the appropriate risk-adjusted cost of capital on an ongoing basis, particularly in light of the state commissions' experiences in addressing this issue in specific situations.

703. We disagree with the conclusion that, when there are mostly sunk costs, forward-looking economic costs should not be the basis for pricing interconnection elements. The TELRIC of an element has three components, the operating expenses, the depreciation cost,[1711] and the appropriate risk-adjusted cost of capital. We conclude that an appropriate calculation of TELRIC will include a depreciation rate that reflects the true changes in economic value of an asset and a cost of capital that appropriately reflects the risks incurred by an investor. Thus, even in the presence of sunk costs, TELRIC-based prices are an appropriate pricing methodology.

(b) Cost Measures Not Included in Forward-Looking Cost Methodology

704. *Embeded Costs.* We read section 252(d)(1)(A)(i) to prohibit states from conducting traditional rate-of-return or other rate-based proceedings to determine rates for interconnection and access to unbundled network elements. We find that the parenthetical, "(determined without reference to a rate-of-return or other rate-based proceeding)," [1712] does not further define the type of costs that may be considered, but rather specifies a type of proceeding that may not be employed to determine the cost of interconnection and unbundled network elements. The legislative history demonstrates that Congress was eager to set in motion expeditiously the development of local com-

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[1711] Depreciation is the method of recognizing as an expense the cost of a capital investment. Properly calculated economic depreciation is a periodic reduction in the book value of an asset that makes the book value equal to its economic or market value.

[1712] 47 U.S.C. § 252(d)(1)(A)(i).

petition and intended to avoid imposing the costs and administrative burdens associated with a traditional rate case. Prior to the joint conference, the Senate version of the 1996 Act contained the parenthetical language.[1713] In addition, the Senate version of the 1996 Act eliminated rate-of-return regulation,[1714] as did the House version.[1715] Conferees removed the provisions eliminating rate-of-return regulation, but retained the parenthetical.

705. Section 252(d)(1)(A)(i) does not specify whether historical or embedded costs should be considered or whether only forward-looking costs should be considered in setting arbitrated rates. We are not persuaded by incumbent LEC arguments that prices for interconnection and unbundled network elements must or should include any difference between the embedded costs they have incurred to provide those elements and their current economic costs. Neither a methodology that establishes the prices for interconnection and access to network elements directly on the costs reflected in the regulated books of account, nor a price based on forward looking costs plus an additional amount reflecting embedded costs, would be

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[1713] S. 652, 104th Cong., 1st Sess. § 251(d)(6)(A) (1995) ("the charge (A) shall be (i) based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the unbundled element . . . .").

[1714] *Id.* at § 301(a)(3) ("Rate of Return Regulation Eliminated—(A) In instituting the price flexibility required under paragraph (1) the Commission and the States shall establish alternative forms of regulation for Tier 1 telecommunications carriers that do not include regulation of the rate of return earned by such carrier . . . .").

[1715] H.R. 1555, 104th Cong., 1st Sess. § 248(b) (1995) ("Abolition of Rate-of-Return Regulation—Notwithstanding any other provision of law, to the extent that a carrier has complied with sections 242 and 244 of this part, the Commission, with respect to rates for interstate or foreign communications, and State commissions, with respect to rates for intrastate communications, shall not require rate-of-return regulation.").

consistent with the approach we are adopting. The substantial weight of economic commentary in the record suggests that an "embedded cost"-based pricing methodology would be pro-competitor—in this case the incumbent LEC—rather than pro-competition.[1716] We therefore decline to adopt embedded costs as the appropriate basis of setting prices for interconnection and access to unbundled elements. Rather, we reiterate that the prices for the interconnection and network elements critical to the development of a competitive local exchange should be based on the pro-competition, forward-looking, economic costs of those elements, which may be higher or lower than historical embedded costs. Such pricing policies will best ensure the efficient investment decisions and competitive entry contemplated by the 1996 Act, which should minimize the regulatory burdens and economic impact of our decisions on small entities.[1717]

706. Incumbent LECs contend generally that, in order to ensure they will recover their total investment costs and earn a profit, they must recover embedded costs. These costs, they argue, were incurred under federal and regulatory oversight and therefore should be recoverable.[1718] We are not convinced by the incumbent LECs' principal arguments for recognizing embedded cost in setting section 251 pricing rules. Even if the incumbent LECs' contention is correct, increasing the rates for interconnection and unbun-

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[1716] *See, e.g.*, Ad Hoc Telecommunications Users' Committee reply at Appendix A (Interconnection Pricing Standards for Monopoly Rate Elements in a Potentially Competitive Local Telecommunications Market), p.4; ALTS comments at Attachment B (Competitive Pricing of Interconnection, Unbundled Elements, and Collocation), pp. 28-29; AT&T reply at Appendix B (Reply Affidavit of William J. Baumol, Janusz A. Ordover, and Robert D. Willig), pp. 3-5; Competition Policy Institute comments at 18-19; DJ comments at 30-31.

[1717] *See* Regulatory Flexibility Act, 5 U.S.C. §§ 601 *et seq.*

[1718] *See, e.g.*, Ameritech reply at 31; BellSouth comments at 57; Lincoln Tel. comments at 16-17.

dled elements offered to competitors would interfere with the development of efficient competition, and is not the proper remedy for any past under-depreciation. Moreover, contrary to assertions by some incumbent LECs, regulation does not and should not guarantee full recovery of their embedded costs. Such a guarantee would exceed the assurances that we or the states have provided in the past.[1719] We have considered the economic impact of precluding recovery of small incumbent LECs' embedded costs.[1720] We do not believe that basing the prices of interconnection and unbundled elements on an incumbent LEC's embedded costs would advance the pro-competitive goals of the statute. We also note that certain small incumbent LECs are not subject to our rules under section 251(f)(1) of the 1996 Act, unless otherwise determined by a state commission, and certain other small incumbent LECs may seek relief from their state commissions from our rules under section 251(f)(2) of the 1996 Act.[1721]

707. We acknowledge that some incumbent LECs may have incurred certain embedded costs reasonably before the passage of the 1996 Act, based on different regulatory regimes. Some incumbent LECs may assert that they have made certain historical investments required by regulators that they have been denied a reasonable opportunity to recover in the past and that the incumbent LECs may no longer have a reasonable opportunity to recover in the new environment of the 1996 Act. The record before us, however, does not support the conclusion that significant residual embedded costs will necessarily result from the availability of network elements at economic costs. To the extent that any such residual consists of costs of meeting universal service obligations, the recovery of such costs can and should be considered in our ongoing universal service

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[1719] *See In the Matter of the Applications of Pacific Bell*, Order and Authorization, 10 FCC Rcd 12448, 12502-12503 (1995).

[1720] *See* Regulatory Flexibility Act, 5 U.S.C. §§ 601 *et seq.*

[1721] 47 U.S.C. § 251(f).

proceeding.[1722] To the extent a significant residual exists within the interstate jurisdiction that does not fall within the ambit of section 254, we intend that to address that issue in our upcoming proceeding on access reform.

708. *Opportunity Cost—Efficient Component Pricing Rule.* A number of incumbent LECs advocate using the "efficient component pricing rule" (ECPR) to set the prices that incumbent LECs charge new entrants for inputs required to produce the same retail services the incumbent produces. Under the ECPR, the price of an input should be equal to the incremental cost of the input plus the opportunity cost that the incumbent carrier incurs when the new entrant provides the services instead of the incumbent. The opportunity cost, which is computed as revenues less all incremental costs, represents both profit and contribution to common costs of the incumbent, given the existing retail prices of the services being sold.

709. We conclude that ECPR is an improper method for setting prices of interconnection and unbundled network elements because the existing retail prices that would be used to compute incremental opportunity costs under ECPR are not cost-based. Moreover, the ECPR does not provide any mechanism for moving prices towards competitive levels; it simply takes prices as given. The record indicates that both incumbents and new entrants agree that retail prices are not based on costs. Incumbents generally argue that local residential retail prices are below costs while new entrants contend that they exceed competitive levels.[1723] In either case, application of ECPR would result in input prices that would be either higher or lower than those which would be generated in a competitive market and would not lead to efficient retail pricing.

710. In markets where retail prices exceed competitive levels, entry would take place if network element prices

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[1722] *See Universal Service* NPRM at para. 32.

[1723] *See, e.g.*, Ameritech comments at 62.

were set at efficient competitive levels. The ECPR, however, will serve to discourage competition in these very markets because it relies on the prevailing retail price in setting the price which new entrants pay the incumbent for inputs. While ECPR establishes conditions for efficient entry given existing retail prices, as its advocates contend, the ECPR provides no mechanism that will force retail prices to their competitive levels. We do not believe that Congress envisioned a pricing methodology for interconnection and network elements that would insulate incumbent LECs' retail prices from competition. Instead, Congress specifically determined that input prices should be based on costs because this would foster competition in the retail market. Therefore, we reject the use of ECPR for establishing prices for interconnection and unbundled elements.

711. As discussed above, the record in this docket shows that end user prices are not cost-based. In *Open Video Systems,* in contrast, we did not find that there would be a problem with the determination of end user prices.[1724] We concluded that "[u]se of [an ECPR] approach is appropriate in circumstances where the pricing is applicable [sic] to a new market entrant (the open video system operator) that will face competition from an existing incumbent provider (the incumbent cable operator) as opposed to circumstances where the pricing is used to establish a rate for an essential input service that is charged to a competing new entrant by an incumbent provider."[1725] In addition, in *Open Video Systems,* we concluded that the ECPR is appropriate because it encourages entry for open video system operators and also enhances the availability of carriage for unaffiliated programmers.[1726] The

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[1724] *Implementation of Section 302 of the Telecommunications Act of 1996—Open Video Systems,* CS Docket No. 96-46, Second Report and Order, FCC 96-249 (rel. June 3, 1996) (*Open Video Systems*).

[1725] *Id.* at 127.

[1726] *Id.*

ECPR generally protects the provider's profits and provides opportunities for third parties to use the provider's inputs. The ECPR does not provide a mechanism to drive retail prices to competitive levels, however. In *Open Video Systems,* we wanted to encourage entry by open video system providers and to encourage them to have incentives to open their systems to unaffiliated programmers. Here, our goal is to ensure that competition between providers, including third party providers using interconnection and unbundled elements, will drive prices toward competitive levels and thus use of the ECPR is inappropriate.

712. *Universal Service Subsidies.* We conclude that funding for any universal service mechanisms adopted in the universal service proceeding may not be included in the rates for interconnection, network elements, and access to network elements that are arbitrated by the states under sections 251 and 252. Sections 254(d) and 254(e) of the 1996 Act mandate that universal service support be recovered in an equitable and nondiscriminatory manner from all providers of telecommunications services.[1727] We conclude that permitting states to include such costs in rates arbitrated under sections 251 and 252 would violate that requirement by requiring carriers to pay specified portions of such costs solely because they are purchasing services and elements under section 251. Section 252 (d)(1) requires that rates for interconnection, network elements, and access to network elements reflect the costs of providing those network elements, not the costs of supporting universal service.

713. Section 254(f) provides that a state may adopt equitable, nondiscriminatory, specific, and predictable mechanisms to advance universal service within that

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[1727] Joint Explanatory Statement at 131 ("In keeping with the conferees' intent that universal service support should be clearly identified, [section 254(e)] states that such support should be made explicit . . .").

state.[1728] If a state collects universal service funding in rates for elements and services pursuant to sections 251 and 252, it will be imposing non-cost based charges in those rates. Including non-cost based charges in the rates for interconnection and unbundled elements is inconsistent with our rules implementing sections 251 and 252 which require that these rates be cost-based. It is also inconsistent with the requirement of section 254(f) that telecommunications carriers contribute to state universal service on a nondiscriminatory basis, because telecommunications carriers requesting interconnection or access to unbundled network elements will be required to make contributions to universal service support through such surcharges.[1729] States may not, therefore, include universal service support funding in the rates for elements and services pursuant to sections 251 and 252, nor may they implement mechanisms that have the same effect. For example, states may not fund universal service support by imposing higher rates for interconnection, unbundled elements, or transport and termination on carriers that offer service to different types of customers or different geographic areas. To the extent that New York's "pay or play" system funds universal service in this manner, it violates sections 251, 252, and 254 of the 1996 Act. Nothing in the 1996 Act or in this Order, however, precludes a state from adopting a universal service funding mechanism, whether interim or otherwise, if such funds are collected in accordance with section 254(f) on an "equitable and nondiscriminatory basis" through "specific, predictable, and sufficient mechanisms that do not rely on or burden Federal universal service support mechanisms." [1730]

714. Our decision here does not exempt carriers purchasing elements or services under section 251 from con-

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[1728] 47 U.S.C. § 254(f).

[1729] *See infra*, Section VII.D.3, discussing discrimination.

[1730] 47 U.S.C. § 254(f).

tributing to (or possibly receiving) universal service support. Rather, the recovery of universal service support costs from telecommunications carriers, including carriers requesting unbundled network elements, will be governed by section 254 of the 1996 Act. Federal universal service support mechanisms will be determined by our decisions reached in CC Docket 96-45, based on the recommendations of the Federal/State Universal Service Joint Board, and states may adopt additional universal service support mechanisms consistent with section 254(f).

715. We are mindful that the requirements of the 1996 Act may be disruptive to existing state universal service support mechanisms during the period commencing with this order continuing until we complete our universal service proceeding to implement section 254. As discussed in the subsection immediately below, we permit incumbent LECs to continue to recover certain non-cost-based interstate access charge revenues for a limited period of time, largely because of concerns about possible deleterious impacts on universal service. We also authorize incumbent LECs, for a similar limited period of time, to continue to recover explicit intrastate universal service subsidy revenues based on intrastate access charges. This mechanism minimizes any possibility that implementation of sections 251 and 252 will unduly harm universal service during the interim period prior to completion of our universal service and access reform proceedings. Because we conclude this action should adequately provide for the continuation of a portion of existing subsidy flows during a transition period until completion of our proceeding implementing section 254, we decline to permit any additional funding of universal service support through rates for interconnection, unbundled elements, and transport and termination during the interim period.

716. *Interim Application of Access Charges to Purchasers of Unbundled Local Switching Element.* In the introduction of this Order, we emphasize that implementa-

tion of section 251 of the 1996 Act is integrally related to both universal service reform as required under section 254, and to reform of the interstate access charge system.[1731] In order to achieve pro-competitive, deregulatory markets for all telecommunications services, we must create a new system of funding universal service that is specific, explicit, predictable, sufficient, and competitively neutral. We also must move access charges to more cost-based and economically efficient levels. We intend to fulfill both of these goals in the coming months, by completing our pending universal service proceeding to implement section 254 by our statutory deadline of May 1997, and by addressing access charge issues in an upcoming access reform proceeding. The 1996 Act, however, requires us to adopt rules implementing section 251 by August 1996. We are concerned that implementation of the requirements of section 251 now, without taking into account the effects of the new rules on our existing access charge and universal service regimes, may have significant, immediate, adverse effects that were neither intended nor foreseen by Congress.

717. Specifically, as we conclude above, the 1996 Act permits telecommunications carriers that purchase access to unbundled network elements from incumbent LECs to use those elements to provide telecommunications services, including the origination and termination of interstate calls. Without further action on our part, section 251 would allow entrants to use those unbundled network facilities to provide access services to customers they win from incumbent LECs, without having to pay access charges to the incumbent LECs. This result would be consistent with the long term outcome in a competitive market. In the short term, however, while other aspects of our regulatory regime are in the process of being reformed, such a change may have detrimental consequences.

[1731] *See supra*, Section I.B.

718. The access charge system includes non-cost-based components and elements that at least in part may represent subsidies, such as the carrier common line charge (CCLC) and the transport interconnection charge (TIC). The CCLC recovers part of the allocated interstate costs for incumbent LECs to provide local loops to end users. In the universal service NPRM, we observed that the CCLC may result in higher-volume toll users paying rates that exceed cost, and some customers paying rates that are below cost. We sought comment on whether that subsidy should be continued, and on whether and how it should be restructured.[1732] The nature of much of the revenues recovered through the TIC is unclear and subject to dispute, although a portion of the TIC is associated with certain costs related to particular transport facilities. Although the TIC was not created to subsidize local rates, some parties have argued in the *Transport* proceeding and elsewhere that some portion of the revenues now recovered through the TIC may be misallocated local loop or intrastate costs that operate to support universal service.[1733] In the forthcoming access reform proceeding, we intend to consider the appropriate disposition of the TIC, including the development of cost-based transport rates as directed by the United States Court of Appeals for the District of Columbia Circuit in *Competitive Telecommunications Association v. FCC* (*CompTel v. FCC*).[1734]

[1732] *Universal Service* NPRM at paras. 113-14.

[1733] *Transport Rate Structure and Pricing*, CC Docket No. 91-213, Report and Order and Further Notice of Proposed Rulemaking, 7 FCC Rcd 7006, 7065-7066 (1992) (*First Transport Order*). *Cf.* Letter from Bruce K. Cox, Government Affairs Director, AT&T, to William F. Caton, Acting Secretary, FCC, September 7, 1995 (filed in CC Docket No. 91-213) (suggesting that TIC revenues not allocable to specific transport facilities may represent misallocated common line costs).

[1734] *Competitive Telecommunications Association v. FCC*, No. 96-1168 (D.C. Cir. July 5, 1996).

719. Without a temporary mechanism such as the one we adopt below, the implementation of section 251 would permit competitive local service providers that also provide interstate long-distance service to avoid totally the CCLC and the TIC, which in part represent contributions toward universal service, by serving their local customers solely through the use of unbundled network elements rather than through resale. We believe that allowing such a result before we have reformed our universal service and access charge regimes would be undesirable as a matter of both economics and policy, because carrier decisions about how to interconnect with incumbent LECs would be driven by regulatory distortions in our access charge rules and our universal service scheme, rather than the unfettered operation of a competitive market. Because of our desire to err on the side of caution where universal service may be implicated, we conclude that some action is needed during the interim period before we complete our access reform and universal service proceedings.

720. We conclude that we should establish a temporary mechanism to help complete all of the steps toward the pro-competitive goal of the 1996 Act, including the implementation of a new, competitively-neutral system to fund universal service and a comprehensive review of our system of interstate access charges. Therefore, for a limited period of time, incumbent LECs may recover from interconnecting carriers the CCLC and a charge equal to 75 percent of the TIC for all interstate minutes traversing the incumbent LECs' local switches for which the interconnecting carriers pay unbundled local switching element charges. Incumbent LECs may recover these charges only until the earliest of: (1) June 30, 1997; (2) the effective date of final decisions by the Commission in both the universal service and access reform proceedings; or (3) if the incumbent LEC is a BOC, the date on which that BOC is authorized under section 271 of the 1996 Act to offer in-region interLATA service. The end date for

BOCs that are authorized to offer interLATA service shall apply only to the recovery of access charges in those states in which the BOC is authorized to offer such service.

721. We tentatively concluded in the NPRM that purchasers of unbundled network elements should not be required to pay access charges. We reaffirm our conclusion above in our discussion of unbundled network elements that nothing on the face of sections 251(c)(3) and 252(d)(1) compels telecommunications carriers that use unbundled elements to pay these charges, nor limits these carriers' ability to use unbundled elements to originate or terminate interstate calls, and that payment of rates based on TELRIC plus a reasonable allocation of common costs, pursuant to section 251(d)(1), represents full compensation to the incumbent LEC for use of the network elements that telecommunications carriers purchase. Because of the unique situation described in the preceding paragraphs, however, we conclude, contrary to our proposal in the NPRM, that during a time-limited period, interconnecting carriers should not be able to use unbundled elements to avoid access charges in all cases. As detailed below, this temporary mechanism will apply only to carriers that purchase the local switch as an unbundled network element, and use that element to originate or terminate interstate traffic.[1785] We are applying these transitional charges to the unbundled local switching element, rather than to any other network elements, because such an approach is most closely analogous to the manner in which the CCLC and TIC are recovered in the interstate access regime. Currently, the CCLC and TIC apply to interstate switched access minutes that traverse incumbent LECs' local switches. Applying the CCLC and

[1785] As discussed *infra*, carriers that choose to enter a local market through resale of an incumbent LEC's intrastate local exchange service will pay interstate and intrastate access charges to originate and terminate toll traffic for end user customers that purchase that resold local exchange service.

75 percent of the TIC to the unbundled local switching element is consistent with our goal of minimizing disruptions while we reform our universal service system and consider changes to our access charge mechanisms. Moreover, the CCLC and the TIC are recovered on a per-minute basis, and the local switch is the primary point at which incumbent LECs are capable of recording interstate minutes for traffic associated with end user customers of requesting carriers.

722. We have crafted this short-term continuation of certain access charge revenue flows to minimize the possibility that incumbent LECs will be able to "double recover" through access charges the facility costs that new entrants have already paid to purchase unbundled elements. For that reason, we do not permit incumbent LECs to assess on purchasers of the unbundled local switching element any interstate access charges other than the CCLC and 75 percent of the TIC. The other access charges are all designed to recover the cost of particular facilities involved in the provision of interstate access services, such as local switching, dedicated interoffice transport circuits, and tandem switching. Imposition of these facility-based access charges in addition to the cost-based charges for comparable network elements established under Section 252 could result in double recovery. The mechanism we establish will ensure that incentives created by non-cost-based elements of access charges do not result in harmful consequences prior to completion of access reform and our universal service proceeding. Imposition of additional access charges is therefore not necessary. We note that this mechanism serves to minimize the potentially disruptive effects of our decisions on incumbent LECs, including small incumbent LECs.[1736]

723. For the same reason, we permit incumbent LECs to recover only 75 percent of the TIC. Some portion of

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[1736] *See* Regulatory Flexibility Act, 5 U.S.C. §§ 601 *et seq.*

the TIC recovers revenues associated with specific transport facilities. To the extent that these costs can be identified clearly, they should not be imposed on new entrants through the TIC. Incumbent LECs will be fully compensated for any transport facilities that new entrants purchase from them through the unbundled element rates states establish under 252(d)(1), which, as we have stated, must be based on economic cost rather than access charges. In our interim transport rate restructuring, we explicitly set the initial tandem switching rate at 20 percent of the interstate revenue requirement, with the remainder included in the TIC.[1737] In addition, certain costs of upgrading incumbent LEC networks to support SS7 signaling were allocated to transport through then-existing separations procedures. In our interim transport rate restructuring, we did not create any facility-based charges to recover these costs,[1738] so the associated revenues presumably were incorporated into the TIC. There may also be other revenues associated with transport facilities that are recovered today through the TIC. While we are uncertain of the precise magnitude of these revenues, in our best judgment, based on the record in the *Transport* proceeding and other information before us, we find that it is likely that these revenues approach, but probably do not exceed 25 percent of the TIC for most incumbent LECs. Thus, we believe that 25 percent is a conservative amount to exclude from the TIC to ensure that incumbent LECs do not double recover revenues associated with transport facilities from new entrants. Moreover, the Court in *CompTel v. FCC* remanded our *Transport* decision, in part, because of the inclusion of tandem switching revenues in the TIC rather than in the rate element for tandem switching. We find that excluding 25 percent of the TIC represents a reasonable exercise of our discretion to prevent revenues associated with the tandem

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[1737] *First Transport Order*, 7 FCC Rcd at 7019.

[1738] *First Transport Order*, 7 FCC Rcd at 7019.

switching revenue requirement from being recovered from purchasers or unbundled local switching.

724. We strongly emphasize that these charges will apply to purchasers of the unbundled switching element only for a very limited period, to avoid the possible harms that might arise if we were to ignore the effects on access charges and universal service of implementation of section 251. BOCs shall not be permitted to recover these revenues once they are authorized to offer in-region interLATA service, because at that time the potential loss of access charge revenues faced by a BOC most likely will be able to be offset by new revenues from interLATA services. Moreover, although we do not prejudge the conditions necessary to grant BOC petitions under section 271 to offer in-region interLATA service, we do decide that BOCs should not be able to charge the CCLC and the TIC, which are not based on forward-looking economic costs, to competitors that use unbundled elements under section 251 once they are authorized to provide in-region interLATA service. Only BOCs are subject to special restrictions in the 1996 Act to ensure that their entry into the in-region interLATA market does not have an adverse impact on competition. We conclude that this additional trigger date after which BOCs may not continue to receive access charges from purchasers of unbundled local switching is consistent with this Congressional design.

725. We have selected June 30, 1997 as an ultimate end date for this transitional mechanism to coincide with the effective date for LEC annual access tariffs, and because we believe it is imperative that this transitional requirement be limited in duration. We can conceive of no circumstances under which the requirement that certain entrants pay the CCLC or a portion of the TIC on calls carried over unbundled network elements would be extended further. The fact that access or universal service reform have not been completed by that date would not

be a sufficient justification, nor would any actual or asserted harm to the financial status of the incumbent LECs. By June 30, 1997, the industry will have had sufficient time to plan for and adjust to potential revenue shifts that may result from competitive entry. Thus, the economic impact of our decision on competitive local service providers, including those that are small entities, should be minimized.[1739]

726. We believe that we have ample legal authority to implement this temporary transitional measure, and we find that this approach is consistent with the letter and spirit of the 1996 Act. We recognize that the CCLC and TIC have not been developed in accordance with the pricing standards of section 252(d)(1), and that to comply with the 1996 Act, the rates that states establish for interconnection and unbundled network elements may not include non-cost-based amounts or subsidies. The 1934 and 1996 Acts do, however, give us legal authority to determine, for policy reasons, that users of LEC facilities should pay certain access charges for a period of time.[1740] Section 4(i) of the 1934 Act authorizes the Commission to "perform any and all acts . . . not inconsistent with this Act, as may be necessary in the execution of its functions."[1741] Given the extraordinary upheaval in the industry's structure set in motion by the 1996 Act, and the specific concerns described above, we believe that a temporary mechanism is necessary in order to ensure that the policy goals underlying the access charge system and the Communications Act itself are not undermined. Further, we believe section 251(g) of the 1996 Act lends support to our decision. As discussed above, section 251(g)

[1739] *See* Regulatory Flexibility Act, 5 U.S.C. §§ 601 *et seq.*

[1740] *See, e.g., New England Tel. and Tel. Co. v. FCC*, 826 F.2d 1101 (D.C. Cir. 1987); *North American Telecommunications Association v. FCC*, 772 F.2d 1282 (7th Cir. 1985); *Lincoln Tel. and Tel. Co. v. FCC*, 659 F.2d 1092 (D.C. Cir. 1981).

[1741] 47 U.S.C. § 4(i).

does not require that incumbent LECs continue to receive access charge revenues when telecommunications carriers use unbundled incumbent LEC network elements to originate and terminate interstate traffic. That section does, however, provide evidence of Congressional recognition of the potential tension between existing interconnection obligations, such as access charges, and the new methods of interconnection mandated by section 251, and therefore supports our decision to create a limited-duration mechanism to address this tension.

727. The decision of the court in *CompTel v. FCC* to remand our decision to adopt the TIC is not inconsistent with this approach. The Court's concern stemmed, in part, from the inclusion of a portion of the interstate tandem switching revenue requirement in the TIC. We have excluded from the charges that purchasers of unbundled local switching must pay a percentage of the TIC that, at a minimum, includes these allocated tandem switching revenues from the transitional charges that incumbent LECs may assess on IXCs.[1742] Furthermore, the Court directed the Commission to develop a cost-based transport rate structure, or to explain why it chose not to do so.[1743] We intend to fulfill this obligation in the forthcoming access reform proceeding. The charge equal to 75 percent of the TIC will be applied only as an interim measure for a brief, clearly-identified period, until that restrucuring of access charges is completed. The court expressly acknowledged that the 1996 Act would have implications for the access charge system.[1744] For the rea-

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[1742] As discussed above, we estimate that the tandem switching, SS7, and other costs associated with transport facilities now recovered through the TIC likely do not exceed 25% of the TIC for most incumbent LECs.

[1743] *Competitive Telecommunications Association v. FCC*, No. 96-1168 at 26-27.

[1744] *Id.* at 12-13.

sons described above, we conclude that these effects necessitate temporary application of a portion of the TIC to entrants that win end user customers from LECs, and that puchase the local switch as an unbundled element to originate and terminate interstate and intrastate toll traffic for such end users. In the access reform proceeding, we intend to determine the appropriate disposition for these revenues. Until we have had the opportunity to do so, however, we permit incumbent LECs to recover a transitional charge equal to 75 percent of the TIC under the limited circumstances described herein.

728. The interim mechanism we establish here differs from the waiver relief we have previously granted to NYNEX and Ameritech to permit them to recover certain interstate access charge revenues through "bulk billing" of revenues to all interstate switched access customers.[1748] Those orders responded to waiver requests filed prior to the passage of the 1996 Act. Our responsibility in those proceedings was to determine whether special circumstances existed, and whether the specific relief requested better served the public interest than continued application of our general rules. By contrast, the action we take today addresses industry-wide issues that arise from the new regime put into place by section 251 of the 1996 Act, which allows states to establish unbundled network element rates that recover the full unseparated cost of elements. Our response to the Ameritech and NYNEX waiver petitions does not, simply because those petitions also concerned access charge recovery, constrain our decision in this proceeding.

[1748] *See The NYNEX Tel. Cos. Petition for Waiver, Transition Plan to Preserve Universal Service in a Competitive Environment*, Memorandum Opinion and Order, 10 FCC Rcd 7445 (1995), *reconsideration pending* (*NYNEX USPP Order*); *Ameritech Operating Companies Petition for a Declaratory Ruling and Related Waivers to Establish a New Regulatory Model for the Ameritech Region*, Order, FCC 96-58 (released Feb. 15, 1996) (*Ameritech Customers First Order*).

729. It would be unreasonable to provide such a transitional mechanism on the federal level, but to deny similar authority to the states. Therefore, states may continue existing explicit universal service support mechanisms based on intrastate access charges for an interim period of a similar brief, clearly-defined length. During that period, unless decided otherwise by the state, incumbent LECs may continue to recover such revenues from purchasers of unbundled local switching elements that use those elements to originate or terminate intrastate toll calls for end user customers they win from incumbent LECs. States may terminate these mechanisms at any time. We define mechanisms based on intrastate access charges as those mechanisms that require purchasers of intrastate access services from incumbent LECs to pay non-cost-based charges for those access services on the basis of their intrastate access minutes of use.

730. We do not intend, however, that such a transitional mechanism eviscerate the requirements of sections 252 and 254, which, as we have stated, prohibit funding of universal service subsidies through rates for interconnection and unbundled network elements. Mechanisms such as New York's "pay or play" system, which would impose intrastate access charges on non-access services rather than allowing incumbent LECs to recover non-cost-based revenues from purchasers of access services, may not be included in this interim system. Such a result is justified because state "pay or play" mechanisms do not at present constitute a significant revenue stream to incumbent LECs, and therefore elimination of this mechanism is unlikely, in the short term, to have significant detrimental effects on universal service support.

731. These state mechanisms must end on the earlier of: (1) June 30, 1997; or (2) if the incumbent LEC that receives the transitional access charge revenues is a BOC, the date on which that BOC is authorized under

section 271 of the 1996 Act to offer in-region interLATA service. With one exception, the analysis provided above as to the rationale for the end dates for the transitional interstate access charge mechanism applies here as well. Because our access reform proceeding focuses on federal charges, and because the full extent of the section 254 universal service mechanism remains to be determined in that proceeding, intrastate access charge-based universal service support mechanisms should not now be required to terminate upon the completion of those proceedings.

732. As with our decision to permit incumbent LECs to continue to receive certain interstate access charge revenues from some purchasers of unbundled local switching for a limited period of time, we believe our decision to allow states to preserve certain intrastate universal service support mechanisms based on access charges is within our authority under section 251(d)(1) of the 1996 Act, and section 4(i) of the 1934 Act. Moreover, although section 251(g) does not directly refer to intrastate access charge mechanisms, it would be incongruous to conclude that Congress was concerned about the effects of potential disruption to the interstate access charge system, but had no such concerns about the effects on analogous intrastate mechanisms.

(c) Fifth Amendment Issues

733. We conclude that our decision that prices for incumbent LECs' unbundled elements and interconnection offerings be based on forward-looking economic cost does not violate the incumbent LECs' rights under the Fifth Amendment of the Constituton. The Supreme Court has recognized that public utilities owned and operated by private investors, even though their assets are employed in the public interest to provide consumers with service, may assert their rights under the Takings Clause of the

Fifth Amendment.[1746] In applying the Takings Clause to rate setting for public utilities, the Court has stated that "[t]he guiding principle has been that the Constitution protects utilities from being limited to a charge for their property serving the public which is so 'unjust' as to be confiscatory." [1747]

734. The Supreme Court has held that the determination of whether a rate is confiscatory depends on whether that rate is just and reasonable, and not on what methodology is used.[1748] In *Federal Power Comm'n v. Hope Natural Gas Co.*, the Court upheld the Federal Power Commission's order that required the company to make a large reduction in wholesale gas rates. The commission based its determination of a reasonable rate of return on a plant valuation determined by using a historical cost methodology that was only half as large as the company's own valuation based on forward-looking reproduction costs. In its decision, the Court set forth the governing legal standard for determining whether a rate is constitutional:

> Under the statutory standard of "just and reasonable" it is the result reached not the method employed that is controlling. It is not the theory but the impact of the rate order which counts. If the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry under the Act is at an

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[1746] The Fifth Amendment provides that, "private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V. *See Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307 (1989) (*Duquesne*).

[1747] *Duquesne*, 488 U.S. at 307 (*citing Covington & Lexington Turnpike Road Co. v. Sandford*, 164 U.S. 578, 597 (1896)).

[1748] *Hope Natural Gas*, 320 U.S. at 602-603; *see also Duquesne; In re Permian Basin Area Rate Cases*, 390 U.S. 747 (1968); *Federal Power Commission v. Memphis Light, Gas & Water Division*, 411 U.S. 458 (1973); *Jersey Central Power & Light v. FERC*, 810 F.2d 1168 (D.C. Cir. 1987).

> end. The fact that the method employed to reach that result may contain infirmities is not then important.[1749]

735. The Court went on to explain that, in determining whether a rate is reasonable, the regulatory body must balance the interests of both the investor and consumer.[1750] "From the investor or company point of view, it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business. . . . [T]he return on the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks." [1751]

736. Under sections 251(c)(2) and (3) of the 1996 Act, incumbent LECs must establish rates for interconnection and unbundled elements that are just and reasonable.[1752] In adopting the rules that govern those rates, under *Hope Natural Gas* we must consider whether the end result of incumbent LEC rates is just and reasonable. Incumbent LECs argue that establishing a rate structure that does not permit recovery of historical or embedded costs is confiscatory. We disagree. As stated above, the Court has consistently held since *Hope Natural Gas* that it is the end result, not the method used to achieve that result, that is the issue to be addressed.[1753] Indeed, the Court has found that the "fixing of prices, like other applications of the police power, may reduce the value of the property which is being regulated. But the fact that the value is reduced does not mean that the regulation is in-

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[1749] *Hope Natural Gas*, 320 U.S. at 602.

[1750] *Id.*

[1751] *Id.* at 603.

[1752] 47 U.S.C. § 251(c)(2) and (3).

[1753] *See, e.g., Duquesne*, 488 U.S. at 310; *Hope Natural Gas*, 320 U.S. at 602.

valid."[1754] Moreover, the Court has upheld as reasonable changes in ratemaking methodology when the change resulted in the exclusion of historical costs prudently incurred.[1755] Thus, the mere fact that an incumbent LEC may not be able to set rates that will allow it to recover a particular cost incurred in establishing its regulated network does not, in and of itself, result in confiscation.

737. Moreover, *Hope Natural Gas* requires only that the end result of our overall regulatory framework provides LECs a reasonable opportunity to recover a return on their investment. In other words, incumbent LECs' overall rates must be considered, including the revenues for other services under our jurisdiction.[1756]

738. In this proceeding, we are establishing rules that should produce rates for monopoly elements and services that approximate what the incumbent LECs would be able to charge if there were a competitive market for such offerings. We believe that a forward-looking economic cost methodology enables incumbent LECs to recover a fair return on their investment, *i.e.*, just and reasonable rates. The record does not compel a contrary conclusion. No incumbent LEC has provided persuasive evidence that prices based on a forward-looking economic cost methodology would have a significant impact on its "financial integrity." We further note that at least one federal appellate court has held incremental cost-based pricing constitutional.[1757]

739. Incumbent LECs may seek relief from the Commission's pricing methodology if they provide specific

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[1754] *Hope Natural Gas*, 320 U.S. at 601.

[1755] *Duquesne*, 488 U.S. at 301-302.

[1756] However, we may not consider incumbent LECs' revenue derived from services not under our jurisdiction. *Smith v. Ill. Bell*, 282 U.S. 133 (1930).

[1757] *Metropolitan Transp. Auth. v. Interstate Commerce Commission*, 792 F.2d 287, 297 (2d Cir.), *cert. denied*, 479 U.S. 1017 (1986).

information to show that the pricing methodology, as applied to them, will result in confiscatory rates. We also do not completely foreclose the possibility that incumbent LECs will be afforded an opportunity to recover, to some extent, their embedded costs through a mechanism separate from rates for interconnection and unbundled network elements. As stated above, we intend to explore this issue in detail in our upcoming access reform proceeding.

740. GTE argues that the proper standard to review our ratemaking methodology is the just compensation standard generally reserved for takings of property. This is in effect a contention that the 1996 Act's physical collocation and unbundled network facility requirements constitute physical occupation of their property that should be deemed a taking and that must be subject to "just compensation." Assuming for the sake of argument that the physical collocation and unbundled facilities requirements do result in a taking, we nevertheless find that the ratemaking methodology we have adopted satisfies the just compensation standard. Just compensation is normally measured by the fair market value of the property subject to the taking.[1738] Just compensation is not, however, intended to permit recovery of monopoly rents.[1739] The just and reasonable rate standard of TELRIC plus a reasonable allocation of the joint and common costs of providing network elements that we are adopting attempts to replicate, with respect to bottleneck monopoly elements, the rates

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[1738] *See, e.g., United States v. Miller*, 317 U.S. 369, 374 (1943) (holding that just compensation can readily be set by ascertaining the property's fair market value, *i.e.*, "what a willing buyer would pay in cash to a willing seller").

[1739] *See, e.g., Lord Mfg. Co. v. United States*, 84 F.Supp. 748, 755-56 (Ct.Cl. 1949), *citing United States v. Cors*, 337 U.S. 325, 334 (1949).

that would be charged in a competitive market,[1760] and, we believe, is entirely consistent with the just compensation standard. Indeed, a similar rate methodology based on incremental costs has been found to satisfy the just compensation requirement.[1761] For these reasons, we conclude that, even if the 1996 Act's physical collocation and unbundled network facility requirements constitute a taking, a forward-looking economic cost methodology satisfies the Constitution's just compensation standard.

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(3) Discussion

743. We conclude, as a general rule, that incumbent LECs' rates for interconnection and unbundled elements must recover costs in a manner that reflects the way they are incurred. This will conform to the 1996 Act's requirement that rates be cost-based, ensure requesting carriers have the right incentives to construct and use public network facilities efficiently, and prevent incumbent LECs from inefficiently raising costs in order to deter entry. We note that this conclusion should facilitate competition on a reasonable and efficient basis by all firms in the industry by establishing prices for interconnection and unbundled elements based on costs similar to those incurred by the incumbents, which may be expected to reduce the regulatory burdens and economic impact of our decision for many parties, including both small entities seeking to enter the local exchange markets and small incumbent LECs.[1768] We also adopt some more specific rules that follow from this general rule.

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[1760] *Compare Policy and Rules Concerning Rates for Dominant Carriers*, Further Notice of Proposed Rulemaking, CC Docket No. 87-313, 3 FCC Rcd 3195, 3200-01 (1988).

[1761] *Metropolitan Transp. Auth. v. Interstate Commerce Commission*, 792 F.2d at 297.

[1768] *See* Regulatory Flexibility Act, 5 U.S.C. §§ 601 *et seq.*

C. Default Proxy Ceilings and Ranges

767. As previously discussed, we strongly encourage state commissions, as a general rule, to set arbitrated rates for interconnection and access to unbundled network elements pursuant to the forward-looking, economic cost pricing methodology we adopt in this Order. Such rates would approximate levels charged in a competitive market, would be economically efficient, and would be based on the forward-looking, economic cost of providing interconnection and unbundled elements. We recognize, however, that in some cases, it may not be possible for carries to prepare, or the state commission to review, economic cost studies within the statutory time frame for arbitration and thus here first address situations in which a state has not approved a cost study. States that do not complete their review of a forward-looking economic cost study within the statutory time periods but must render pricing decisions, will be able to establish interim arbitrated rates based on the proxies we provide in this Order. A proxy approach might provide a faster, administratively simpler, and less costly approach to establishing prices on an interim basis than a detailed forward-looking cost study.

768. The default proxies we establish will, in most cases, serve as presumptive ceilings. States may set prices below those ceilings if the record before them supports a lower price. States should provide a reasoned basis for selecting a particular default price. In one case, for local switching, the default proxy is a range within which a state may set prices.

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2. Proxies for Specific Elements

a. Overview

787. Although we encourage states to use an economic cost methodology to set rates for interconnection, unbundled network elements, and collocation, we will permit

states unable to analyze an economic costing study within the statutory time constraints to use default proxies in setting and reviewing rates. We set forth below the default proxies for specific network elements. These proxies are interim only. They will apply only until a state sets rates in arbitrations on the basis of an economic cost study, or until we promulgate new proxies based on economic cost models.[1866] We also set forth below the rate structure rules that apply to each of network elements. These rate structure requirements are applicable regardless of whether a state uses an economic cost study or the proxy approach to set rate levels.

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792. We are adopting a proxy ceiling based on two cost models and rates for unbundled loops allowed by six states that had available to them the results of forward-looking economic cost studies at the time they considered either interim or permanent rates for the unbundled loop element. These states are Colorado, Connecticut, Florida, Illinois, Michigan, and Oregon. Each of these states has used a standard that appears to be reasonably close to the forward-looking economic cost methodology that we require to be used, although possibly not consistent in every detail with our TELRIC methodology.[1867] Generally, these

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[1866] *See infra*, Section VII.C.3., discussing generic cost models.

[1867] *See In re: U S West Communications, Inc. Filing of Advice Letter No. 2610 In Compliance with Commission Decision No. C96-521 Adopting Emergency Rules (Tariff)*, Docket No. 96S-233T, Decision No. C96-655 (Colorado Commission, June 21, 1996) [*"Colorado Decision"*] at 58-64 (interim unbundled loop prices set after review of TSLRIC cost studies); *Re Southern New England Telephone Company*, Order No. 95-06-17, 1995 WL 803837 (Conn. D.P.U.C., December 20, 1995) [*"Connecticut Decision"*] at 9-10, 72 (same); *In re: application of City Signal, Inc., for an order establishing and approving interconnection arrangements with Ameritech Michigan*, Case No. U-10647 (Michigan Commission, February 23, 1995) [*"Michigan Decision"*] at 32, 56-57 (setting interim unbundled loop rates based on estimated TSLRIC costs); *In re: Resolution of petition(s) to establish nondiscriminatory rates, terms and*

states appear to have included an allocation of forward-looking common costs in their unbundled loop prices. The individual state studies resulted in the following average rates for unbundled local loops: Colorado, $18; Connecticut, $12.95; Florida, $17.28; Illinois, $10.93; Michigan, $10.03; and Oregon, $12.45, computed as set forth below.

793. The Colorado Commission set an interim rate of $18 per month for unbundled loops terminated at the main distribution frame of the LEC switch.[1868] The Connecticut Commission ruled that SNET must provide the following interim unbundled loop prices varying by four zones: metro $10.18; urban $11.33; suburban $15.33; and rural $14.97.[1869] In the absence of further information about customer density or average loop length by zone, we used a simple average equal to $12.95. The Florida Commis-

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conditions for resale involving local exchange companies and alternative local exchange companies and alternative local exchanges companies pursuant to Section 364.161, Florida Statutes, Docket No. 950984-TP, Order No. PSC-96-0444-FOF-TP, (Florida Commission, March 29, 1996) [*"Florida Decision I"*] at 16 (interim unbundled loop prices set with reference to BellSouth cost studies); *In Re: Resolution of petition(s) to establish nondiscriminatory rates, terms and conditions for resale involving local exchange companies and alternative local exchange companies and alternative local exchanges companies pursuant to Section 364.161, Florida Statutes*, Docket No. 950981-TP, Order No. PSC-96-0811-FOF-TP (Florida Commission, June 24, 1996) [*"Florida Decision II"*] at 25-26 (setting rates after review of GTE and United/Centel cost studies); *In re: Investigation into the Cost of Providing Telecommunications Service*, Order No. 96-188, (Oregon Commission, July 19, 1996) [*"Oregon Decision"*] at 78 n.61 (interim unbundled loop prices generally based on LRIC estimates plus applicable group related costs, and an additional contribution for recovery of joint and common costs); *Illinois Bell Telephone Company Proposed introduction of a trial of Ameritech's Customers First Plan in Illinois* Docket Nos. 94-0096/94-0117/94-0146]94-0301 (Illinois Commission, April 7, 1995) [*"Customers* First Order"] at 54, 61 (rates set with reference to Ameritech's LRSIC studies).

[1868] Colorado Decision at 66.

[1869] *Connecticut Decision* at 74.

sion set an interim rate for 2-wire loops at $17.00 per month for BellSouth, $15.00 for United/Centel, and $20.00 for GTE.[1870] Using weights equal to the number of loops served by each company in 1994 as reported in the Monitoring Report,[1871] we computed a weighted average price equal to $17.28. Pursuant to its *Customers First* Order, the Illinois Commerce Commission approved tariffs establishing business rates equal to $7.08, $10.92, and $14.45, and residential rates equal to $4.59, $8.67, and $12.14 in three density zones.[1872] Based on data from Table 2.5, page 20 of the Common Carrier Statistics, 1995 Preliminary, we found a 36 percent–64 percent business residential split. Using Illinois Commission data for number of households in each density zone (996,750 in zone A; 2,788,759 in zone B; 4,594,567 in zone C), we computed an average loop cost of $10.93. The Michigan Commission approved transitional rates of $8.00 per loop for business and $11 per loop for residence.[1873] Based on Common Carrier Statistics, 1995 Preliminary data, we computed a 32 percent–68 percent business-residential split in Michigan, which leads to an average rate of $10.03. The Oregon Commission set the rate for a "basic 2-wire loop set" at $11.95 plus $0.50 for a network access channel connection, for a total price of $12.45.[1874]

794. In order to set a proxy ceiling for unbundled loop elements we make use of the two cost models for which nationwide data are available and upon which parties have had the opportunity to comment in this proceeding. These

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[1870] *Florida Decision I* at 19; *Florida Decision II* at 25-26.

[1871] Monitoring Report, CC Docket No. 87-339, May 1996 (listing the following number of loops by company: GTE, 1,909,172; United/Centel, 1,627,314; BellSouth, 5,328,280).

[1872] *See* Ameritech Tariff, Ill. C.C. No. 20, Part 19, Section 1, issued October 23, 1995.

[1873] *Michigan Decision* at 94.

[1874] *Oregon Decision* at Appendix C, p.1.

models are the Benchmark Cost Model (*BCM*)[1875] and the *Hatfield 2.2*.[1876] Based on our current information, we believe that both these models are based on detailed engineering and demographic assumptions that vary among states, and that the outputs of these models represent sufficiently reasonable predictions of relative cost differences among states to be used as set forth below to set a proxy ceiling on unbundled loop prices for each state. We do not believe, however, that these model outputs by themselves necessarily represent accurate estimates of the absolute magnitude of loop costs. As we discuss below, further analysis is necessary in order to evaluate fully the procedures and input assumptions that the models use in order to derive cost estimates. Furthermore, in the case of *BCM*, model outputs include costs in addition to the cost of the local loop. In order to correct for these considerations, we have developed a hybrid cost proxy in the following manner. First, we have applied a scaling factor to the cost estimates of each model. This scaling is based on the actual rates computed for unbundled loop elements in the six states referred to above. Specifically we have multiplied the cost estimate produced by each model in each state by a factor equal to the unweighted average of rates adopted by state commissions in the six states, divided by the unweighted average of the model cost estimates for the same six states. Our hybrid cost proxy is computed as the simple average of the scaled cost estimates for the

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[1875] *Benchmark Cost Model: A Joint Submission by MCI Communications, Inc., NYNEX Corporation, Sprint Corporation, U S West, Inc.* (December 1995), submitted by MCI Communications, Inc., NYNEX Corp., Sprint/United Management Corp., U S West, Inc. on July 24, 1996 (*BCM*). For a more detailed discussion of the *BCM*, *see infra*, Section VII.C.3.

[1876] *Hatfield Model, Version 2.2, Release 1*, (Hatfield Associates, Inc., March 1996), submitted by AT&T and MCI on May 16, 1996 (*Hatfield 2.2*); *see also* AT&T reply at Appendix D (Update of the Hatfield Model Version 2.2, Release 1). *See infra*, Section VII.C.3., for a more detailed discussion of the various versions of the *Hatfield* model.

two models in each of the 48 contiguous states and the District of Columbia. Neither *BCM* nor *Hatfield 2.2* provide cost estimates for Alaska and only the *BCM* provides an estimate for Hawaii. Our default loop cost proxies for Hawaii and Puerto Rico are based on the default loop cost proxies of the states that most closely approximate them in population density per square mile.[1877] We are not setting default loop cost proxies in this Order for Alaska or for any of the remaining non-contiguous areas subject to the 1996 Act requirement that incumbent LECs offer unbundled loop elements. We are not establishing default loop cost proxies for these areas because we are unsure that comparisons of the population densities of the continental states and of Alaska and other non-contiguous areas subject to the 1996 Act fully capture differences in loop costs. Regulatory authorities in those areas may seek assistance from this Commission should default loop cost proxies be needed before they have completed their investigations of the forward-looking costs of providing unbundled loop elements. Since our intention is to establish a ceiling for unbundled loop rates, we believe that it is necessary to take account of the variation in the data that we have used for scaling. While the six states that we considered appear to have based their rates on forward-looking economic cost pricing principles, the actual rates that they approved appear to reflect other factors as well. Furthermore, because only a small number of states have conducted such studies, some upward adjustment is warranted as a safety margin to ensure that the ceiling captures the variation in forward-looking economic costing prices on a state-by-state basis. We have therefore chosen to adjust the hybrid cost estimates upward by five percent

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[1877] There is a strong (negative) correlation between population density and the loop costs reported by all the cost models. The correlation is significant at the 5% level. Population densities are from The Statistical Abstract of the United States 1995, Table Number 23. For Puerto Rico, land area is from Table 361 and population is from Table 1345.

for each state. A table listing the proxy ceilings on a statewide average basis is contained in Appendix D.

795. A number of parties have opposed the use of either the *Hatfield* model or *BCM*.[1878] Some critics, for example, have argued that the models may lead to inaccurate cost estimates since these estimates assume that a network is built "from scratch."[1879] Others have criticized specific procedures that have been used in the models to estimate both operating expenses and capital costs. As discussed below in Section VII.C.3., we believe that these criticisms may have merit. In a future rulemaking proceeding, we intend to examine in greater detail various forward looking economic cost models. For the purposes of setting an interim proxy, however, we note that the criticisms have been directed largely toward the absolute level of cost estimates produced by the models, rather than the relative cost estimates across states. Since our hybrid proxy ceiling explicitly scales the model cost estimates based on existing state decisions and uses the model results simply to compute relative prices, we believe that these criticism do not apply in the present context.

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811. Based on the record in this proceeding and in the *LEC-CMRS Interconnection* proceeding, we conclude that a range between 0.2 cents ($0.002) per minute of use and 0.4 cents ($0.004) per minute of use for unbundled local switching is a reasonable default proxy. In setting this default price range, we consider the range of evidence in the record, and believe that the most credible studies fall at the lower end of this range.[1929] However, so as to

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[1878] For a more detailed discussion of these generic cost models, *see infra*, Section VII.C.3.

[1879] *See, e.g.*, Florida Commission comments at 28-29; USTA comments at 54 n.45; Rural Tel. Coalition reply at 35.

[1929] *See, e.g.*, Maryland Commission comments at Appendix B (Maryland Commission Order No. 72348, Case No. 8548 Phase II),

minimize disruption for any state that has set a rate only marginally outside this range, we will grandfather any state that has set a rate at 0.5 cents ($0.005) per minute of use or less pending completion of an economic study pursuant to the methodology set forth in this Order.

812. The forward-looking cost studies contained in the record estimate that the average cost of end-office switching ranges from 0.18 cents ($0.0018) per minute of use [1930] to 0.35 cents ($0.0035) per minute of use.[1931] Maryland and Florida have adopted rates based on forward-looking economic cost studies that fall within the default price range we are adopting.[1932] NYNEX's estimate of 0.129 cents ($0.00129) per minute of use, in the Massachusetts proceeding, is estimate an estimate of the marginal cost of end-office switching.[1933] As discussed above, we generally expect studies estimating marginal costs to generate estimates that are less than

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p.28-32; Letter from Robert F. Roche, CTIA, to William F. Caton, Acting Secretary, FCC, December 8, 1995, in CC Docket No. 94-54 (Incremental Cost of Local Usage, Brock Paper No. 3), p. 1; *Hatfield Model, Version 2.2, Release 1*, (Hatfield Associates, Inc. March 1996), submitted by AT&T and MCI on May 16, 1996); AT&T reply at Appendix D (Update of the Hatfield Model, Version 2.2, Release 1).

[1930] *See* MCI comments at Attachment 1, "The Cost of Basic Network Elements, Theory, Modeling, and Policy Implications," prepared for MCI by Hatfield Assoc., Inc. p.34.

[1931] Letter from Whitney Hatch, Assistant Vice President Regulatory Affairs, GTE, to William F. Caton, Acting Secretary, FCC, July 11, 1996 at Attachment 2 (Economic Evaluation of Version 2.2 of the Hatfield Model), pp.16-17.

[1932] *See* Maryland Commission comments at Appendix B (Maryland Commission Order No. 72348, Case No. 8584 Phase II), pp. 28-32; *Cox June 20, 1996 Ex Parte* at 4.

[1933] *See* Mass. Commission comments at Attachment 3 (Testimony of Paula L. Brown, Managing Director, NYNEX Corporation, in Massachusetts Dept. of Pub. Util. Docket No. 93-125, Workpaper 2), p.6.

estimates derived from TELRIC-based studies. We, therefore, conclude that 0.2 cents ($0.002) per minute of use is a reasonable lower end of the price range for end-office switching.

813. USTA's estimate of 1.3 cents ($0.013) appears to be an outlier that is significantly higher than the other estimates.[1934] We find that USTA's estimate does not represent an appropriate cost model for termination of traffic. USTA's estimate is based on the high end of a set of econometric estimates of LEC-reported cost data rather than an independent cost estimate, and USTA gives no explanation of why we should regard this as the best estimate. In addition, USTA's figure is derived, at least in part, from studies that attempt to measure the incremental cost of end-to-end use of the network for local calls, not the cost of local switching. Pacific Bell's study of the average LRIC of a call terminating under "Feature Group B" [1935] apparently includes terminations at tandem switches in addition to end-office terminations.

814. Michigan and Illinois have adopted rates for transport and termination of traffic that are higher than the default price range we adopt for end-office switching.[1936] Michigan, which established mutual compensation rates of 1.5 cents ($0.015) per minute of use, did not review a forward-looking cost study.[1937] Illinois's 0.5 cents ($0.005)

[1934] USTA comments in CC Docket No. 95-185 at Attachment (Bill and Keep: A Bad Solution to a Non-Problem), pp.9-10.

[1935] Pacific Bell comments in CC Docket No. 95-185 at Exhibit B (Submission of Jerry A. Hausman), para. 32.

[1936] Michigan Commission comments at Attachment 1 (State of Michigan, Case No. U-10647, Opinion and Order, February 23, 1995), p.28; Illinois Commission comments at Attachment C (Illinois Commerce Commission Docket No. 94.0096), pp.83-86, 98.

[1937] Michigan Commission comments at Attachment 1 (State of Michigan, Case No. U-10647, Opinion and Order, February 23, 1995), p.28.

per minute rate for termination through the end office is just outside the range we are establishing. First, as previously stated, we are grandfathering rates of 0.5 cents ($0.005) per minute or lower. Further, we do not believe Illinois's rate overrides the weight of evidence in the record, which supports the range we are establishing.

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b. Discussion

838. As noted earlier, we will continue to review our pricing methodology, and will make revisions as appropriate. Accordingly, there is no present need to establish a Commission price cap or cost index system to adjust interconnection and unbundled element rate levels.

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a. Criteria for Cost Studies

911. There has been considerable debate on the record in this proceeding and before the state commissions on whether section 252(d)(3) embodies an "avoided" cost standard or an "avoidable" cost standard. We find that "the portion [of the retail rate] . . . attributable to costs that will be avoided" includes all of the costs that the LEC incurs in maintaining a retail, as opposed to a wholesale, business. In other words, the avoided costs are those that an incumbent LEC would no longer incur if it were to cease retail operations and instead provide all of its services through resellers. Thus, we reject the arguments of incumbent LECs and others who maintain that the LEC must actually experience a reduction in its operating expenses for a cost to be considered "avoided" for purposes of section 252(d)(3). We do not believe that Congress intended to allow incumbent LECs to sustain artificially high wholesale prices by declining to reduce their expenditures to the degree that certain costs are readily avoidable. We therefore interpret the 1996 Act as requiring states to make an objective assessment of what costs are

reasonably avoidable when a LEC sells its services wholesale. We note that Colorado, Georgia, Illinois, New York, and Ohio commissions have all interpreted the 1996 Act in this manner.[2194]

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925. We find that we can use MCI's model, with some modifications, along with the results of certain state proceedings, to establish a range of rates that would produce an acceptable default wholesale discount rate that reasonably approximates the amount of avoided costs that should be subtracted from the retail rate. A default rate is to be used only in three instances: (1) in a state arbitration proceeding if an avoided cost study that satisfies the criteria we set forth above does not exist; (2) where a state has not completed its review of such an avoided cost study; (3) where a rate established by a state before the release date of this Order is based on a study that does not comply with the criteria described in the previous section. We emphasize that the default rate is to be used as an interim measure only, and should be replaced with an avoided cost study within a reasonable time. The MCI model is a reasonable attempt at estimating avoided cost in accordance with section 252(d)(3) using only publicly-available data. We find, however, that we should modify certain features of the model.

926. First, MCI treats account 6722 (external relation) and account 6727 (research and development) as avoidable costs. MCI argues that purchasers of wholesale services are competing with LECs and, therefore, should not be forced to fund regulatory activities reflected in account 6722. MCI claims that research and develop-

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[2194] *See, e.g., U S West Communications, Inc. Filing Advice Letter No. 2610 in Compliance with Commission Decision No. C96-521 Adopting Emergency Rules*, Docket No. 96S-233T (Colorado Commission June 21, 1996) at paras. 12-13; *Petiton of AT&T for the Commission to Establish Resale Rules, Rates, Terms, and Conditions.*

ment are not of practical use for the services that resellers will purchase. As explained above, this type of disallowance is not contemplated by the avoided cost standard of section 252(d)(3). We therefore adjust the model to treat these costs in the same manner as other overhead expense accounts.

927. Second, MCI treats a number of accounts as "other avoided costs" on the grounds that the expenses in those accounts are not relevant to the provision of telecommunications services that an incumbent LEC currently provides.[2204] Public telephone terminal equipment expense and large PBX expense are not "avoided" precisely because they are unrelated to the retail services being discounted. We would not expect these expenses to be included in retail service rates for resold services; but if these expenses were included in retail rates, they would not be avoided when the services are purchased by resellers. The rest of MCI's "other" accounts contain costs that support all of the telecommunications services offered by the company. MCI has not shown that any of these costs are either reduced or eliminated when services are sold at wholesale. We, therefore, adjust the MCI model so as not to treat these accounts as avoidable costs.

928. Third, MCI treats accounts 6611 (product management), 6612 (sales), 6613 (product advertising), and 6623 (customer services) as costs that are entirely avoided with respect to services purchased at wholesale. We agree that a large portion of the expenses in these accounts is avoided when service is sold at wholesale. We also agree, however, with parties that argue that some expenses in

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[2204] Based on this rationale, MCI excludes account 6113 (aircraft expense), account 6341 (large PBX expense), account 6511 (property held for future telecommunications use expense), account 6351 (public telephone terminal equipment expense), account 6512 (provisioning expense), account 6562 (depreciation expense for property held for future telecommunications use), and account 6564 (amortization expense, intangible).

these accounts will continue to be incurred with respect to wholesale products and customers, and that some new expenses may be incurred in addressing the needs of resellers as customers. No party in this proceeding has suggested a specific adjustment to the MCI model that would account for these costs of the wholesale operation. We note that, in their own proceedings, several states have made varying estimates concerning the level of wholesale-related expenses in these accounts. Colorado, for example, estimated that none of the costs in accounts 6611-6613 would relate to wholesale services, and that only five percent of the costs in account 6623 would be incurred in a wholesale operation.[2205] The Georgia Commission, on the other hand, decided that 25 percent of sales and product advertising expenses would continue to be incurred in the wholesale operation.[2206] Given the lack of evidence, and the wide range of estimates that have been made by these states, we find it reasonable to assume, for purposes of determining a default range of wholesale discount rates, that ten percent of costs in accounts 6611, 6612, 6613, and 6623 are not avoided by selling services at wholesale.

929. Fourth, MCI uses a complex formula to calculate the portions of overhead and general support expense that are attributable to avoided costs. We find that this formula is constructed in a way that tends to inflate the results of

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[2205] *U S West Communications, Inc. Filing Advice Letter No. 2610 in Compliance with Commission Decision No. C96-521 Adopting Emergency Rules*, Docket No. 96S-233T (Colorado Commission June 21, 1996) at para. 12 and n.20. The Colorado Commission explained that it chose 5 percent because "some small portion of customer services will remain for the interfaces of Operational Support Systems of [U S West] and the resellers, but nowhere near the amount necessary for direct customer contact services." *Id.* n.20.

[2206] *Petition of AT&T for the Commission to Establish Resale Rules, Rates, Terms, and Conditions and Initiate Unbundling of Services*, Docket No. 6352U (Georgia Commission June 21, 1996) at Appendix 1. The Georgia Commission characterized its calculations with respect to sales expense as "conservative at best."

the calculation. We have, therefore, substituted a more straightforward approach in which we apply to each indirect expense category the ratio of avoided direct expense to total expenses. We also identify a slightly different list of accounts representing indirect costs than that proposed by MCI.

930. With the modifications described above, and using actual 1995 data, MCI's model produces the following results for the RBOCs and GTE:

U S West	18.80%
GTE	18.81%
BellSouth	19.20%
Bell Atlantic	19.99%
SBC	20.11%
NYNEX	21.31%
Pacific	23.87%
Ameritech	25.98%

931. We also take into account the experience of those state commissions, Illinois and Georgia, that have undertaken or approved detailed avoided cost studies under the pricing standard of section 252(d)(3) of the 1996 Act. Applying the statutory standard to the examination of significant cost studies, those commissions derived average wholesale discounts of 18.74 percent [2207] and 20.07 percent. We find that these decisions present evidence of an appropriate wholesale discount that should be given more weight than state commission decisions that have set their

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[2207] Prior to apportioning avoided costs between business and residential services, the Georgia Commission's avoided cost computation would have yielded an aggregate wholesale discount rate of 18.74 percent. This figure is computed by dividing the total avoided costs computed by the Georgia Commission by the total BellSouth residential and business revenues (which were used individually both to apportion total avoided costs between residential and business service and as the denominator in the final wholesale discount calculations).

discounts under other pricing standards or only on an interim basis.[2208]

932. Accordingly, based on the record before us, we establish a range of default discounts of 17-25 percent that is to be used in the absence of an avoided cost study that meets the criteria set forth above. A state commission that has not set wholesale prices based on avoided cost studies that meet the criteria set forth above as of the release date of this Order shall use a default wholesale discount rate between 17 and 25 percent. A state should articulate the basis for selecting a particular discount rate. If this default discount rate is used, the state commission must establish wholesale rates based on avoided cost studies within a reasonable time. The avoided cost study must comply with the criteria for avoided cost studies described above. A state commission may submit an avoided cost study to this Commission for a determination of whether it complies with these criteria. If a party (either a reseller or an incumbent LEC) believes that a state commission has failed to act within a reasonable period of time, that party may file a petition for declaratory ruling with this Commission, asking us to determine whether the state has failed to comply with this rule. We will, in making such determinations, consider the particular circumstances in the state involved. If a state commission has adopted as of the release date of this Order an interim wholesale pricing decision that relies on an avoided cost study that meets the criteria set forth above,

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[2208] *See, e.g., Order Instituting Rulemaking on the Commission's Own Motion into Competition for Local Exchange Service*, R. 95-04-043 and I. 95-04-044 (California Commission April 26, 1996); *U S West Communications, Inc. Filing Advice Letter No. 2610 in Compliance with Commission Decision No. C96-521 Adopting Emergency Rules*, Docket No. 96S-233T (Colorado Commission June 21, 1996); *Wholesale Rates for Telecommunications Services Ruling on AT&T's Petiton for a Reduction on the Wholesale Rates of Bell Atlantic—Maryland, Inc.*, Case No. 8721 (Maryland Commission June 27, 1996).

the state commission may continue to require an incumbent LEC to offer services for resale under such interim wholesale prices in lieu of the default discount range, so long as the state commission's interim pricing rules are fully enforceable by resellers and followed by a final decision within a reasonable period of time that adopts an avoided cost study that meets the criteria set forth above.

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984. Although incumbent LECs may continue to recover the SLC when other carriers resell their local exchange services, the SLC is not subject to the wholesale pricing standard of section 252(d)(3). As described above, resellers of local exchange service are not reselling access services; they are purchasing these services from incumbent LECs in the same manner they do today. The SLC is a component of interstate access charges, not of intrastate local service rates. Consistent with the principles of cost-causation and economic efficiency, we have required the portion of interstate allocated loop costs represented by the SLC to be recovered from end users, rather than from carriers as with other access charges. Although the SLC is listed on end user monthly local service bills, this charge does not represent a "telecommunications service [an incumbent LEC] provides at retail to subscribers." Rather, the SLC, like other interstate access charges, relates solely to incumbent LEC interstate access services, which are provided to other carriers rather than retail subscribers and which we have concluded are not subject to the resale requirements of section 251(c)(4). Therefore, the reseller shall pay the SLC to the incumbent LEC for each subscriber taking resold service. The specific SLC that applies depends upon the identity of the end user served by the reselling telecommunications carrier.

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1023. Sections 251, 252, 332 and 201 are designed to achieve the common goal of establishing interconnection

and ensuring interconnection on terms and conditions that are just, reasonable, and fair. It is consistent with the broad authority of these provisions to hold that we may apply sections 251 and 252 to LEC-CMRS interconnection. By opting to proceed under sections 251 and 252, we are not finding that section 332 jurisdiction over interconnection has been repealed by implication, or rejecting it as an alternative basis for jurisdiction. We acknowledge that section 332 in tandem with section 201 is a basis for jurisdiction over LEC-CMRS interconnection; we simply decline to define the precise extent of that jurisdiction at this time.

1024. As a practical matter, sections 251 and 252 create a time-limited negotiation and arbitration process to ensure that interconnection agreements will be reached between incumbent LECs and telecommunications carriers, including CMRS providers. We expect that our establishment of pricing methodologies and default proxies which may be used as interim rates will help expedite the parties' negotiations and drive voluntary CMRS-LEC interconnection agreements. We also believe that sections 251 and 252 will foster regulatory parity in that these provisions establish a uniform regulatory scheme governing interconnection between incumbent LECs and all requesting carriers, including CMRS providers. Thus, we believe that sections 251 and 252 will facilitate consistent resolution of interconnection issues for CMRS providers and other carriers requesting interconnection.

1025. Although we are applying sections 251 and 252 to LEC-CMRS interconnection at this time, we preserve the option to revisit this determination in the future. We note that Section 332 generally precludes states from rate and entry regulation of CMRS providers, and thus, differentiates CMRS providers from other carriers.[2430] We

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[2430] In passing section 332 in 1993, Congress stated that it intended to "foster the growth and development of mobile services that, by their nature, operate without regard to state lines as an

also recognize that, based on the combined record in CC Docket No. 95-185 and CC Docket No. 96-68, there have been instances in which state commissions have treated CMRS providers in a discriminatory manner with respect to the terms and conditions of interconnection.[2481] Should the Commission determine that the regulatory scheme established by sections 251 and 252 does not sufficiently address the problems encountered by CMRS providers in obtaining interconnection on terms and conditions that are just, reasonable and nondiscriminatory, the Commission may revisit its determination not to invoke jurisdiction under section 332 to regulate LEC-CMRS interconnection rates.

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5. Bill and Keep

a. Background

1096. *Local Competition NPRM.* In the NPRM, we defined bill-and-keep arrangements as those in which neither of two interconnecting networks charges the other network for terminating traffic that originated on the other network.[2636] Instead, each network recovers from its own end users the cost of both originating traffic delivered to the other network and terminating traffic received from the other network. A bill-and-approach for termination of traffic does not, however, preclude a positive flat-rated charge for transport of traffic between carriers' networks.

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1112. Section 252(d)(2)(A)(i) provides that to be just and reasonable, reciprocal compensation must "provide for the mutual and reciprocal recovery by each carrier of costs associated with transport and termination." [2715]

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integral part of the national telecommunications infrastructure." H.R. Report No. 103-11, 103d. Cong., 1st Sess. 260 (1993).

[2481] *See supra*, Section VII.D.

[2636] NPRM at para. 239.

[2715] 47 U.S.C. § 252(d)(2)(A)(i).

In general, we find that carriers incur costs in terminating traffic that are not *de minimis,* and consequently, bill-and-keep arrangements that lack any provisions for compensation do not provide for recovery of costs. In addition, as long as the cost of terminating traffic is positive, bill-and-keep arrangements are not economically efficient because they distort carriers' incentives, encouraging them to overuse competing carries' termination facilities by seeking customers that primarily originate traffic. On the other hand, when states impose symmetrical rates for the termination of traffic,[2716] payments from one carrier to the other can be expected to be offset by payments in the opposite direction when traffic from one network to the other is approximately balanced with the traffic flowing in the opposite direction. In such circumstances, bill-and-keep arrangements may minimize administrative burdens and transaction costs. We find that, in certain circumstances, the advantages of bill-and-keep arrangements outweigh the disadvantages, but no party has convincingly explained why, in such circumstances, parties themselves would not agree to bill-and-keep arrangements. We are mindful, however, that negotiations may fail for a variety of reasons. We conclude, therefore, that states may impose bill-and-keep arrangements if traffic is roughly balanced in the two directions and neither carrier has rebutted the presumption of symmetrical rates.

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XII. EXEMPTIONS, SUSPENSIONS, AND MODIFICATIONS OF SECTION 251 REQUIREMENTS

A. Background

1249. Section 251(f)(1) grants rural telephone companies an exemption from section 251(c), until the rural telephone company has received a bona fide request for

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[2716] *See infra,* Section XI.A.4. for a discusison of symmetrical rates.

interconnection, services, or network elements, and the state commission determines that the exemption should be terminated.[3060] Section 251(f)(2) allows LECs with fewer than two percent of the nation's subscriber lines to petition a state commission for a suspension or modification of any requirements of sections 251(b) and (c). Section 251(f) imposes a duty on state commissions to make determinations under this section, and establishes the criteria and procedures for the state commissions to follow. In the NPRM, we tentatively concluded that state commissions have the sole authority to make determinations under section 251(f). In addition, we sought comment on whether we should issue guidelines to assist state commissions when they make determinations regarding exemptions, suspensions, or modifications under section 251(f).

1250. Although subsections (f)(1) and (f)(2) both address the circumstances under which an incumbent LEC could be relieved of duties otherwise imposed by section 251, subsection 251(f)(2) also applies to non-incumbent LECs. The standard for determining whether to exempt a carrier under subsection 251(f)(1) is different from the standard for determining whether to grant a suspension or modification under subsection (f)(2). Subsection 251(f)(1)(B) requires state commissions to determine that terminating a rural exemption is consistent with the universal

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[3060] A rural telephone company is defined as a local exchange carrier operating entity to the extent that such entity "(A) provides common carrier service to any local exchange carrier study area that does not include either— (i) any incorporated place of 10,000 inhabitants or more, or any part thereof . . .; or (ii) any territory, incorporated or unincorporated, included in an urbanized area . . .; (B) provides telephone exchange service, including exchange access, to fewer than 50,000 access lines; (C) provides telephone exchange service to any local exchange carrier study area with fewer than 100,000 access lines; or (D) has less than 15 percent of its access lines in communities of more than 50,000 on the date of enactment of the Telecommunications Act of 1996." 47 U.S.C. § 153(37).

service provisions of the 1996 Act.[3061] Subsection 251(f)(2)(A)(i) requires state commissions to grant a suspension or modification if it is necessary to "avoid a significant adverse economic impact on users of telecommunications services generally," and subsection 251(f)(2)(B) requires a suspension or modification to be "consistent with the public interest, convenience, and necessity."[3062] Although we address these two subsections together, we highlight instances in which we believe that differences in statutory language require different treatment by state commissions.

1251. We discuss below issues raised by the commenters, and establish some rules regarding the requirements of section 251(f) that we believe will assist state commissions as they carry out their duties under section 251(f). For the most part, however, we expect that states will interpret the requirements of section 251(f) through rulemaking and adjudicative proceedings. We may in the future initiate a Notice of Proposed Rulemaking on certain additional issues raised by section 251(f) if it appears that further action by the Commission is warranted.

B. Need for National Rules

1. Comments

1252. Most state commissions[3063] and some other

[3061] The provision states, "the State commission shall terminate the exemption if the request . . . is consistent with section 254 (other than subsections (b)(7) and (c)(1)(D) thereof)." 47 U.S.C. § 251(f)(1)(B).

[3062] 47 U.S.C. § 251(f)(2).

[3063] *See, e.g.*, Alaska Commission comments at 6; Alabama Commission comments at 33-34; California Commission comments at 46; Idaho Commission comments at 14; Illinois Commisison comments at 84; Louisiana Commission comments at 22-23; Ohio Commission comments at 80; Oregon Commission comments at 31; Pennsylvania Commission comments at 42; Texas Commission comments at 34; Wyoming Commission comments at 38-39.

parties [3064] assert that states should have exclusive responsibility for the guidelines and determinations made under this section. Several commenters contend that any guidelines the Commission might issue would be useless, because generalized national guidelines could not take into account the variations among states and among individual LECs.[3065] For example, the Minnesota Independent Coalition argues that the additional grant of authority to states under section 214(e) confirms that state commissions have the sole authority to make determinations under section 251(f).[3066] A number of small telephone companies and associations of LECs advocate mandatory national rules regarding implementation of section 251(f). They assert that such rules would ensure that states carry out this provision in accordance with congressional intent.[3067] Some commenters favor a middle ground, claiming that non-mandatory guidelines from the Commission would be helpful, but that mandatory requirements would conflict with the Act's delegation to the states to make determinations under section 251(f).[3068]

[3064] Ad Hoc Telecommunications Users Committee comments at 11; ALLTEL comments at 16; Citizens Utilities comments at 34; Colorado Ind. Tel. Ass'n comments at 5-6; GVNW comments at 42; GTE comments at 80; Home Tel. comments at 1; Illinois Ind. Tel. Ass'n comments at 7; Minnesota Ind. Coalition comments at 14; Ohio Consumers' Counsel reply at 25-26; PacTel comments at 99; Puerto Rico Tel. reply at 16-17; Rural Tel. Coalition comments at 11-15.

[3065] Minnesota Ind. Coalition comments at 14; Western Alliance comments at 7.

[3066] Minnesota Ind. Coalition comments at 14.

[3067] Anchorage Tel. Utility comments at 2-4; Bay Springs, *et al.* comments at 10; Centennial Cellular Corp. comments at 12; Alaska Tel. Ass'n comments at 6; Matanuska Tel. Ass'n comments at 5; USTA comments at 87-93.

[3068] Kentucky Commission comments at 7; Anchorage Tel. Utility comments at 4. Several parties argue that any federal action should not be mandatory. Ohio Commission comments at 80; Citizens Utilities comments at 33; Colorado Ind. Tel. Ass'n comments at 6; Rural Tel. Coalition reply at 18-19.

2. Discussion

1253. We agree with parties, including small incumbent LECs, who argue that determining whether a telephone company is entitled, pursuant to section 251(f), to exemption, suspension, or modification of the requirements of section 251 generally should be left to state commissions.[3069] Requests made pursuant to section 251(f) seek to carve out exceptions to application of the section 251 rules that we are establishing in this proceeding. We find that Congress intended the section 251 requirements, and the Commission's implementing rules thereunder, to apply to all carriers throughout the country, except in the circumstances delineated in the statute. We find convincing assertions that it would be an overwhelming task at this time for the Commission to try to anticipate and establish national rules for determining when our generally-applicable rules should *not* be imposed upon carriers. Therefore, we establish in this Order a very limited set of rules that will assist states in their application of the provisions in section 251(f).

1254. Many parties have proposed varying interpretations of the provisions in section 251(f), and have asked for Commission determination or a statement of agreement. Because it appears that many parties welcome some guidance from the Commission, we briefly set forth our interpretation of certain provisions of section 251(f). Such statements will assist parties and, in particular, state commissions that must make determinations regarding requests for exemption, suspension, and modification.

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3. Discussion

1262. Congress generally intended the requirements in section 251 to apply to carriers across the country, but Congress recognized that in some cases, it might be unfair

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[3069] *See, e.g.*, Minnesota Ind. Coalition comments at 14; Rural Tel. Coalition comments at 11.

or inappropriate to apply all of the requirements to smaller or rural telephone companies.[3103] We believe that Congress intended exemption, suspension, or modification of the section 251 requirements to be the exception rather than the rule, and to apply only to the extent, and for the period of time, that policy considerations justify such exemption, suspension, or modification. We believe that Congress did not intend to insulate smaller or rural LECs from competition, and thereby prevent subscribers in those communities from obtaining the benefits of competitive local exchange service. Thus, we believe that, in order to justify continued exemption once a bona fide request has been made, or to justify suspension, or modification of the Commission's section 251 requirements, a LEC must offer evidence that application of those requirements would be likely to cause undue economic burdens beyond the economic burdens typically associated with efficient competitive entry. State commissions will need to decide on a case-by-case basis whether such a showing has been made.

1263. Given the pro-competitive focus of the 1996 Act, we find that rural LECs must prove to the state commission that they should continue to be exempt pursuant to section 251(f)(1) from requirements of section 251(c), once a bona-fide request has been made, and that smaller companies must prove to the state commission, pursuant to section 251(f)(2), that a suspension or modification of requirements of sections 251(b) or (c) should be granted. We conclude that it is appropriate to place the burden of proof on the party seeking relief from otherwise applicable requirements. Moreover, the party seeking exemption, suspension, or modification is in control of the relevant information necessary for the state to make a determination regarding the request. A rural company that falls within section 251(f)(1) is not required to make any showing until it receives a bona fide request for interconnection, services, or network elements. We decline at

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[3103] 47 U.S.C. § 251(f).

this time to establish guidelines regarding what constitutes a bona fide request. We also decline in this Report and Order to adopt national rules or guidelines regarding other aspects of section 251(f). For example, we will not rule in this proceeding on the universal service duties of requesting carriers that seek to compete with rural LECs. We may offer guidance on these matters at a later date, if we believe it is necessary and appropriate.

1264. We find that Congress intended section 251(f)(2) only to apply to companies that, at the holding company level, have fewer than two percent of subscriber lines nationwide. This is consistent with the fact that the standard is based on the percent of subscriber lines that a carrier has *"in the aggregate nationwide."*[3104] Moreover, any other interpretation would permit almost any company, including Bell Atlantic, Ameritech, and GTE affiliates, to take advantage of the suspension and modification provisions in section 251(f)(2). Such a conclusion would render the two percent limitation virtually meaningless.

1265. We note that some parties recommend that, in adopting rules pursuant to section 251, the Commission provide different treatment or impose different obligations on smaller or rural carriers.[3105] We conclude that section 251(f) adequately provides for varying treatment for smaller or rural LECs where such variances are justified in particular instances. We conclude that there is no basis in the record for adopting other special rules, or limiting the application of our rules to smaller or rural LECs.

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1291. Requirements set forth in section 252(c) for arbitrated agreements would apply to arbitration conducted by the Commission. We see no reason, and no

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[3104] 47 U.S.C. § 251(f)(2) (emphasis added).

[3105] For example, the Rural Tel. Coalition argues that interconnection and collocation points should be set in a flexible manner to take into account size and volume differences among carriers. Rural Tel. Coalition comments at 31.

party has suggested a policy or legal basis, for not applying such standards when the Commission conducts arbitration. Thus, arbitrated agreements must: (1) meet the requirements of section 251, including regulations prescribed by the Commission pursuant to section 251; (2) establish any rates for interconnection, services, or network elements according to section 252(d); and (3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.[3160] We reject the suggestion made by some parties that, if the Commission steps into the state commission role, it is bound by state laws and standards that would have applied to the state commission. While states are permitted to establish and enforce other requirements, these are not binding standards for arbitrated agreements under section 252(c). Moreover, the resources and time potentially needed to review adequately and interpret the different laws and standards of each state render this suggestion untenable. Finally, we conclude that it would not make sense to apply to the Commission the timing requirements that section 252(b)(4)(c) imposes on state commissions. The Commission, in some instances, might not even assume jurisdiction until nine months (or more) have lapsed since a section 251 request was initiated.

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3. Discussion

1309. We conclude that it will assist the carriers in determining their respective obligations, facilitate the development of a single, uniform legal interpretation of the Act's requirements and promote a procompetitive, national policy framework to adopt national standards to implement section 252(i). Issues such as whether section 252(i) allows requesting telecommunications carriers to choose among provisions of prior interconnection agree-

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[3160] 47 U.S.C. § 252(e).

ments or requires them to accept an entire agreement are issues of law that should not vary from state to state and are also central to the statutory scheme and to the emergence of competition. National standards will help state commissions and parties to expedite the resolution of disputes under section 252(i).

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1311. We disagree with BellSouth regarding the significance of the legislative history quoted in the NPRM. The Conference Committee amended section 251(g), S. 652's predecessor to section 252(i), and changed "service, facility, or function" to "interconnection, service, or element." The House of Representatives' bill did not contain a version of section 252(i).[8206] We find that section 252 (i)'s language does not differ substantively from the text of the Senate bill's section 251(g). The Senate Commerce Committee stated its provision, section 251(g), was intended to "make interconnection more efficient by making available to other carriers the individual elements of agreements that have been previously negotiated."[8207]

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1317. We find that section 252(i) permits differential treatment based on the LEC's cost of serving a carrier. We further observe that section 252(d)(1) requires that unbundled element rates be cost-based, and sections 251 (c)(2) and (c)(3) require incumbent LECs to provide only technically-feasible forms of interconnection and access to unbundled elements, while section 252(i) mandates that the availability of publicly-filed agreements be limited to carriers willing to accept the same terms and

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[8206] Although H.R. 1555's section 244(d) contained similar ideas, its language and structure are sufficiently different from that of section 252(i) that we do not consider section 244(d) to be a prior version of section 252(i).

[8207] *Report of the Committee on Commerce, Science, and Transportation on S. 652*, S. Rpt. 104-23, 104th Cong., 1st Sess. (1995) at 21-22.

conditions as the carrier who negotiated the original agreement with the incumbent LEC. We conclude that these provisions, read together, require that publicly-filed agreements be made available only to carriers who cause the incumbent LEC to incur no greater costs than the carrier who originally negotiated the agreement, so as to result in an interconnection arrangement that is both cost-based and technically feasible. However, as discussed in Section VII regarding discrimination, where an incumbent LEC proposes to treat one carrier differently than another, the incumbent LEC must prove to the state commission that that differential treatment is justified based on the cost to the LEC of providing that element to the carrier.

* * * *

XVI. ORDERING CLAUSES

1442. Accordingly, IT IS ORDERED that, pursuant to Sections 1-4, 201-205, 214, 224, 251, 252, and 303(r) of the Communications Act of 1934, as amended, and Section 601 of the Telecommunications Act of 1996, 47 U.S.C. §§ 151-154, 201-205, 224, 251, 252, 303(r) and 601, the REPORT AND ORDER IS ADOPTED, effective 30 days after publication of a summary in the Federal Register. The collections of information contained within are contingent upon approval by the Office of Management and Budget.

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FCC 96-333

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

IN THE MATTERS OF

CC Docket No. 96-98

IMPLEMENTATION OF THE LOCAL COMPETITION
PROVISIONS OF THE TELECOMMUNICATIONS ACT OF 1996

CC Docket No. 95-185

INTERCONNECTION BETWEEN LOCAL EXCHANGE CARRIERS
AND COMMERCIAL MOBILE RADIO SERVICE PROVIDERS

NSD File No. 96-8

AREA CODE RELIEF PLAN FOR DALLAS
AND HOUSTON, ORDERED BY THE PUBLIC UTILITY
COMMISSION OF TEXAS

CC Docket No. 92-237

ADMINISTRATION OF THE NORTH AMERICAN
NUMBERING PLAN

IAD File No. 94-102

PROPOSED 708 RELIEF PLAN AND 630
NUMBERING PLAN AREA CODE BY AMERITECH-ILLINOIS

SECOND REPORT AND ORDER AND MEMORANDUM OPINION AND ORDER

Adopted: August 8, 1996 Released: August 8, 1996

By the Commission:

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5. With respect to toll service, we further find that section 251(b)(3) requires, at a minimum, that customers be entitled to choose different presubscribed, or preselected, carriers for both their intraLATA and interLATA toll calls. In states, like Alaska and Hawaii, that have no LATAs,[14] customers must be able to choose different presubscribed carriers for both their intrastate and interstate toll calls. Based on this finding, we adopt a rule requiring all LECs to implement intraLATA and interLATA toll dialing parity, using the "full 2-PIC" presubscription method.[15] The toll dialing parity requirement we adopt is

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[14] 47 U.S.C. § 153(25). According to the 1996 Act, a LATA is a "local access and transport area." It is a "contiguous geographic area—

(A) established before the date of enactment of the Telecommunications Act of 1996 by a Bell operating company such that no exchange area includes points within more than 1 metropolitan statistical area, consolidated metropolitan statistical area, or State, except as expressly permitted under the AT&T Consent Decree; or

(B) established or modified by a Bell operating company after such date of enactment and approved by the Commission."

[15] We note that the abbreviation "PIC" in the past has stood for the term "primary," or "preferred, interexchange carrier." While we retain the acronym "PIC," we define the term to include any

defined by LATA boundaries given that the Bell Operating Companies' (BOCs') operations are likely to be shaped by LATA boundary restrictions for a period of unforeseeable duration. Given that implementation of the 1996 Act over time may diminish the significance of LATA boundaries, however, we permit states to redefine the toll dialing parity requirement based on state, rather than LATA, boundaries where a state deems such a requirement to be procompetitive and otherwise in the public interest.[16]

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b. Discussion

25. We conclude that the purpose of the statutory dialing parity requirements—to facilitate the introduction of competition in the local and toll markets—is best served by the adoption of broad guidelines and minimum federal standards that build upon the states' experiences. We conclude that such minimum nationwide standards will facilitate competition to the extent that new entrants seeking to offer regional or national services will not be subjected to an array of differing state standards and timetables.[39]

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toll carrier for purposes of the presubscription rules that we adopt in this *Order*. For a discussion of the full 2-PIC presubscription methodology, *see infra* section II.B(4).

[16] To illustrate, if the presubscription requirement were based on LATA boundaries, a customer would be entitled to choose a primary carrier for all intraLATA toll calls and a separate, or the same, primary carrier for all interLATA toll calls. If the presubscription requirement were based on state boundaries, a customer would be entitled to choose a primary carrier for all intrastate toll calls and a separate, or the same, primary carrier for all interstate toll calls.

[39] We note that section 271(e)(2)(B) precludes most states from requiring a BOC to implement intraLATA toll dialing parity in a state before the BOC has received authority to provide in-region, interLATA services in such state or before three years after enactment of the 1996 Act, whichever is earlier. 47 U.S.C. § 271(e)(2)(B).

We note that our conclusion to adopt nationwide dialing parity standards is consistent with our conclusion in the *First Report and Order* that nationwide standards to implement other section 251 provisions are necessary to facilitate competition by serving as a backdrop against which interconnection negotiations and arbitration can occur.[40] We are persuaded that, contrary to the views of Bell Atlantic, the failure to adopt minimum federal standards would harm both new entrants and consumers by delaying the introduction of competition and imposing additional costs on competitors, including small entities, particularly when different network configurations are required in each market. We conclude that uniform standards—in some cases minimum, uniform standards—will speed competitive entry by more promptly opening the local and toll markets to competition.

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c. Discussion

29. We adopt our tentative conclusion that section 251(b)(3) creates a duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service with respect to all telecommunications services that require dialing to route a call, and encompasses international as well as interstate and intrastate, local and toll services.[54] We note that section 251(b)(3) does not limit the types of traffic or services for which dialing parity must be provided to competing providers of telephone exchange and telephone toll service. The reference to these types of providers clearly shows that dialing parity must be provided for exchange service and toll service. Nothing in the statutory language limits the scope of the dialing parity obligation to exchange and toll services or distinguishes among the various types of telecommuni-

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40 See *First Report and Order* at section II.

54 *NPRM* at para. 206.

cations services in imposing the dialing parity obligations. This conclusion is further supported by the statutory definition of dialing parity insofar as it refers to the provision of "telecommunications services" generally without distinction among various types of telecommunications services.[55] In addition, we are not persuaded that section 251(g) relieves certain LECs of the duty to provide toll dialing parity. That section contains no reference or cross reference to dialing parity or to section 251(b)(3). Section 251(g) preserves the equal access obligations already imposed on the BOCs and GTE, but does not exempt them or other LECs from the toll dialing parity requirements. Finally, we note that CMRS providers are not required to provide dialing parity or nondiscriminatory access under section 251(b)(3) because the Commission has not determined that CMRS providers are LECs and section 332(c) of the Communications Act of 1934 provides that a "person engaged in the provision of commercial mobile services . . . shall not be required to provide equal access to common carriers for the provision of toll services."[56]

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c. Discussion

37. With respect to toll service, we conclude that section 251(b)(3) requires, at a minimum, that customers be entitled to choose presubscribed carriers for their intraLATA and interLATA toll calls. Because of the variations that exist among LATA boundaries and toll traffic within, and among, the various states, we have also concluded that each state should have the opportunity to determine whether customers should be able to presubscribe to carriers for intrastate toll service and for inter-

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[55] The issue of whether a separate presubscription choice is required for international, interstate, and intrastate toll calls is discussed more fully in section II.B(2) *infra*.

[56] 47 U.S.C. § 332(c)(8).

state toll service in lieu of the intraLATA and interLATA toll presubscription dichotomy that we have established as a minimum nationwide standard at this time. Although toll dialing parity typically has been based on LATA boundaries in multi-LATA states where it has been implemented, we do not impose a requirement that toll dialing parity be based only on LATA boundaries given our expectation that implementation of the 1996 Act eventually will diminish the significance of LATA boundaries.[80] We are aware that BOCs remain subject to certain LATA boundary restrictions for at least the near-term and that some BOCs may find it technically infeasible, or otherwise undesirable, to implement toll dialing parity based on state boundaries.[81] We thus conclude that states should be able to take the relevance of those factors into account, where applicable, and have the flexibility to require that toll dialing parity implementation be based on state boundaries where they determine that implementing toll dialing parity on the basis of state boundaries would be pro-competitive and otherwise in the public interest. In Alaska and Hawaii, states with no LATAs, toll dialing parity will continue to be based on state boundaries.

38. We also direct each LEC to submit to the state regulatory commission for each state in which it provides telephone exchange service the LEC's plan for implement-

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[80] USTA correctly notes that independent exchange carriers have not been subject to the interLATA line of business restrictions that were imposed on the BOCs pursuant to the AT&T Consent Decree. *See United States v. American Telephone and Telegraph Co.*, 552 F. Supp. 226 (D.D.C. 1982). *See* USTA comments at 3 n.2.

[81] For example, where BOCs receive authority to provide in-region, interLATA services, they are required to provide such services through a separate affiliate for at least three years pursuant to section 272 of the 1996 Act. *See* 47 U.S.C. §§ 272(a)(2), (f)(1). Accordingly, it appears that the LATA distinction will remain relevant insofar as it will continue to define the geographic areas in which a BOC must provide toll services through an affiliate and those in which it may provide toll services directly.

ing toll dialing parity. That plan must contain detailed implementation information, including the proposed date for dialing parity implementation for that exchange that the LEC operates in each state, and the method it proposes for enabling customers to select alternative providers of telephone toll service. For a LEC, other than a BOC, the plan also must identify the LATA with which the LEC proposes to associate.[82]

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c. Discussion

49. We adopt in this *Order* the full 2-PIC method as the minimum presubscription standard. Under our rules and pursuant to section 251(d)(3),[102] however, state commissions may impose more stringent presubscription requirements, such as multi-PIC or smart-PIC.

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2. Discussion

59. As discussed above, we require all LECs to provide intraLATA and interLATA toll dialing parity no later than February 8, 1999. In addition, we require a LEC, including a BOC, to provide toll dialing parity throughout a state based on LATA boundaries coincident with its provision of in-region, interLATA or in-region, interstate toll services in that state. As discussed below, for non-BOC LECs that currently are providing, or within a year of release of this *Order* begin to provide, in-region, interLATA or in-region, interstate toll service, we provide a grace period during which those LECs will be able to provide such toll service before having to provide toll dialing parity to their customers. Moreover, non-BOC LECs that implement intraLATA and interLATA toll dialing parity

[82] States may require a LEC to provide other categories of information in its plan in addition to the information categories stated here.

[102] 47 U.S.C. § 251(d)(3).

may choose whichever LATA within their state that they deem to be most appropriate to define the area within which they will offer intraLATA toll dialing parity. State commissions in ruling upon such a choice of LATA association shall determine whether the proposed LATA association is pro-competitive and otherwise in the public interest. We note, however, as discussed above, that states may redefine the toll dialing parity requirement based on state, rather than LATA, boundaries where a state deems such a requirement to be pro-competitive and otherwise in the public interest.

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D. Implementation of the Local Dialing Parity Requirements

1. In General

a. Background

64. The *NPRM* tentatively concluded that, pursuant to section 251(b)(3), a LEC is required to permit telephone exchange service customers within a defined local calling area to dial the same number of digits to make a local telephone call, notwithstanding the identity of a customer's or the called party's local telephone service provider.[140] The *NPRM* sought comment on this tentative conclusion.[141]

b. Comments

65. Nearly all parties concur with the Commission's proposed interpretation of the local dialing parity requirements of section 251(b)(3).[142] Ameritech contends, however, that the 1996 Act requires only that local calls between competing LECs be dialed without the use of an

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140 *NPRM* at para. 211.

141 *Id.*

142 *See, e.g.*, ALTS comments at 4; GTE comments at 8; Ohio Commission comments at 8.

access code.[143] Ameritech states that, while the Senate version of the dialing parity provision would have required LECs to provide customers with the ability "to dial the same number of digits" when using any carrier providing telephone exchange and exchange access service in the same area, Congress narrowed the dialing parity obligation in the final legislation to require only that calls between competing LECs be dialed without the use of an access code.[144] In response to Ameritech's proposed interpretation of the local dialing parity requirements, the Ohio Consumers' Counsel asserts that it does "not believe that consumers would see any real functional difference between having to dial extra digits and having to dial an access code" and, thus, urges that customers not be required to dial access codes or extra digits when using a competing provider's services.[145]

66. Ameritech also asks the Commission to clarify that "the dialing parity obligation applies only to competing carriers that provide both telephone exchange service *and* telephone toll service (*i.e.*, competing LECs)."[146] Finally, USTA urges the Commission to clarify that section 251 (b)(3) does not include an obligation to provide dialing parity to CMRS providers.[147] USTA contends that the provision of dialing parity to CMRS providers by LECs would complicate implementation of "sender pays" arrangements that have been adopted in certain states if dialing parity were interpreted to preclude the use of extra

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143 Ameritech comments at 3-4. Notwithstanding its interpretation of the local dialing parity requirements, Ameritech notes that it has exceeded these requirements by establishing interconnection arrangements that allow customers of competing LECs to complete calls by dialing the same number of digits. *Id.* at 4.

144 *Id.*

145 Ohio Consumers' Counsel reply at 2.

146 Ameritech comments at 3 n.6 (emphasis in original).

147 USTA comments at 5.

digits and/or recorded announcements associated with a "sender pays" arrangement.[148] USTA expesses concern that customers may receive bills for calling CMRS customers without advance notice that they are going to be billed for such calls.[149]

c. Discussion

67. We adopt our tentative conclusion that, pursuant to section 251(b)(3), a LEC is required to permit telephone exchange service customers within a defined local calling area to dial the same number of digits to make a local telephone call, notwithstanding the identity of a customer's or the called party's local telephone service provider. As we stated in the *NPRM*, we believe that this interpretation of the dialing parity requirement as applied to the provision of telephone exchange service would best facilitate the introduction of competition in local markets by ensuring that customers of competitive service providers are not required to dial additional access codes or personal identification numbers in order to make local telephone calls. We disagree with Ameritech's view that Congress intended only to preclude the use of access codes and did not intend to preclude the dialing of extra digits. The fact that Congress ultimately adopted a dialing parity definition that precludes "the use of any access code" [150] does not constrain the Commission from precluding the dialing of extra digits, including access codes. Given that

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148 *Id.* In this context, the term "sender pays" refers to an arrangement under which a customer who originates a call to a CMRS customer pays the cost of airtime for terminating the call. Under a sender pays arrangement, the customer typically receives information regarding the price of the call before the call is placed. Once the customer receives this information, the customer then may decide whether or not to complete the call. Sender pays arrangements are atypical insofar as it is the CMRS customer who generally pays the cost of airtime for terminating calls.

149 *Id.*

150 47 U.S.C. § 153(15).

the statute does not define the term "access code," we conclude that our interpretation of the local dialing parity requirement will avoid potential disputes concerning what is and what is not an "access code." We are also persuaded by the argument advanced by the Ohio Consumers' Counsel that consumers would not perceive a functional difference between having to dial extra digits and having to dial an access code when using a competing provider's services.

68. We conclude that Ameritech's additional argument that the dialing parity obligation applies only to competing carriers that provide both telephone exchange service *and* telephone toll service, represents an impermissibly narrow reading of the statute. We find that the phrase "providers of telephone exchange service and telephone toll service" imposes an obligation on LECs to provide dialing parity to providers of solely telephone exchange service, to providers of solely telephone toll service, or to providers of both telephone toll and exchange service. We believe that this interpretation is consistent with both the language of the statute and Congress' intent to encourage the entry of new competitors in both the local and toll markets.[151] We reject USTA's argument that the section 251(b)(3) dialing parity requirements do not include an obligation to provide dialing parity to CMRS providers.[152] To the extent that a CMRS provider offers telephone exchange serv-

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[151] As the U.S. Court of Appeals for the Fifth Circuit stated in *Peacock v. Lubbock Compress Company*, "the word 'and' is not a word with a single meaning, for chameleonlike, it takes its color from its surroundings." The court held that "[i]n the construction of statutes, it is the duty of the Court to ascertain the clear intention of the legislature. In order to do this, Courts are often compelled to construe 'or' as meaning 'and,' and again 'and' as meaning 'or'." *Peacock v. Lubbock Compress Company*, 252 F.2d 892, 893 (5th Cir. 1958) (*citing United States v. Fisk*, 70 U.S. 445, 448 (1865)).

[152] *See* section X of the *First Report and Order* for a discussion of the applicability of section 251 to CMRS providers.

ice, such a provider is entitled to receive the benefits of local dialing parity. Regarding USTA's argument that applying section 251(b)(3) in a way that benefits CMRS providers could complicate implementation of sender pays arrangements in some states, we conclude that the record before us is insufficient to determine whether, or under what circumstances, sender pays arrangements, including those requiring the dialing of extra digits or recorded announcements, are consistent with the 1996 Act. Although we do not intend to preclude the states from lawfully enforcing legitimate consumer protection policies that do not have an anticompetitive impact, we cannot conclude on this record that the arrangements USTA describes would be permissible. Finally, given our expectation that local dialing parity will be achieved through LECs' compliance with other section 251 requirements, we do not adopt a timetable for implementing the local dialing parity requirements.

2. Local Dialing Parity Methodologies

a. Background and Comments

69. In the *NPRM*, we stated our expectation that the local dialing parity obligations would not be achieved through presubscription.[153] Rather, we anticipated that a customer's ability to select a telephone exchange service provider and make local telephone calls without dialing extra digits will be accomplished through the unbundling, number portability and interconnection requirements of section 251.[154] The *NPRM* sought information and comment as to how the local dialing parity requirement should be implemented.[155]

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153 *NPRM* at para. 207 n.284.

154 *Id.*

155 *NPRM* at paras. 209, 211.

70. The parties generally agree that local dialing parity will be accomplished through implementation of the unbundling, number portability and interconnection requirements of section 251.[156] Parties add to this list the 1996 Act's equal access requirements.[157] A few parties contend that local dialing parity is assured once competing providers of telephone exchange service are permitted nondiscriminatory access to telephone numbers.[158]

b. Discussion

71. We anticipate that local dialing parity will be achieved upon implementation of the number portability and interconnection requirements of section 251. We also concur with the view that the ability of competing local exchange service providers to receive telephone numbers on a nondiscriminatory basis is critical to the achievement of local dialing parity. We believe that the interconnection requirements that section 251(c)(2) imposes on incumbent local exchange carriers will reduce the likelihood that customers of a competing LEC will have to dial an access code to reach a customer of the incumbent LEC insofar as the two networks are connected. Number portability will ensure that customers switching local service providers will not need to dial additional digits to make local telephone calls. Likewise, allowing every telecommunications carrier authorized to provide local telephone service, exchange access, or paging service in an area code to have at least one NXX in an existing area code also reduces the potential local dialing disparity that may result if competing LECs can only give customers numbers from a new area code. We therefore decline to prescribe now any additional guidelines addressing the methods that LECs may use to accomplish local dialing parity. We also conclude that, contrary to the views expressed by some parties, the

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156 *See, e.g.*, SBC comments at 3 n.4; NEXTLINK comments at 8.

157 *See, e.g.*, BellSouth comments at 9.

158 *See, e.g.*, U S WEST comments at 6.

provision of nondiscriminatory access to telephone numbers, by itself, does not fulfill the local dialing parity mandate of section 251(b)(3). Given that acquisition of a central office code by a LEC would not necessarily ensure that the LEC's customers would be relieved of an obligation to dial extra digits, access codes or some other special dialing protocol, the provision of nondiscriminatory access to telephone numbers does not by itself ensure local dialing parity. Rather, we find that under section 251(b)(3) each LEC must ensure that its customers within a defined local calling area be able to dial the same number of digits to make a local telephone call notwithstanding the identity of the calling party's or called party's local telephone service provider.

3. Non-Uniform Local Calling Areas

a. Background

72. The *NPRM* tentatively concluded that, pursuant to section 251(b)(3), a LEC is required to permit telephone exchange service customers within a defined local calling area to dial the same number of digits to make a local telephone call, notwithstanding the identity of a customer's or the called party's local telephone service provider.[159] The *NPRM* did not address the potential dialing parity implications of non-uniform local calling areas[160] nor did it address the potential impact of our proposed interpretation of the local dialing parity obligation on local calling area boundaries.[161]

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159 *NPRM* at para. 211.

160 We use the term "non-uniform local calling area" to refer to a situation in which a telephone exchange service provider's local calling area is either larger or smaller than that of another telephone exchange service provider that is providing telephone exchange service in the same geographic area.

161 Insofar as parties contend that the section 251(b)(3) dialing parity requirements compel the use of a ten-digit dialing plan for

b. Comments

73. A number of parties express concern about the potential interrelationship between our proposed interpretation of the local dialing parity requirements and local calling area boundaries.[162] For example, WinStar cautions the Commission that by requiring that customers "within a defined local calling area" be able to dial the same number of digits to make a local telephone call, certain parties may interpret this to require that a competing provider of local exchange service must define its local calling area to match the local calling area of the incumbent LEC.[163] GSA/DOD maintains that dialing is not truly at parity if different carriers have different definitions of the geographic areas in which calls can be made with seven-digit dialing.[164] To address the potential dialing parity issue that may arise when a new entrant's "network coverage" is more limited than the incumbent LEC's, GSA/DOD recommends that the Commission adopt rules that ensure that local calling areas are consistently defined for LEC wholesale and retail services.[165]

74. GTE contends that "[s]o long as new entrants have the technical ability to deploy equipment necessary to offer the same seven-digit dialing as the incumbent LEC, dialing

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local calls within an area code overlay (*see, e.g.*, MFS comments at 3-5), we note that these concerns are addressed more fully below in paragraphs 286 through 287.

162 *See, e.g.*, WinStar comments at 10-11; GSA/DOD comments at 4-5; Florida Commission comments at 3.

163 WinStar comments at 10-11 ("The Commission should proceed carefully to ensure that it does not inadvertently limit carriers from experimenting with local calling areas"); *see also*, U S WEST comments at 6 (where dialing parity disputes arise over fact that local calling areas of two competing LECs do not match, states should resolve such disputes since they are familiar with local calling areas and calling patterns in that state).

164 GSA/DOD comments at 4.

165 *Id.* at 5.

parity should be deemed to exist even if one or more of the new entrants ultimately chooses to provide ten-digit dialing." [166] To illustrate its point that all local calls cannot be dialed using the same number of digits, NYNEX notes that in the New York City Metro LATA local calls span three different area codes, with seven-digit dialing within an area code and ten-digit dialing between area codes.[167] Finally, the Florida Commission expresses concern regarding the potential customer confusion that may result if customers in local calling areas are required to dial ten rather than the currently dialed seven digits to make local "Extended Calling Service" calls.[168]

c. Discussion

75. A telephone call requiring seven-digit dialing is not necessarily a local call [169] and a telephone call requiring ten-digit dialing is not necessarily a toll call.[170] Disparity in local dialing plans, by itself, does not contravene our interpretation of the local dialing parity requirements unless such plans are anti-competitive in effect.[171] By requir-

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[166] GTE comments at 8 n.10.

[167] NYNEX comments at 3 n.6.

[168] Florida Commission comments at 3.

[169] We note that several states permit seven-digit dialing for toll calls. *North American Numbering Plan, Area Codes 1996 Update*, Bellcore (January 1996) at 14. For example, within the 518 area code a call from Clifton Park, New York to Hague, New York is a toll call that can be dialed with seven digits.

[170] Section 3(48) defines "telephone toll service" as "telephone service between stations in different exchange areas for which there is made a separate charge not included in contracts with subscribers for exchange service." 47 U.S.C. § 153(48). By contrast, charges for calls within a local calling area generally are not assessed on a per call basis. Thus, the construct of local calling areas serves as the basis by which carriers price their services.

[171] *See, e.g.*, the discussion at paras. 281-291 regarding the discriminatory and anticompetitive nature of a service-specific or technology-specific overlay in connection with area code relief plans.

ing that all customers "within a defined local calling area" be able to dial the same number of digits to make a local telephone call, we do not intend to require a competing provider of local exchange service to define its local calling area to match the local calling area of an incumbent LEC. We further do not intend to require a competing provider of telephone exchange service that voluntarily chooses to provide ten-digit as opposed to seven-digit dialing in a local calling area to modify its dialing plan in this instance in order to conform to the dialing plan of another LEC. No other commenter addressed GSA's proposal that the Commission adopt rules that ensure that local calling areas are consistenty defined for LEC wholesale and retail services. Therefore, we conclude that the record is insufficient to permit us to take such action at this time.

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78. While several commenters urge the Commission to adopt rules for balloting,[182] the majority of parties urge us to reject this option.[183] Parties that oppose balloting argue that such decisions should be left to the individual states [184] and claim that balloting is confusing to customers,[185] costly,[186] and forces consumers to make selections before they might otherwise choose to do so.[187] Commenters also argue that competition for customers will ensure that carriers notify customers as to how their serv-

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[182] *See, e.g.*, NEXTLINK comments at 9; Excel comments at 7.

[183] *See, e.g.*, Ohio Consumers' Counsel comments at 3; SBC reply at 1; MFS reply at 12; CBT reply at 3-4.

[184] *See, e.g.*, Florida Commission comments at 2; PacTel reply at 13.

[185] *See, e.g.*, Ohio Commission comments at 7.

[186] *See, e.g.*, GTE comments at 13; Sprint comments at 4.

[187] Ameritech comments at 20.

ices can be obtained.[188] In stating its opposition to a balloting requirement, MFS observes that:

> the long-distance market today differs markedly from the situation in the mid-1980's, when non-dominant carriers were virtually unknown to most consumers and balloting was mandated as a way of educating consumers to their ability to choose a carrier. No such education is needed today, because most consumers are well aware of their long-distance choices, and the carriers have readily available means of contacting those who are not.[189]

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c. Discussion

92. We conclude that, in order to ensure that dialing parity is implemented in a procompetitive manner, national rules are needed for the recovery of dialing parity costs. We further conclude that these costs should be recovered in the same manner as the costs of interim number portability, as mandated in our recent *Number Portability Order*.[224] Our authority to promulgate national cost recovery rules derives from section 251(d) of the 1996 Act and section 4(i) of the 1934 Act. In section 251(d), Congress directed the Commission to take the necessary steps to implement section 251. Section 4(i) of the 1934 Act authorizes us to take any action we consider "necessary and proper" to further the public interest in the regulation of telecommunications. Because we determine that dialing parity is crucial to the development of local exchange competition, we conclude that we should establish pricing principles for the recovery of dialing par-

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188 *See, e.g.*, GTE comments at 13; U S WEST comments at 8.

189 MFS comments at 6.

224 *Telephone Number Portability*, FCC 96-286, CC Docket No. 95-116 (July 2, 1996) (*Number Portability Order*).

ity costs. Accordingly, we reject the arguments of incumbent LECs and others who oppose national standards for cost recovery of the network upgrades required to achieve dialing parity.

93. Many of the network upgrades necessary to achieve dialing parity, such as switch software upgrades, are similar to those required for number portability. Moreover, with both dialing parity and number portability, customer inconvenience represents the barrier to effective competition Congress intends to eliminate, whether that inconvenience results from the dialing of extra digits in the case of dialing parity, or notification of family, friends and business contacts when a customer is forced to change his or her number. For these reasons, we determine that our recent *Number Portability Order* provides guidance regarding which costs incumbent LECs should be able to recover in implementing dialing parity, as well as how such costs should be recovered. The rules adopted in the *Number Portability Order* apply only to currently-available number portability mechanisms. We sought further comment on cost recovery for long-term number portability, because long-term number portability will involve a different kind of system that currently available solutions. We tentatively concluded that under section 251(e)(2), the same cost recovery principles should apply to long-term number portability. In the case of dialing parity, there is a similar distinction between currently-available solutions (*i.e.*, full 2-PIC presubscription), and long-term solutions (*i.e.*, multi-PIC or smart-PIC methodologies). Like number portability, we may need to revisit the issue of an appropriate cost recovery standard once other presubscription technologies become available on a nationwide basis.

94. In the *Number Portability Order*, we concluded that costs for number portability should be recovered on a

competitivey-neutral basis.[225] We also concluded that any recovery mechanism should: (1) not give one service provider an appreciable, incremental cost advantage over another service provider, when competing for a specific subscriber; and (2) not have a disparate effect on the ability of competing service providers to earn a normal return.[226] We therefore reject the arguments of those commenters that assert that only new entrants should bear the costs of implementing dialing parity, because such an approach would not be competitively neutral. We also concluded in the *Number Portability Order* that LECs could only recover the incremental costs of implementing number portability. Because we determine that number portability and dialing parity share significant technical similarities and overcome similar barriers to competition, we conclude that we should impose the same cost standard for dialing parity costs that we have adopted for number portability costs. We therefore agree with AT&T that LECs may not recover from other carriers under a dialing parity cost recovery mechanism any network upgrade costs not related to the provision of dialing parity.

95. In our *Number Portability Order*, we concluded that the costs of long-term number portability that could be recovered through a competitively-neutral mechanism included installation of number portability-specific switch software, implementation of SS7 and IN or AIN capability, and the construction of number portability databases.[227] We determined that states could use several allocators, including gross telecommunications revenues, number of lines, and number of active telephone numbers, to

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[225] Section 251(e)(2) of the 1996 Act states that "the cost of establishing . . . number portability shall be born by all telecommunications carriers on a competitively neutral basis, as determined by the Commission." This statutory provision does not apply to the dialing parity requirement.

[226] *Number Portability Order* at paras. 121-140.

[227] *Id.* at para. 122.

spread number portability costs across all telecommunications carriers.[228] Applying the same cost recovery principles to dialing parity, we conclude that LECs may recover the incremental costs of dialing parity-specific switch software, any necessary hardware and signalling system upgrades, and consumer education costs that are strictly necessary to implement dialing parity. These costs must be recovered from all providers of telephone exchange service and telephone toll service in the area served by a LEC, including that LEC, using a competitively-neutral allocator established by the state.[229] Although, under section 251(e)(2), number portability costs must be recovered from all telecommunications carriers, section 251(b)(3) only requires that dialing parity be provided to providers of telephone exchange service and telephone toll service. Therefore, we concluded that a competitively-neutral recovery mechanism for dialing parity should only allocate costs to this more limited class. States may use any of the allocators described in the *Number Portability Order*, or any other allocator that meets the criteria we have established. States should apply the principles we adopt today, and the other guidelines for recovering costs of currently available number portability measures, in establishing more specific cost recovery requirements for dialing parity.

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292. Finally, we address petitions for clarification or reconsideration that were filed in the *Ameritech* and *NANP* proceedings. On February 22, 1995, Comcast Corporation filed a Petition for Clarification or Reconsideration of the *Ameritech* Order regarding the Commission's

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[228] *Id.* at paras. 134-36.

[229] We recognize that, unlike the case for number portability costs, states would not be able to establish a cost allocator based on numbers of lines because such an allocator could not apportion costs on a competitively neutral basis where dialing parity is provided to a CMRS provider. We expect that states will establish a competitively neutral allocator that can be used to apportion costs among all providers.

jurisdiction over numbering administration.[619] In its petition, Comcast seeks clarification of the *Ameritech Order* to the extent that it implies the Commission does not have broad statutory authority over the assignment of numbering resources, and seeks reconsideration of any implication in the *Ameritech Order* that the Commission's authority is limited by or subordinate to state interests.[620] Because section 251(e)(1) gives the Commission exclusive jurisdiction over numbering matters in the United States, any uncertainty about the Commission's and the states' jurisdiction over numbering administration that may have existed prior to the 1996 Act has now been eliminated. In light of the enactment of section 251(e)(1), Comcast's request that the Commission reconsider its conclusion in the *Ameritech Order* that the Commission does not retain plenary jurisdiction over numbering issues in the United States is moot. Accordingly, we dismiss Comcast's petition.

* * * *

343. Section 251(e)(2) requires that the costs of telecommunications numbering administration be borne by all telecommunications carriers on a competitively neutral basis. Contributions based on gross revenues would not be competitively neutral for those carriers that purchase telecommunications facilities and services from other telecommunications carriers because the carriers from whom they purchase services or facilities will have included in their gross revenues, and thus in their contributions to number administration, those revenues earned from services and

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[619] *See Petition for Clarification or Reconsideration*, filed by Comcast Corporation (February 22, 1995). PageNet and Nextel Communications, Inc. ("Nextel") filed Comments in support of Comcast's petition.

[620] Comcast Petition at 1. According to Comcast, footnote 18 of the *Ameritech Order* explicitly overruled *dicta* in a prior Commission decision that stated that the Commission had plenary jurisdiction over CO code allocation. *Id.* at 3.

facilities sold to other carriers. Therefore, to avoid such an outcome, we require all telecommunications carriers to subtract from their gross telecommunications services revenues expenditures for all telecommunications services and facilities that have been paid to other telecommunications carriers.[713] It should be noted that this requirement is solely for the purpose of determining a carrier's contribution to numbering administration costs and not for any other purpose, interpretation, or meaning of any other Commission rule such as those contained in Parts 32, 36, 51, 64, 65, or 69 of the Commission's rules.

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[713] See *Assessment and Collection of Regulatory Fees for Fiscal Year 1995*, Report and Order, 10 FCC Rcd 13512, at 13558-59 (1995) (*Regulatory Fees Order*) In the *Regulatory Fees Order*, we stated that, in order to avoid imposing a double payment burden on resellers, we would permit interexchange carriers to subtract from their reported gross interstate revenues any payments made to underlying carriers for telecommunications facilities or services. *Id.* Our action here is consistent with that taken in the *Regulatory Fees Order*. We note that the gross telecommunications services revenues referenced in this discussion are not limited to gross interstate revenues.

UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

Nos. 96-3321, 96-3406, 96-3410, 96-3414, 96-3416, 96-3418, 96-3424, 96-3430, 96-3436, 96-3444, 96-3450, 96-3453, 96-3460, 96-3507, 96-3519, 96-3520, 96-3603, 96-3604 and 96-3608

IOWA UTILITIES BOARD,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION;
UNITED STATES OF AMERICA,
Respondents.

NATIONAL ASSOCIATION OF REGULATORY
UTILITY COMMISSIONERS,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION;
UNITED STATES OF AMERICA,
Respondents.

THE SOUTHERN NEW ENGLAND TELEPHONE COMPANY,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION;
UNITED STATES OF AMERICA,
Respondents.

BELL ATLANTIC CORPORATION;
BELLSOUTH CORPORATION;
PACIFIC TELESIS GROUP,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION;
UNITED STATES OF AMERICA,
Respondents.

AMERITECH CORPORATION,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION;
UNITED STATES OF AMERICA,
Respondents.

U S WEST, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION;
UNITED STATES OF AMERICA,
Respondents.

GTE SERVICE CORPORATION; GTE ALASKA INCORPORATED; GTE ARKANSAS, INCORPORATED; GTE CALIFORNIA, INCORPORTED; GTE FLORIDA, INCORPORATED; GTE MIDWEST, INCORPORATED; GTE SOUTH, INCORPORATED; GTE SOUTHWEST, INCORPORATED; GTE NORTH, INCORPORATED; GTE NORTHWEST, INCORPORATED; GTE HAWAIIAN TELEPHONE COMPANY, INCORPORATED; GTE WEST COAST, INCORPORATED; CONTEL OF CALIFORNIA, INC.; CONTEL OF MINNESOTA, INC.; CONTEL OF THE SOUTH, INC.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION;
UNITED STATES OF AMERICA,

Respondents.

NEW YORK TELEPHONE COMPANY;
NEW ENGLAND TELEPHONE AND
TELEGRAPH COMPANY,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION;
UNITED STATES OF AMERICA,

Respondents.

CINCINNATI BELL TELEPHONE COMPANY,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION;
UNITED STATES OF AMERICA,

Respondents.

PEOPLE OF THE STATE OF NEW YORK;
THE PUBLIC SERVICE COMMISSION OF THE
STATE OF NEW YORK,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION;
UNITED STATES OF AMERICA,
Respondents.

SBC COMMUNICATIONS, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION;
UNITED STATES OF AMERICA,
Respondents.

LOUISIANA PUBLIC SERVICE COMMISSION,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION;
UNITED STATES OF AMERICA,
Respondents.

FLORIDA PUBLIC SERVICE COMMISSION,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION;
UNITED STATES OF AMERICA,
Respondents.

SOUTH DAKOTA PUBLIC UTILITIES COMMISSION,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION;
UNITED STATES OF AMERICA,
Respondents.

THE PEOPLE OF THE STATE OF CALIFORNIA;
THE PUBLIC UTILITIES COMMISSION OF THE
STATE OF CALIFORNIA,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION;
UNITED STATES OF AMERICA,
Respondents.

UNTED STATES TELEPHONE ASSOCIATION,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION;
UNITED STATES OF AMERICA,
Respondents.

RURAL TELEPHONE COALITION,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION;
UNITED STATES OF AMERICA,
Respondents.

COMPETITIVE TELECOMMUNICATIONS ASSOCIATION,
Petitioner,
v.
FEDERAL COMMUNICATIONS COMMISSION;
UNITED STATES OF AMERICA,
Respondents.

MISSISSIPPI PUBLIC SERVICE COMMISSION,
Petitioner,
v.
FEDERAL COMMUNICATIONS COMMISSION;
UNITED STATES OF AMERICA,
Respondents.

Submitted Oct. 3, 1996
Filed Oct. 15, 1996

Before BOWMAN, WOLLMAN and HANSEN, Circuit Judges.

HANSEN, Circuit Judge.

These cases have been consolidated in this circuit by the September 11, 1996 order of the Judicial Panel on Multidistrict Litigation, Docket No. RTC-31, pursuant to Rule 24 of the *Rules of Procedure of the Judicial Panel on Multidistrict Litigation*. *See* 28 U.S.C. § 2112(a)(3) (1994). Numerous petitioners have moved this court for a stay pending judicial review of the Federal Communications Commission's First Report and Order.[1] The FCC promulgated the rules and regulations in its First Report and Order pursuant to its reading of its statutory duty to implement the local competition provisions of the Tele-

[1] First Report and Order, *Implementation of the Local Competition Provisions in the Telecommuncations Act of 1996*, CC Docket No. 96-98 (Aug. 8, 1996) [hereinafter First Report and Order].

communications Act of 1996 (the Act).[2] This court granted a temporary stay on September 27, 1996, pending oral argument. After hearing oral argument on October 3, 1996, from representatives of the concerned parties, we have decided to stay the operation and effect of only the pricing provisions[3] and the "pick and choose" rule[4] contained in the FCC's First Report and Order pending our final determination of the issues raised by the pending petitions for review.

I.

In the Telecommunications Act of 1996, Congress enacted a plan to alter the monopolistic structure of local telephone service markets with an injection of competition. The Act effectively opens up local markets by imposing several new obligations on the existing providers of local telephone service in those markets. The Act refers to the current local providers as "incumbent local exchange carriers" (incumbent LECs). *See* 47 U.S.C.A. §§ 251(c), (h), 252(j) (West Supp. May 1996). Among other duties, the Act requires incumbent LECs (1) to allow other telecommunication carriers (such as cable television companies and current long-distance providers) to interconnect with the incumbent LEC's existing local network to provide competing local telephone service (interconnection); (2) to provide other telecommunication carriers access to elements of the incumbent LEC's local network on an unbundled basis (unbundled access); and (3) to

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[2] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (to be codified as amended in scattered sections of 47 U.S.C.).

[3] The pricing provisions refer to First Report and Order. Appendix B-Final Rules §§ 51.501-51.515 (inclusive), 51.601-51.611 (inclsive), 51.707-51.717 (inclusive) and to the default proxy range for line ports used in the delivery of basic residential and business exchange services established in the FCC's Order on Reconsideration, dated September 27, 1996.

[4] The "pick and choose" rule refers to First Report and Order, Appendix B-Final Rules § 51.809.

sell to other telecommunication carriers, at wholesale rates, any telecommunitacions service that the incumbent LEC provides to its retail customers (resale). *Id.* § 251 (c).

To accomplish these directives, the Act places a duty on incumbent LECs to privately negotiate, in good faith, comprehensive agreements with other telecommunication carriers seeking to enter the local market. *See id.* §§ 251 (c)(1) and 252(a). If the incumbent LEC and the carrier seeking entry are unable to reach a negotiated agreement, either party may petition the respective state utility commission to conduct a compulsory arbitration of the open and disputed issues and arrive at an arbitrated agreement. *See id.* § 252(b). The final agreement, whether arrived at through negotiation or arbitration, must be approved by the state commission. *Id.* § 252(e)(1). Certain portions of the Act also require the FCC to participate in the Act's implementation. *See, e.g., id.* §§ 251(b)(2), (d)(1), (e), 252(e)(5). The FCC's regulations pertaining to the Act form the heart of the controversies at bar.

On August 8, 1996, the FCC released its First Report and Order in which it published its comments and rules regarding the local competition provisions of the Act. The petitioners in this consolidated proceeding, consisting, at the moment, primarily of incumbent LECs and state utility commissions, argue that the FCC exceeded its authority in promulgating these rules. While several of the petitioners object to the FCC's regulations in their entirety, others specifically challenge the FCC's rules regarding the prices that an incumbent LEC may charge an incoming competitor for interconnection, unbundled access to network elements, and resale of its services.

Despite the different approaches, it is clear that all of the petitioners object principally to the FCC's pricing rules. One such rule is a mandate from the FCC that state commissions employ the "total element long-run incremental

cost" (TELRIC) method to calculate the costs that an incumbent LEC incurs in making its facilities available to competitors. *See* First Report and Order, Appendix B-Final Rules §§ 51.503, 51.505. After applying the TELRIC method and arriving at a cost figure, the state commissions, acting as arbitrators, must then determine the price that an incumbent LEC may charge its competitors, based on the TELRIC driven cost figure. *See id.*

Many of the incumbent LECs object to the TELRIC method for two reasons. First, it does not consider their "historical" or "embedded" costs (costs that an incumbent incurred in the past) in calculating the cost figure to be used to determine the rates. *See* id. § 51.505(d)(1). Second, it requires that an incumbent LEC's cost be measured as if the incumbent were using the most efficient telecommunication technology currently available, regardless of the technology presently employed by the incumbent and to be used by the competitor. *See id.* § 51.505(b)(1). The incumbent LECs argue that the TELRIC method underestimates their costs and results in prices that are too low. The incumbent LECs maintain that these low prices would effectively require them to subsidize their competitors and thereby threaten the viability of the LEC's own businesses.

For similar reasons, the petitioners also object to the FCC's proxy rates, which are to be used by the state commissions if they elect not to employ the TELRIC method to set prices. *See id.* §§ 51.503(b)(2), 51.513, 51.705(a)(2), 51.707. The incumbent LECs argue that these proxy rates do not accurately reflect their costs and are artificially low. In addition to the rules regarding TELRIC and the proxy rates, the petitioners object to several other FCC regulations that pertain to the pricing of intrastate telephone service.[8]

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[8] The state utilities commissions take issue with the "deaveraging" rule requiring them to establish different rates in at least three dif-

Some of the petitioners also seek to stay the FCC's so-called "pick and choose" rule, *id.* § 51.809, with which the FCC purports to implement § 252(i) of the Act. Section 252(i) requires an LEC to make available any interconnection, service, or network element contained in an approved agreement to which it is a party to any other telecommunications carrier upon the same "terms and conditions" as those provided in the agreement. Here again, price becomes a key issue. When the FCC promulgated its rule, it expanded the statutory language of § 252(i) to include "*rates*, terms, and conditions." *Id.* § 51.809 (emphasis added). The petitioners' objection is that the rule would permit the carriers seeking entry into a local market to "pick and choose" the lowest-priced individual elements and services they need from among all of the prior approved agreements between that LEC and other carriers, taking one element and its price from one agreement and another element and its price from a different approved agreement. Moreover, if an LEC and Carrier A, for example, reach an approved agreement, and then the LEC and a subsequent entrant, Carrier B, agree in their agreement to a lower price for one of the elements or services provided for in the LEC's agreement with Carrier A, Carrier A will be able to demand that its agreement be modified to reflect the lower cost negotiated in the agreement with Carrier B. Consequently, the petitioners assert that the congressional preference for negotiated agreements would be undermined because an agreement would never be finally binding, and the whole methodology for negotiated and arbitrated agreements would be thereby destabilized.

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ferent geographic areas within each state. *See id.* § 51.507(f). Many of the incumbent LECs also challenge the FCC's wholesale rate rules, asserting that the FCC's mandated method for calculating these rates, as well as its interim wholesale rates, result in rates that are also too low and threaten the incumbent LEC's viability. *See id.* §§ 51.607, 51.609, 51.611.

II.

We consider the following four factors in determining whether a stay is warranted: (1) the likelihood that a party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay. *See Arkansas Peace Ctr. v. Dep't of Pollution Control*, 992 F.2d 145, 147 (8th Cir. 1993), *cert. denied*, 511 U.S. 1017, 114 S.Ct. 1397, 128 L.Ed.2d 70 (1994); *Wisconsin Gas Co. v. F.E.R.C.*, 758 F.2d 669, 673-74 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1114, 106 S.Ct. 1968, 1969, 90 L.Ed.2d 653 (1986). Applying these factors to the case at hand leads us to conclude that a stay pending final review of the FCC's pricing and "pick and choose" rules is justified.

A.

In evaluating the likelihood of the petitioners' success on appeal, we note that the petitioners "need not establish an absolute certainty of success." *Population Inst. v. McPherson*, 797 F.2d 1062, 1078 (D.C. Cir. 1986). Instead, as the actual terms of the test indicate, the petitioners must show that they are "likely" to succeed on the merits. Here, the petitioners allege primarily that the FCC exceeded its jurisdiction by imposing national pricing rules for what is essentially local service. They argue that the text and the structure of the Act give the States, not the FCC, authority over the pricing of intrastate telephone service. After evaluating the contentions of all of the interested parties, we believe that the petitioners present a strong argument that is sufficient to satisfy the first prong.

Historically, the state commissions have determined the rates for intrastate communications services. *See* Communications Act of 1934, § 2(b), 47 U.S.C. § 152(b) (1994). Subsection 252(d), which indicates that state commissions have the authority to determine "just and

reasonable rates" necessary to implement the local competition provisions of the Act appears consistent with that past practice. This subsection, entitled "Pricing standards," makes no mention of FCC rules on pricing. Moreover, subsection 252(c)(2) directs state commissions to "establish any rates for interconnection, services, or network elements according to subsection (d) of this section." Again, no reference is made to FCC regulations regarding rates. By contrast, where Congress intended for the state commissions to follow FCC rules in arbitrations, it expressly said so. In subsection 252(c)(1), the Act requires state commissions to ensure that their resolutions of arbitrated disputes comply with both section 251 and with the regulations that the FCC is specifically authorized to issue under section 251. But nowhere in section 251 is the FCC specifically authorized to issue rules on pricing. The sections of the Act that directly authorize the state commissions to establish prices are devoid of any command requiring the state commissions to comply with FCC pricing rules (or, for that matter, authorizing the FCC to issue any pricing rules). This absence indicates a likelihood that Congress intended to grant the state commissions the authority over pricing of local telephone service, either by approving or disapproving the agreements negotiated by the parties, or, when the parties cannot agree, through compulsory arbitration, thereby preserving what historically has been the States' role.

We are mindful of the FCC's contrary interpretation of the Act. The FCC asserts that subsection 251(d)(1), when read together with subsection 252(c)(1), authorizes the FCC to establish rules regarding pricing. Subsection 251(d)(1) directs the FCC to complete the promulgation of regulations pursuant to its duties under section 251 by August 8, 1996. The FCC also urges us to read the general provisions of subsection 251(c) together with subsection 252(d) (the pricing standards) and conclude that these portions of the Act supply the FCC with the power to issue pricing rules.

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We recognize that courts must give deference to an agency's reasonable interpretation of an unclear statute. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843-45, 104 S.Ct. 2778, 2781-83, 81 L.Ed.2d 694 (1984). In this case, however, we believe that the petitioners have a better than even chance of convincing the court that the FCC's pricing rules conflict with the plain meaning of the Act, in which case the court would not be bound by *Chevron* deference and would be entitled to overturn the agency's interpretation. *See id.* at 842-43, 104 S.Ct. at 2781 ("If the intent of Congress is clear, that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."); *id.* at 844, 104 S.Ct. at 2782-83 (indicating that courts should not give controlling weight to regulations that are contrary to the statute). In this, our first look at the issue, we are skeptical that the FCC's roundabout construction of the statute could override what, at first blush, appears to be a rather clear and direct indication in subsections 252(c)(2) and 252(d) that the state commissions should establish prices.

Moreover, we have serious doubts that the FCC's interpretation of the Act constitutes the straightforward or unambiguous grant of intrastate pricing authority to the FCC sufficient to qualify as an exception to the provisions of subsection 2(b) of the Communications Act of 1934, 47 U.S.C. § 152(b) (1994). *See Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 377, 106 S.Ct. 1890, 1903, 90 L.Ed.2d 369 (1986). Subsection 2(b) provides that "nothing in this Chapter shall be construed to apply or to give the [FCC] jurisdiction with respect to . . . . charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communications service." 47 U.S.C. § 152(b) (1994). In *Louisiana*, the Supreme Court determined that in order to overcome subsection 2(b)'s limits on the FCC's jurisdiction with respect to intrastate communications service, Congress must "unambiguously" or "straightforwardly"

either modify subsection 2(b) or grant the FCC additional authority. 476 U.S. at 377, 106 S.Ct. at 1903. We acknowledge that portions of the Telecommunications Act of 1996 expressly grant the FCC authority over some aspects of intrastate telephone service. *See, e.g.*, 47 U.S.C.A. § 251(e) (West Supp. May 1996) (FCC authority regarding numbering administration). We have been unable, however, to find such an express grant of authority to the FCC over the pricing of intrastate telephone service, nor does there appear to be a modification of subsection 2(b).[6] The combination of these omissions indicates a sufficient likelihood that the petitioners will succeed on the merits of their appeal. We, of course, remain open to being persuaded that the FCC's read is the correct one when full briefing and argument on the merits have been concluded.

Because we believe that the petitioners have demonstrated that they will likely succeed on the merits of their appeals based on their argument that, under the Act, the FCC is without jurisdiction to establish pricing regulations regarding intrastate telephone service, we think that it is unnecessary at this time to address the remaining theories which the petitioners use to challenge the legality of the FCC's pricing rules.

B.

With respect to the likelihood of irreparable harm, the petitioners initially assert that their interest in productive ongoing negotiations and arbitrations regarding the implementation of the Act will be irreparably harmed if the FCC's pricing regulations are not stayed. They argue that the competitors seeking entry into the local phone markets will refuse even to consider prices that are higher than the FCC's proxy rates and will simply hold out for

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[6] In fact, we are told that a provision which specifically modified subsection 2(b) was expressly rejected by Congress before the bill was passed. *See* S. 652, 104th Cong., 1st Sess. § 101(c) (1995).

the proxy rates that the States will feel obligated to impose in their arbitrations. In this manner, the proxy rates effectively establish a price ceiling, an observation recognized by the FCC itself, which inevitably confines and restricts the give and take characteristic of free negotiations and arbitrations. The state commissions specifically argue that the FCC's pricing regulations effectively undermine their authority, and if not stayed, the rules will disrupt the predictability and continuity of the existing regulatory system. The state commissions explain that the FCC pricing rules essentially handcuff their discretion in determining the just and reasonable rates in arbitrations required under subsection 252(d)(1).

In order to demonstrate irreparable harm, a party must show that the harm is certain and great and of such imminence that there is a clear and present need for equitable relief. *See Packard Elevator v. I.C.C.*, 782 F.2d 112, 115 (8th Cir. 1986), *cert. denied*, 484 U.S. 828, 108 S.Ct. 98, 98 L.Ed.2d 59 (1987) (quoting *Wisconsin Gas*, 758 F.2d at 673-74). The FCC asserts that the petitioners' allegations of irreparable harm are merely speculative and that there is no certainty that its proxy rates will ever be applied to the petitioners. We are persuaded, however, by the petitioners' evidence that the negotiations preferred by the Congress are already breaking down due to the competitors' desire to hold out for the FCC's proxy rates. Moreover, given the time constraints under the Act, some state commissions have already felt obliged to impose the proxy rates in their arbitrations. These experiences indicate that the FCC's pricing rules will derail current efforts to negotiate and arbitrate agreements under the Act, and the "pick and choose" rule will operate to further undercut any agreements that are actually negotiated or arbitrated. The inability of the incumbent LECs and the state commissions to effectively negotiate and arbitrate agreements free from the influence of the FCC's pricing rules, including the "pick and choose" rule, will irreparably injure the in-

terests of the petitioners. If the FCC's rules are later struck down, it will be extremely difficult for the parties to abandon the influence of their previous agreements that were based on the national pricing rules and to recreate the atmosphere of free negotiations that would have existed in the absence of the FCC's dictated presumptive prices. Without a stay, the opportunity for effective private negotiations will be irretrievably lost. We initially believe that this result would be contrary to Congress's intent that these matters be resolved through negotiation and/or arbitration.

The petitioners also argue that the FCC's pricing rules will force the incumbent LECs to offer their services to requesting carriers at prices that are below actual costs, causing the incumbent LECs to incur irreparable losses in customers, goodwill, and revenue. The FCC contends that its pricing rules, in particular its proxy rates, are merely an option for the parties and the state commissions to consider, and consequently the petitioners cannot make a showing that the harm is certain and imminent, as required in *Packard Elevator*, 782 F.2d at 115. As we explained above, we are persuaded that, absent a stay, the proxy rates would frequently be imposed by the state commissions and would result in many incumbent LECs suffering economic losses beyond those inherent in the transition from a monopolistic market to a competitive one. We are mindful of the precedents that declare that "economic loss does not, in and of itself, constitute irreparable harm," *Wisconsin Gas*, 758 F.2d at 674, and that "revenues and customers lost to competition which can be regained through competition are not irreparable." *Central & S. Motor Freight Tariff Ass'n v. United States*, 757 F.2d 301, 309 (D.C. Cir. 1985), *cert. denied*, 474 U.S. 1019, 106 S.Ct. 568, 88 L.Ed.2d 553 (1985). Both of these propositions, however, rest on the assumption that the economic losses are recoverable. The threat of unrecoverable economic loss, however, does qualify as irrep-

arable harm. *See Baker Elec. Coop., inc. v. Chaske*, 28 F.3d 1466, 1473 (8th Cir. 1994); *Airlines Reporting Corp. v. Barry*, 825 F.2d 1220, 1227 (8th Cir. 1987). In this case, the incumbent LECs would not be able to bring a lawsuit to recover their undue economic losses if the FCC's rules are eventually overturned, and we believe that the incumbent LECs would be unable to fully recover such losses merely through their participation in the market. Moreover, the petitioners' potential loss of consumer goodwill qualifies as irreparable harm. *See Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co.*, 22 F.3d 546, 552 (4th Cir. 1994) (holding that the possibility of permanent loss of customers to a competitor or the loss of goodwill satisfies the irreparable injury prong). For the foregoing reasons, we believe that the petitioners have adequately demonstrated that they will be irreparably harmed if a stay of the FCC's pricing rules is not granted.

C.

In assessing whether others will be harmed if the court grants the stay, we acknowledge that our decision, either way, will unavoidably adversely affect the interests of either the incumbent LECs or their potential competitors. If we decide to grant the stay, we recognize that the companies seeking entry into the local telephone markets will have to negotiate and arbitrate their agreements without the added leverage of the FCC's pricing rules, and assuming that the FCC's rules were later upheld, they would likely renegotiate the terms of their agreements. The inconvenience of this scenario, however, is outweighed by the harm and difficulties of its alternative, discussed in the previous section. In other words, we think that it would be easier for the parties to conform any variations in their agreements to the uniform requirements of the FCC's rules if the rules were later upheld than it would be for the parties to rework agreements adopted under the FCC's

rules if the rules were later struck down. Consequently, we conclude that any harm that other parties may endure as a consequence of imposing a stay is outweighed by the irreparable injury that the petitioners would sustain absent a stay.

D.

The FCC argues that a stay would not promote the public interest because it would not maintain the status quo and it would block the road to competiton in local telephone service markets. We reject both contentions. Before the FCC published its regulations pursuant to the Act, several incumbent LECs, potential competitors, and state utility commissions were all working together to implement the local competition provisions of the Act. The Act's system of private negotiation backed by state-run arbitration was operating without the input from the FCC. A stay would preserve the continuity and stability of this regulatory system—a system that has initially proved to be successful. The FCC asserts that without its pricing regulations in effect, the incumbent LECs will be able to exert their superior bargaining power over their potential competitors and impose unreasonable rates for their services. This argument ignores the empirical success that private parties and the state commissions have had in implementing the local competition provisions of the Act.[7] It also denigrates the proven ability of the state commissions to prevent incumbent LECs from charging excessive rates for their services. The Act requires rates to be just and reasonable and it authorizes state commission to enforce these

[7] We note that some states, Connecticut, Florida, and Iowa in particular, have already established rates based on local conditions and are already involved in opening up their local markets to competition under both the federal Act and state statutes which foreshadowed the new federal law. Moreover, the FCC-imposed rate for Iowa is substantially higher than the state-set rate which was based on the full record from a contested case proceeding, while in Florida, the FCC proxy rate is substantially lower than the state-set rate.

requirements. Presently, we have no reason to doubt the ability of the state commissions to fulfill their duty to promote competition in the local telephone service markets and thus conclude that the public interest weighs in favor of granting a stay.

III.

Having concluded that the petitioners satisfy the four requirements for granting a stay, we grant the petitioners' motion to stay the FCC's pricing rules and the "pick and choose" rule contained in its First Report and Order [8] pending a final decision on the merits.

Upon the filing of this order, the stay imposed by our order of September 27, 1996, is dissolved, and is replaced by the stay imposed by the terms of this order.

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[8] The stay pertains only to §§ 51.501-51.515 (inclusive), 51.601-51.611 (inclusive), 51.701-51.717 (inclusive), § 51.809, and the proxy range for line ports used in the delivery of basic residential and business exchange services established in the FCC's Order on Reconsideration, dated September 27, 1996.

FCC 97-295

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

CC Docket No. 96-98

IN THE MATTER OF
IMPLEMENTATION OF THE LOCAL COMPETITION
PROVISIONS IN THE TELECOMMUNICATIONS ACT
OF 1996

CC Docket No. 95-185

INTERCONNECTION BETWEEN LOCAL EXCHANGE
CARRIERS AND COMMERCIAL MOBILE RADIO
SERVICE PROVIDERS

THIRD ORDER ON RECONSIDERATION
AND
FURTHER NOTICE OF PROPOSED RULEMAKING

Adopted: August 18, 1997 Released: August 18, 1997

FNPRM Comment Date: October 2, 1997
FNPRM Reply Date: October 17, 1997

By the Commission: Chairman Hundt issuing a separate statement.

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30. Finally, we note that, traditionally, shared facilities are priced on a usage-sensitive basis, and dedicated facili-

ties are priced on a flat-rated basis. We believe that this usage-sensitive pricing mechanism provides a reasonable and fair allocation of cost between the users of shared transport facilities. For example, in the *Access Charge Reform Order*, specifically the sections dealing with rate structure issues for interstate access charges, we required that the cost of switching, a shared facility, be recovered on a per minute of use basis, while the cost of entrance facilities, which are dedicated to a single interexchange carrier, be recovered on a flat-rated basis.[83] We note that several state commissions, in proceeedings conducted pursuant to section 252 of the Act, have required incumbent LECs to offer shared transport priced on a usage-sensitive basis.[84] We acknowledge that, under the Eighth Circuit's decision, we may not establish pricing rules for shared transport. However, in situations where the Commission is required to arbitrate interconnection agreements pursuant to subsection 252(e)(5), we intend to establish usage-sensitive rates for recovery of shared transport costs unless parties demonstrate otherwise.[85]

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34. We also note that the failure of an incumbent LEC to provide access to all of its interoffice transport facilities on a shared basis would significantly increase the requesting carriers' costs of providing local exchange

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[83] Access Charge Reform, First Report and Order, CC Docket 96-262, FCC 97-158 (rel. May, 16, 1997) (*Access Charge Reform Order*) at paras, 135, 153.

[84] *See, e.g.*, Michigan Public Service Commission, Case No. U-11280, July 14, 1997, Order at 26; Public Service Commission of Wisconsin, Case No. 6720-TI-120, Findings of Fact, Conclusions of Law, and Second Order, May 30, 1997.

[85] *See* 47 U.S.C. § 252(e)(5). *See also Local Competition Order*, 11 FCC Rcd at 16127-32, paras. 1283-95 (giving notice of certain minimum procedural rules and substantive standards that the Commission will use if it assumes jurisdiction pursuant to section 252(e)(5)).

service and thus reduce competitive entry into the local exchange market. In the *Local Competition Order*, we observed that:

> By unbundling various dedicated and shared interoffice facilities, a new entrant can purchase *all* interoffice facilities on an unbundled basis as part of a competing local network, or it can combine its own interoffice facilities with those of the incumbent LEC. The opportunity to purchase unbundled interoffice facilities will decrease the cost of entry compared to the much higher cost that would be incurred by an entrant that had to construct all of its own facilities. An efficient new entrant might not be able to compete if it were required to build interoffice facilities where it would be more efficient to use the incumbent LEC's facilities.[94]

We continue to find the foregoing statements to be true with respect to shared as well as dedicated transport facilities. Requesting carriers should have the opportunity to use *all* of the incumbent LEC's interoffice transport facilities. Moreover, the opportunity to purchase transport facilities on a shared basis, rather than exclusively on a dedicated basis, will decrease the costs of entry.

35. We believe that access to transport facilities on a shared basis is particularly important for stimulating initial competitive entry into the local exchange market, because new entrants have not yet had an opportunity to determine traffic volumes and routing patterns. Moreover, requiring competitive carriers to use dedicated transport facilities during the initial stages of competition would create a significant barrier to entry because dedicated transport is not economically feasible at low penetration rates. In addition, new entrants would be hindered by significant transaction costs if they were required to contin-

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[94] *Local Competition Order*, 11 FCC Rcd at 15718-19, para. 441 (emphasis added).

ually reconfigure the unbundled transport elements as they acquired customers. We note that incumbent LECs have significant economies of scope, scale, and density in providing transport facilities. Requiring transport facilities to be made available on a shared basis will assure that such economies are passed on to competitive carriers. Further, if new entrants were forced to rely on dedicated transport facilities, even at the earliest stages of competitive entry, they would almost inevitably miscalculate the capacity or routing patterns. We recognize, however, that the need for access to all of the incumbent LEC's interoffice facilities on a shared basis may decrease as competitive carriers expand their customer base and have an opportunity to identify traffic volumes and call routing patterns. We therefore may revisit at a later date whether incumbent LECs continue to have an obligation, under section 251(d)(2), to provide access to all of their interoffice transmission facilities on a shared, usage sensitive basis.[95]

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43. We reject as well Ameritech's contention that a network element must be identifiable as a limited or preidentified portion of the network. We find nothing in the statutory definition of network elements that prohibits requesting telecommunications carriers from seeking access to every transport facility within the incumbent's network. Our definition of signalling as a network element does not require requesting carriers to identify in advance a particular portion of the incumbent LEC's signalling facilities, but instead permits requesting carriers to obtain access to multiple signalling links and signalling transfer points in

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[95] We note that, if, in the future, competitive carriers gain sufficient market penetration to justify obtaining dedicated transport facilities, either through the use of unbundled elements or through building their facilities, shared transport may no longer meet the section 251(d)(2) requirements. In that event, the Commission can evaluate at that time whether incumbent LECs must continue to provide access to shared transport as a network element.

the incumbent LEC's network on an as-needed basis.[110] We also reject Ameritech's assertion that shared transport cannot be physically separated from switching.[111] Both dedicated and shared transport facilities are transport links between switches. These links are physically distinct from the end office and tandem switches themselves.

44. Although we conclude that shared transport is physically severable from switching, incumbent LECs may not unbundle switching and transport facilities that are already combined, except upon request by a requesting carrier. Although, the Eighth Circuit struck down the Commission's rule that required incumbent LECs to rebundle separate network elements,[112] the court nevertheless stated that it: "upheld the remaining unbundling rules as reasonable constructions of the Act, because, as we have shown, the Act itself calls for the rapid introduction of competition into the local phone markets by requiring incumbent LECs to make their networks available to . . . competing carriers."[113] Among other things, the court left in effect section 51.315(b) of the Commission's rules, which provides that, "[e]xcept upon request, an incumbent LEC shall not separate requested network elements that the incumbent LEC currently combines."[114] Therefore, although incumbent LECs are not required to combine transport and switching facilities to the extent that those elements are not already combined, incumbent LECs may not separate such facilities that are currently

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[110] *See generally Local Competition Order*, 11 FCC Rcd at 15738-41, paras. 479-483.

[111] *See* May 9, 1997 *ex parte* from Jim Smith, Director, Federal Relations, Ameritech, to William Caton, Acting Secretary, FCC, attaching Supplemental Rebuttal Testimony of David H. Gebhardt at 2 (Gebhardt Supplemental Rebuttal Testimony).

[112] *Iowa Utilities Bd.* at *25. *See also* 47 C.F.R. § 51.315(c)-(f) (vacated rules).

[113] *Iowa Utilities Bd.* at *28.

[114] 47 C.F.R. § 51.315(b).

combined, absent an affirmative request. In addition to violating section 51.315(b) of our rules, such dismantling of network elements, absent an affirmative request, would increase the costs of requesting carriers and delay their entry into the local exchange market, without serving any apparent public benefit. We believe that such actions by an incumbent LEC would impose costs on competitive carriers that incumbent LECs would not incur, and thus would violate the requirement under section 251(c)(3) that incumbent LECs provide nondiscriminatory access to unbundled elements. Moreover, an incumbent LEC that separates shared transport facilities that are already connected to a switch would likely disrupt service to its own customers served by the switch because, by definition, the shared transport links are also used by the incumbent LEC to serve its customers. Thus, incumbent LECs would seem to have no network-related reason to separate network elements that it already combines absent a request.

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47. We also disagree with Ameritech's and BellSouth's argument that defining the unbundled network element shared transport as all transport links between any two incumbent LEC switches would be inconsistent with Congress's intention to distinguish between resale services and unbundled network elements. Section 251(c)(3) requires incumbent LECs to make available unbundled network elements at cost-based rates; sections 251(c)(4) and 252(d)(3) require incumbent LECs to make available for resale, at retail price less avoided costs, services the incumbent LEC offers to retail users. In the *Local Competition Order*, we held that a key distinction between section 251(c)(3) and section 251(c)(4) is that a requesting carrier that obtains access to unbundled network elements faces greater risks than a requesting carrier that only offers services for resale.[124] A requesting carrier that takes a network element dedicated to that carrier, and

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[124] *Local Competition Order*, 11 FCC Rcd at 15668-69, para. 334.

recovered on a flat-rated basis, must pay for the cost of the entire element, regardless of whether the carrier has sufficient demand for the services that the element is able to provide. The carrier thus is not guaranteed that it will recoup the costs of the element. By contrast, a carrier that uses the resale provision will not bear the risk of paying for services for which it does not have customers.[125] In particular, a requesting carrier that takes an unbundled local switch must pay for all of the vertical features included in the switch, even if it is unable to sell those vertical features to end user customers.[126] Requesting carriers that purchase shared transport as a network element to provide local exchange service must also take local switching, for the practical reasons set forth herein, and consequently will be forced to assume the risk associated with switching.[127]

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[125] *Iowa Utilities Bd.* at *26-27.

[126] *Local Competition Order*, 11 FCC Rcd at 15707-08, para. 414.

[127] A requesting carrier that uses its own self-provisioned local switches, rather than unbundled local switches obtained from an incumbent LEC, to provide local exchange and exchange access service would use dedicated transport facilities to carry traffic between its network and the incumbent LEC's network. Thus, the only carrier that would need shared transport facilities would one that was using an unbundled local switch.

August 18, 1997

SEPARATE STATEMENT OF CHAIRMAN REED HUNT

RE: Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Third Order on Reconsideration and Further Notice of Proposed Rulemaking

The Commission today reaffirms and clarifies a very important aspect of our Local Competition Order: the ability of a competitive local exchange carrier to obtain transport on a shared basis from the incumbent local exchange carrier. More fundamentally, this decision highlights the importance we place on incumbents making available to new entrants their network elements on a combined basis—a combination sometimes referred to as the UNE platform.

In the Telecommunications Act of 1996, Congress mandated that new entrants into the formerly monopolized local exchange market have the ability to choose any or all of three entry strategies: interconnection, resale and unbundled network elements. Congress correctly foresaw that new entrants would need these flexible strategies if they are to compete successfully with the incumbents and their extraordinary economies of scale and scope.

In its decision last month, the Eighth Circuit explicitly affirmed our authority under the Act to define unbundled network elements. This is a very important aspect of our local competition policies. Where the purpose or effect of moves by an incumbent LEC to break apart currently combined elements is to create a barrier to competition, we will take action to tear down or prevent the erection of such barriers.

[AT&T Logo]

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AT&T INVESTMENT COMMUNITY MEETING

Transcript
March 3, 1997—AM Session

JOHN ZEGLIS: Okay, Thank you John. The subject is public policy. Like it or not, public policy still plays a very large role in AT&T's current operations and particularly its future aspirations. That's pretty much a function of where we've come from as a regulated utility. It's almost equally a function of where we want to go into regulated monopoly markets. It means we've had to seek a lot of change in the public policy arena. And my purpose here this morning is to persuade you that our program for this public policy work is not nearly as helter skelter as the briefs and the counter briefs, charges and counter charges may make you think on a daily basis. We have structured our initiatives in the public policy arena around these four central strategic objectives. Number one, we need to eliminate the unnecessary regulation of AT&T. That means there has been too much of it and it's been lopsided against us and in favor of our competitors. Number two, we need to open monopoly markets to new entry. That means the local exchanges in the United States and just about any other country outside this nation.

Number three, until we get those markets open, we need to enforce monopoly safeguards. The most celebrated here is clearly the MSJ like safeguard in the United States; no RBOC long-distance entry until their markets are competitive.

And then the fourth goal, also until we get those monopoly markets made competitive, is to use public policy to bring down this exorbitant 15 dollar carrier-to-carrier pay-

ment bill that we lug around? We call that access domestically and international settlement rates globally.

So the modus operandi for this talk is to look at those four objectives. We'll do all of them domestically first. We'll double back and do them internationally at the end.

We're going to talk about where we stand today, where we're going to go, what are the big plays this year and next, and in the end what kind of market framework can we deliver to AT&T for us to execute on our strategy.

All right. Number 1, deregulation of AT&T. This is the most fun because it's essentially done. We have had to seek this relief at two levels, state and federal. State as a practical matter we were done with long-distance regulation of our prices and earnings by the end of the 1980s. Further good news from the state, we're seeing no inclination to resume regulation of AT&T's new local service operations in a few of the states where nondominant by statute. In most of the others the commissions look like treating us for what we are. The second, third, fourth new entered with zero market share and not in need of any kind of traditional public utility regulation.

At the federal level, at the FCC this has been a tougher nut. And if you follow this, you know we've spent the 1990's peeling off the wraps a layer at a time.

The progression is also well-known to most of you. We've gone from rate of return to price caps to streamline tariffs to contract tariffs to nondominant domestically, to nondominant internationally and now we're even up to detariffing. And now we've got an adjustment to make in the course as to whether that's mandatory or whether we can use tariffs where it makes sense. The point of it all is that AT&T, state and federal, has now escaped active regulation of our prices, our earnings and our services. Along the way we've thrown off some ancillary wraps having to do with network disclosure, regulatory accounting rules, we've got a little mop up to do here. There is some

bundling rules out of the old computer inquiry two, prohibition of equipment and services going together. We need to work off some safety nets, improve some deaveraging rules. None of that is seriously getting in our way right now. The asymmetric regulation is completely gone. We're the same as MCI, Sprint and the other long-distance companies. We're better than the local exchange carriers whose markets we're entering. Truth is we'll probably always be subject to regulations at some level. But this is pretty close to about what we want say that regulation on AT&T is no longer a significant constraint on our strategy or its execution.

So I think the thing to do is to get off of that one and go onto numbers 2 and 3. These are more interesting because they are work in progress and they involve some heavy lifting still for the company and the industry. Recognize that the numbers 2 and 3 here are two sides of the same coin, opening the local exchanges and prohibiting the RBOC long-distance entry until we do. And since February of 1996 this has been pretty much a story of the new Telecom Act. We're going to look at these two objectives separately. But we ought to also recognize the critical interdependency that the act created. Prior to 1996 we had a serious policy disconnect on these two objectives. You had Judge Green deciding on long-distance entry for the RBOC, but he couldn't touch the local exchanges. You had the State deciding on local exchange entry, but they couldn't do anything about RBOC long-distance. And so the AT&T nightmare in all of this was that the MFJ relief would come out of sequence. That is, the courts would finish tearing down the MFJ and opening our long-distance market before the state had finished the job opening the local. And that's why the 1996 act is such a great relief to us. It connected the two objectives, it commanded the opening of local first, and only then do the RBOCs come out into long-distance. And now we're engaged in the key to its implementation,

namely we got to get the sequence correct so that the incentives stay in the right place.

All right. On that score, how are we doing? Well, I think as Bob told you, 1996 was the year of getting the rules in place for this new local entry. And our Congress dictated the order of events. The February Telecom Act gave us some standards. The FCC rule making in August gave us some more. Carrier negotiations in the spring and summer were to iron out some of the wrinkles and we were to go to the state commissions for arbitration for the final rules in the fall and winter. We had a surprise along the way, known as the 8th Circuit Court of Appeals. Got that stay in October and we're looking for a decision in April or May. But as it's turned out that may not be as important as we first thought, because the pace of decision-making, the number of decisions and especially their content in the hands of the state has worked out almost exactly as we expected and more importantly as we hoped for. So we're going to take a look at that now. And I want to tell you we're going to use a coverage metric here that goes by access lines. That recognizes that a decision in a small state isn't as valuable to us as a decision in a large state. And it begins by showing you that we have 98 percent of the access lines covered by either final negotiations in arbitrations or those that are in progress. We've done 81 percent complete. That comes out of nearly 50 arbitrations and that covers 120 million lines. We're going to finish up another 17 percent in 1997. That's some 30 odd arbitrations over 25 million lines. The two percent there are either exempt rural local exchange carriers or places that we don't think we need to be.

About half of that solid blue is on appeal to the district court. Frankly I think we'll make it all of the blue on one side or the other.

And only eight of these arbitrations are actually resulted in signed agreements with AT&T. That's because after you get the decision, you are sent back to the bargaining

table to implement principles and to finish the details, not always a quick task.

All right. If that's our coverage, how about our results? Well, the most celebrated issue in these arbitrations is always reselling. Reselling all or a piece of the local exchange carrier's services and networks. And there are two ways to resell under the act. One is the total service, that's what we call total service resale, TSR. And let's look at this one first because the act gave us the formula for the wholesale discount. It said you take the RBOC or the nonRBOC retail price back out of voided costs and properly applied to the FCC that ought to bring you out roughly in a range of 17 to 25 percent. How did we do here? First the RBOC territory. Terrific results, 91 percent of those lines are in or better than the FCC range. We're 102 million lines covered within that proxy range or a little better.

We've got five percent of six million lines underneath it. Utah, with seven or eight percent on the resale discount. And if you look at how these things distribute, you would see that we've got a major cluster there in the 20 to 22 percent range, and way out there on the right, take a bow to the national champion, the District of Columbia has a discount rate of 31.4 percent.

Quickly into GTE territory we've got another story going here. We have 52 percent of GTE lines where we've litigated in that discount range. 44 percent of the time we're out of it. That's about 7 million lines. If you live in California, Florida, Oklahoma, Ohio, you ought to be embarrassed.

Another way to resell, and one that figures prominently in our plans, is what we've been calling the unbundled network element. And here if anything we've got a better story coming out of the arbitration. First, everybody who has addressed the issue everywhere is giving us the full unbundling that the FCC called for in its August intercon-

nect order. That means we can get at the elements, at the features and the functions and the ILEC network piecemeal. That includes the vertical features of the switch. We can pick and choose what we need.

Second piece of real good news. Not only can we have them individually, we can buy the elements, put them all back together, create local service out of it, something we call the unbundled network element platform, UNE P. If you can remember that we'll speed up the presentation. But 92 percent of the lines coming out of these arbitrations are eligible for recombination in the way I described, and we will be appealing intensely Georgia, Tennessee, Louisiana and Alabama, where it is not permitted. Nice work Bell South, but you're going to get reversed.

All right. Next issue, what price for these unbundled elements? Well, more good news. Most of the decisions have come out in favor of a pricing methodology that uses long-run incremental forward looking costs. There are a few hybrids in the mix, but the nice part of this is no decision uses the embedded backward looking costs to price these network elements. Again, how are we doing? RBOCs first. We have 94 percent of the RBOC arbitrated lines covered by that forward looking cost methodology, and when you put that methodology onto the costs and the elements in the RBOC territory, it turns out that something like 74 percent of the prices—this is loop prices—come out near or below what the FCC eestimated would be the case when it issued its August order. These are called proxy prices and they were guesstimates based upon what the forward looking cost methodology would produce. Better pause and acknowledge the national champion, Illinois. 43 percent of the FCC loop proxy. You can get a loop in downtown Chicago for $3.72 a month.

Again, GTE, a little different, this is kind of an amazing story. We have 81 percent of those GTE lines have been arbitrated to use the forward looking cost methodology.

Let's put that cost methodology on the actual cost, going forward, and what do we get? Wow. Only 28 percent of the lines fall within that FCC proxy projection, something like 60 odd percent of the lines are outside it, makes you wonder whether they really are high cost. Also going to have to do something about some attempts to put non-recurring charges on us when we win customers in this manner. Those aren't cost based and we're in the process early this year of litigating any such charges back to cost.

Good news I guess is that the business case for using this unbundled platform is going to turn out to be a lot less sensitive to the pricing results than TSR. And that's where I want to move next. I would like to line up for you the economics of TSR on the one hand and unbundled network elements on the other hand in AT&T's strategy and business case.

We're going to start in the State of Pennsylvania, where like other places, TSR margins are modest. This is a good state for us. This is one where our wholesale discount is 25.9 percent. And when you stack the revenue next to the cost, you see that for a consumer averaging 20 dollars of local exchange service in Pennsylvania, we have a cost of goods sold of $14.81. Gives you a chance to market a combined local and long-distance package to this customer, gives you a fighting chance perhaps of recovering your marketing and billing and customer care costs incrementally to what you're already doing for long-distance. But it's tight. I guess what you say is it's a lot better than it used to be in Rochester where on that trial we have began to a five percent discount and the pink stack would have been 19 bucks.

But now let's look at the unbundled network element platform in the same state. We'll stay in Pennsylvania. Admit it's a good state for us. We're going to go into a high density, low Uni price zone. We're going to buy all the elements, recombine them to make global service out of the elements and assume we're doing this to a consumer that buys $25 of long-distance and five dollars of local

toll service per month. And now what we end up with, stacked next to it, is quite a different picture. Our cost of goods sold on that platform is $16.03, slightly above the TSR cost. But our revenue is $33.50. Consisting of that same 20 dollars in local that we collect and $3.50 in the interstate subscriber line charge, which under FCC rule comes to the provider under the platform, and 10 dollars worth of access, which was otherwise being paid to the local carrier on the 30 dollars of toll this customer was using. So we have widened our margin on the UNE P by more than twelve bucks over what we had on the TSR side.

Where this company assigns this margin, how you assess this business opportunity, depends upon what business you think we're in at AT&T. If you're a division that thinks your business is local exchange service, that is, you're after the 20 dollars, then you say, wow, I've got an all in, net cost of service that is defrayed by that extra revenue I collected, taking that away from the 16 dollars, I'm not paying more than 2 and a half dollars all in for the cost of goods sold to let me go chase the 20 dollars.

A little more accurate way of looking at our local business might say it's not local exchange. It's local network. We're going to change all the revenues that move over local network facilities. In that case I just bought a $33.50 revenue screen for $16.03 cost of goods sold, a discount of 52 percent. Or if you're in one of our sister divisions, say Gail McGovern's consumer long-distance, she might look at it differently. She might say, Good. For the same $16 that Harry Bennett paid to earn his 23.50 of end user collection, I just had my access reduced by $10. I improved my margin on a $30 toll customer by $10 because I don't have to pay access anymore outside the company. And Harry still has the distance between 16 dollars and 23.50 to recover his further costs, which is a 32 percent discount in and of itself. Or if you're Bob Allen you say, I don't care how you all allo-

cate those costs among the divisions, it's all mine. And what I see is a 53.50 cent revenue screen, we saved 30 dollars of toll revenue, we add 23.50 of local revenue, and we traded that crushing permanent access cost for a platform cost, plus a little bit of intercity transport cost represented by those yellow dots.

None of this by the way is to say that we can't make some business out of the TSR side of it. On the TSR side, you still have some very attractive long-distance customers, in this case the same $30 toll customer stacked up on top of that local revenue and that local cost. But now you're still paying access, which is why the pink bar goes up as much as it does. And you've lost your opportunity at 3.50 cents for the subscriber line connection recovery. Just another way of showing that your 13.50 better off on the right-hand side then you are on the left-hand side. And you know, this can go on for a long time. We could really have fun. How about a 75 dollar toll customer with five dollars of intrastate, intra-LATA toll? Now you move your cost of goods up to 19 dollars but you move your true local collections to 50. I'm dealing with a 64 percent discount, as you see, the higher the toll usage the more pronounced advantage of this platform. And you've got lots of room in there for some sensitivity around the existing costs and prices of the platform.

Having said all that, I want to suggest that none of this is the right way to look at the new AT&T's business. We are more than an all distance business. On top of that all distance stack of revenue we intend to add Internet service, information services, we intend to add anything that requires local connectivity. And we can do it without adding local connectivity costs. It's simply a matter of putting a couple extra pennies on the transport, but the basic connectivity platform stays there in the solid pink. It makes you look at our business in a different way. It's a two-fold business. We're local connectivity and its platform costs and anything and everything that comes after that connectivity.

Clearly there are huge advantages to that kind of business when you use the unbundled platform. It makes that local all distance service much more attractive, makes use indifferent to what happens in access for Interest, gives us an outlet for the new services, let's us work down the pink costs by replacing the RBOC elements with our own switch or our own wireless loop when the economists say so or when we want to differentiate our services. Frankly, all of us, you and the business are probably going to have to work on a different way to keep score. We aren't going to be able to allocate that connectivity cost among our businesses any more decisively and definitively than we've been able to allocate the cost of the local loop for 125 years in the industry.

Look, with all that opportunity, what are the public policy threats to AT&T's going forward business? One I hear most asked about is the eight circuit. And sure some national uniformity would be useful if we can get the FCC's jurisdiction restored in that appeal. But most of us are a lot less concerned than we used to be about what's going to come out of St. Louis. The first piece of the business model we've been looking at here, rest on the unbundling of network elements. And that's something that congress built into the new Telecom Act. That's not something the courts can say we don't want. Congress said, you got to have unbundling. So that's the law. And we feel pretty secure about that one.

The second piece of this model depends importantly on a principle that says, you don't pay access if you provide service over an unbundled element platform. Again, that's within the FCC's interstate access jurisdiction. That isn't a local entry matter. Probably that's not even properly before the 8th circuit right now. At least to the 70 percent of access that is interstate. And by the way, the 30 percent that is intrastate so far most of the states with only a few exceptions have gone along with the FCC rule and said no, you don't select intrastate access either when

you're providing a platform and not a per minute connection charge.

So what we ended up with in the 8th circuit was a lot of arguments over jurisdiction; fed or state. The state as it turns out did just fine without that preemptive federal jurisdiction. Perhaps it was seeing those results, perhaps it was doing the math on the platform. But the exchange carriers in the full argument added some substantive pricing challenges to their appeal. They say you can't use the combined elements for local, you can't use forward looking costs. That's unconstitutional or prohibited by the statute. It wouldn't be serious, at least more serious if we got a reversal on those grounds. But frankly the states did not join those challenges. The bulk of the argument has been on jurisdiction and we feel good about our chances on the substantive issues in the appeal.

Let me say here the biggest threat to this kind of business plan probably isn't public policy directly. The biggest threat is really implementation. Can we get at this stuff? Can we order it? Can the local exchange carriers provision it? What we have, incidentally, are the commissions doing their part again. 95 percent of the access lines are subject to orders that the local exchange carrier provide us with electronic interfaces for ordering and provisioning the elements and the service. Not only automated but at parity with the way the LEC provisions its own customers, through its own systems. We're getting the right rules in place about this, too, in the regulatory arena, but are the exchange carriers ever going to get us up and running? Well, we would say that depends in the first instance on incentive. And to show you the advantage of getting the incentives right, we have to return to the sad case of GTE, which illustrates the point for any nonRBOC territory. The Telecom Act didn't get it quite right here. They left GTE free to get into the long-distance business, even as it continues its local exchange monopolies, and they are accumulating customers rapidly. They have got no incen-

tives to cooperate with anybody else in getting those exchanges open. Quite the contrary, the longer they're closed the better it is. They're the most active challenger of the Telecom Act. They have some of the highest access rates, some of the highest element prices, some of the slowest implementation on the entry conditions. Frankly, we've got to do more than we're doing. At the moment we're waiting for the Telecom regulatory processes under the act to play out before we look at testing the that kind of behavior elsewhere, such as in the antitrust courts.

Are the RBOCs doing it any better? After all, these are the ones that have the incentives in the right place. How well can they be expected to perform? I tell you that's going to send us over to the third objective, which is to assure that we don't have long-distance entry before the RBOCs open those exchanges realistically.

This is a subject where the industry has spent a lot of words without necessarily advancing knowledge. So I'm going to try to stick to what we do know about RBOC entry. And it starts here. We know under the new act this is a four hurdle race, and these are the hurdles. First, you have to implement the local entry checklist, fully implement. Second, you've got to be facing some actual facilities competition for both business and residence customers. Then you've got to submit to a DOJ evaluation of conditions. And finally, you have to win the FCC's determinations that your entry to long-distance is in the public interest.

Now, three out of four of these hurdles, B, C and D, remain very speculative. How much competition is going to be required out there? We say nontrivial, everybody agrees. But you can't really look to the act to define it because it didn't.

What DOJ test is going to be used in their evaluation? We hope it's like the MFJ, that it starts with an analysis of whether there is uncontrolled market power locally.

How is the FCC going to weigh the public interest factors? We think that the FCC recognizes how important incentives are and how undermining it would be if premature entries were allowed to reverse the incentives. But at this stage, who knows. All I can do is argue the case and I'm not going to do it right now.

That's why we are spending most of our time working the first issue, the checklist. The checklist is much more granular. We know what it is. We know that it's not just an agreement to do it. It's not just a theoretic availability out there. It needs to be fully implemented. Those are the words of the Telecom Act.

For some of the conditions in that checklist, you get an obvious yes, no. The RBOCs know how to do it and you know when it's been done. It's like dial parity or number portability.

Others are just as important but they're proving a lot more difficult for both sides. And chief among these difficult items are these operating systems for ordering the TSR and the unbundled platform. That has shown up in the industry as a huge problem.

Automated TSR ordering right now is in the early stages. It's only a very few states. Automated unbundled element platform ordering is up and running in no state. Not a single state met the FCC's January 1, 1997 deadline for having the interfaces operational.

We are focusing the PUCs, the FCC, the DOJ on these issues. We're trying to establish metrics and standards where none exist. We've supported the creation of an industry coalition to attempt consensus on a set of quantitative measures that are based on really very common sense business needs. Can we order the stuff automatically? Will the exchange carrier accept the orders in the quantity we submit? Those the customer get service on time? Is the billing accurate? Does the service work? Can you get it fixed? Our view of success here is almost

exactly what FCC chairman Reed Hunt told the state commissioner in November of last year. Provisioning limits must not materially limit the flow of customers from the BOC to its rivals. And folks, the systems do that right now you're going to hear more about it tomorrow from our local service panel. For me, you're going to hear that having said all of what I just said, I still can't answer what you would most want to know about this issue. When do the RBOCs get in? Most of it please recognize is out of AT&T's control. We don't do the checklist compliance, they do. We don't make the public interest determination, FCC does. I can tell you the FCC and the PUC appear to be deadly serious about this. Ameritech Michigan demonstrates that. Ameritech relied on an unsigned AT&T agreement to show that the checklist was available. They didn't get to first base because you must actually be providing service under a signed agreement and neither of those conditions was true. Our position will be steadfast, fully implement that checklist, make big progress on access reform and show genuine competition and choice in your state. What does it mean for 1997 entry? I will say that on the current track no RBOC in our opinion is likely to meet the checklist and show enough competition to qualify for long-distance. They shouldn't get in.

Nonetheless, we've been promised a wave of applications in the second quarter of this year. Nobody ought to build a business on my prediction. So the prudent thing for us all to do is to be prepared just in case some of those applications slip through the net and we get premature entry.

I promise not to talk beyond what I know on RBOC entry. That's it, New subject, access.

This is a large dollar issue for AT&T. Domestically, which is what we'll take first, we're looking at somewhere between a 12 to 13 billion dollar bill. Our historical record on driving down access through public policy is good. I might even say great. There is the twelve year history.

And through a series of regulatory interventions and some smart network optimizing moves, we have moved the cost of access, conversation minutes, both ends, from 18 cents right after divestiture down to five cents on average right now. Even better, you will see that in 1995, the blue AT&T and the red everybody else crossed over, and we now enjoy a slight advantage over our competitors in regard to interexchange access.

But as we assess it, the traditional methods that got us that slope are beginning to run out of gas and still switched access is overpriced by seven or eight times. The local exchange carriers are collecting billions from the interexchange industry. The access charge has disguised the true cost of the service. They deliver a mass of undifferentiated subsidy that's impossible to target and it leaves the local exchange carriers with billions to turn right back on us in their competition in the future. For at least some of those reasons the 1996 act calls for reform. It demanded that any subsidies in these collections be made explicit, that funding be made competitively neutral, and that in our opinion anyway, charges for access be cost based. And that's why we're now in the midst of a very large FCC proceeding on reforming the traditional system. And I'm going to show you how AT&T argues its case in that proceeding.

Let's stay on the left stack, if you would, please.

I'm going to leave out the subscriber line charges. The exchange carriers collect something on the order of 7 billion directly from end users. The stack on the left is what the interexchange industry pays. And as we make it, starting from the bottom, there are to the nearest half billion we'll say there is two and a half billion of special access charges. These are dedicated circuits. Based on our idea of forward looking cost, there is another two and a half billion of actual cost based switched access in the stack. Then we would allow that for legitimate targeted universal service support, there needs to be another five billion dollars

somewhere in the industry. And all the rest, another ten billion dollars or so, is excess. We're going to call that subscriber line overpricing SLOP. So we've got ten billion of SLOP in the system. Our ideal income is the middle column. Our ideal outcome is the middle column. We'll sign up to pay dedicated access on roughly the cost causative basis that's now charged. We will pay on whatever rate structure makes sense the two and a half billion of switched access that we use, actually related to cost. We'll pay our part of the yellow, the universal service subsidy, although we think that under the act, the tax base here needs to be expanded. And that when we get some additional payors in the next—the yellow should go down at least somewhat as a burden on the interexchange industry. And the SLOP just ought to go away. It's excess, It doesn't relate to cost based pricing and its not needed for universal service support. It's just needed to cover inefficiency or what have you. And in consequence, we will flow it through in our long-distance charges, but in the end, the interexchange industry will be relieved of more than $10 billion worth of the burden that we now pay in our access charges.

Okay. That's what we argue. Realistically, as we come near the end of this proceeding, we have to acknowledge that it may not happen. A lot of people think that is too radical a move. Other people think it puts too much pressure on local rates. Not to worry. We are working a strategy that allows us to win under other combinations of reform which are out there in the right-hand column as a for instance.

First and foremost in that strategy is to make the access charges portable. Whoever wins the customer collection the access. That was the basis for the UNE P demonstration we went through. If you're a facility based carrier or a platform competitor, you don't pay act sells to the LEC. You collect it. Same for the subscriber line charge. You collect it, not the LEC, from the end user. And if you're serving one of the supported subsidized customers, you

collect the subsidy, too. Your share of the yellow. That is in fact what the FCC is now denominating incorrectly the market forces approach, but it is in their sights and frankly we have won the portability once in the local interconnect order. We feel good about that part of the strategy.

Second piece of the strategy, if you don't take ten billion of SLOP out, at least take a large portion out. Everybody agrees we're not paying cost based access charges. A minute of access is the same as a minute of local service and we know from those arbitrations that that minute costs less than half a cent, not the two and a half or three or four or five that we're being charged in access. How would you get some of that SLOP out there? I suppose you could raise the subscriber line charge or you could just have the RBOC suck it up and take it and look for more efficiencies. We might even see the FCC putting what's left of the SLOP on a per line charge to the interexchange carriers. But our position maintains—or continues to insist on a very large buoyant ante to the SLOP reduction.

Finally the third part of the strategy is surcharge for the subsidy for the yellow segment, whatever it is. We acknowledge here it might even go up. We're adding schools and libraries and rural health care facilities to the mix of supported customers under the new act. But even though it goes up or might go up, we could use some more payors like the RBOCs who collect the slick and have interstate corridor traffic and most importantly make it explicit and make it competitively neutral. That's what a surcharge on all the carrier's revenues would do. We won't then end up with a relative disadvantage at AT&T.

When that's all said and done, and whatever combination of elements you get in the right-hand stack, here is what we think it's going to mean. To the industry, we think that all the put and takes are going to leave us with something less than the 20 billion dollars of burden

we now carry around. For AT&T, on day one, we expect to be recovering any subsidy as an excise tax like charge on the bottom of the bill. We expect to be recovering any per line assessments against us right back as a per line assessment on customers. And we expect that due to some structural shifts and some outright SLOP reduction, our per minute access rate therefore will decline, and even as the market pushes that through to lower long-distance prices, we'll be benefiting from a handsome piece of stimulation on calling.

That's day one. On day two, I hope by now our strategy is clear. Starting on day two, we play the unbundled element platform game. We win our share of whatever stack is left as we win the customer on our platform or on our own facilities.

We'll know a lot more there in a couple months.

Let's now go to global. Double back on those principal policy objectives. Declare number one not an issue outside the country.

Alas, we don't have enough of a presence to bring down any regulation on us beyond our boarders. Let's recognize we've been working outside the United States and inside for that matter on numbers 2, 3 and 4 in the same way as we have been working for domestic markets. What result? Mixed. As to opening none US markets, the track record is not great. As to preventing PTT entry here until the whole market is open, no better than spotty. As to lowering access costs which are settlements in international parlance, better. A lot better. We do very well here. But it's drudgery. It is working through bilateral negotiations one at a time.

What we are looking at this will season in this international policy work is a break through in all three objectives, which is the cause of a double play with the GATS trade agreement on the one side and the proposed FCC

benchmark order on international settlement rates playing on the other side.

Let's take a quick look at the first part of that play. What GATS did for us is acquire commitments kicking in no later than the year 2,000 to open markets covering 90 percent of the world's telecom revenues outside the United States. This shows you the whole world after GATS. The 35 percent U.S. we've always counted as open. Then there is another 45 percent of the world that just got committed to what we call full offers. That means that the countries commit to enforceable entry conditions. They eliminate ownership and control restrictions on second and third carriers, and they allow international facilities competition. Then there are 14 percent of the world's revenues, 44 countries, that gave us partial offers, meaning that one of those three elements of competition I just named is missing or partially missing. Here you get countries like Mexico and Canada because they insist that ownership cannot rise above 49 percent. And then the last six percent of the world's revenues are those 60 odd small world trade organization countries, as well as China and Russia who are not members of WTO.

What this represents to AT&T is a lot of opportunity. I would emphasize it as opportunity beyond having to set up intracountry telecom businesses with all the expense and investment that goes there. We have new opportunities here, such as the ability to terminate our outbound calling through competitive modes that are going to spring up in these newly opened countries and thus avoid we hope some of those high settlement rates. We also have an opportunity to do truly world telecom networking. Maybe hubbing through the United States. Moving traffic from country A to country F through the U.S., becoming to telecom what Atlanta is to air travel in the southeast.

The thing that let's us support GATS with this kind of fervor is that companion piece I mentioned, this pro-

posed benchmark order for international settlement rates coming down from the FCC. That aims to move these high rates down, and it provides a protection for AT&T as well as opportunity. The reason we need protection is it's going to take some time for these GATS opening to take hold and show up in competitive market openings and gateways into countries. Meanwhile we're going to go on without some regulatory intervention, paying these very high settlement rates on our outbound traffic into those countries. Think of it as terminating access. Sure we make some back at the same level on the return traffic, but we are vulnerable to losing that kind of return profit if a PT and T comes over here and sets a up sub or strikes a sweet heart deal and diverts its inbound traffic to its favorite carrier.

The benchmark order, if properly implemented, would by and large give us some of insulation from that. Here is what's happening as the FCC is tentatively proposing it. The FCC divides the world into these three categories of countries. High income, middle income, low income. It says to the world, you are outrageously high above cost existing rates there in the red bars, pink bars for each of the countries. Need to come down to a benchmark zone which has six to nine percent—six to nine cents per minute at the bottom. I've averaged it here as seven and a half. And a different top end of the zone, depending on whether you're high, middle and low. What's more, we'll let you implement on different schedules. We'll give you one year for the high income countries, two for the middle and four for the low income countries.

And what that's going to do again is reduce the terminating access we pay to the foreign countries. It will also reduce the access we collect on the incoming traffic. But because we have so much more traffic out than in, that increased profitability outbound can more than offset the reduced collections on the inbound. And we aren't

threatened anymore by the incoming traffic diversion. At cost in fact we're absolutely indifferent.

Now, besides protection of the existing revenue streams, there is a lot of room to make money in this games, because of our net outbound traffic advantage. And we're going to try to show it to you this way. Up there on the top, the horizontal bar is what we're paying in 1996 net for international settlements for our top 65 countries which cover about 80 percent of our international revenue stream. About two and a half billion dollars.

Now, if you go to the middle downsloping line, if over a five-year period we pay outbound at the high end of the FCC benchmark and collect that same rate coming back in, we save a billion six hundred million on what we currently pay net to terminate our traffic overseas. If we go to the low end of the FCC benchmark range, we pay seven and a half out and collect seven and a half back, we're going to have 2 billion. And something we don't like to think about, but if it's asymmetric and we pay the high out and the low in, then you're on the pink line and we've still got more than a billion dollars of savings. Indeed if we have to pass the better part of that through to end user rates, we still think there is massive stimulation left in these long-distance rates overseas which have been too high because of these inflated settlement costs.

I guess the point is that we have a lot of room below that yellow line to accommodate even an uneven implementation of the benchmark order and some GATS delays before this would ever float above that line. There is clearly much more opportunity here for AT&T than there is risk.

In fact, I got to say, in this scenario, the place to be is in AT&T's shoes. We're already competitive in the United States. We know how to compete. We're going to have new opportunity in other people's monopoly markets.

We've got more outbound traffic than in. We've got access coming down. The place not to be is one of them. The monopoly PTT. Your market is about to be attacked for the first time and the mother's milk of excessive settlements is about to be taken from you.

So I can't wait for this game to begin.

Look, opportunity after opportunity. I'm going to stop with that. I want to wind up by saying we are winning these opportunities now because our public policy positions are lined up with customers. Giving customers more choice and more value.

After a lot of thought and more importantly after years of losing public policy fights on the other side of the equation, I can tell you that in a prepluralistic society, it's the customer friendly position that wins the contest in the public policy arena. And with that as our touch stone, ladies and gentlemen, and with our businesses lined up behind it, we're winning not just opportunity out there, but we're winning positions that let us be ultimate winners no matter how some of the uncertainty breaks around the fringes of these proceedings. We are creating frameworks for opening huge new markets here and there. I'll tell you for years we're going to be enforcing those rules as we break down the existing monopolies. But I'll also tell you that for the first time I think we see the day when regulatory obstacles are not limiting AT&T's opportunities.

Soon we're not even going to need fundamental change out there in public policy. We're just going to need the enforcement of the frameworks that we're setting up right now. So in this public policy world, in this mystical world of regulatory work, I can assure you that AT&T has gone on the offense. We're there now and forever more. So think you very much and we'll start with your questions if you have any.

A SPEAKER: John, let's take the worst case out of the 8th Circuit and ultimately the Supreme Court, let's say rebundling does not live. How much investment would AT&T have to make in switches or other elements to still be able to get those kinds of financial results? And how long would it take you to get the pieces out in the field to be able to get those kinds of results?

JOHN ZEGLIS: I'm going to give the nonanswer. I cannot think of bundling falling in the 8th Circuit in the Supreme Court when it's already commanded as a matter of the Telecom Act of '96. Pricing, sure that's an issue, but not unbundling itself. But rebundling? Rebundling, once we provide the service on a platform we are not going to pay the access because that's a matter of the FCC's interstate access jurisdiction. What we are seeing in rebundling challenges is the state saying, Georgia is a good example, if you rebundle the platform you have to pay TSR rate, not the unbundled elements rate. So if you have got the elements but had to pay the TSR rate and didn't have to pay anything extra for the additional elements, then the increment is just between the TSR all end price for local, and whatever the unbundled elements price might have been. If you have to pay additional element prices on top of your TSR, we haven't run the numbers on that, and I'm going to defer any elaboration on that question to Harry Bennett, who can also give you tomorrow some scope of what the investment might look like, but it is not in our plans.

A SPEAKER: My understanding is in places like Louisiana you basically would only have to throw in operator services or one item in order to get the unbundled rate, and that's a used profitability issue. My question is, what does it take for to you do that everywhere?

JOHN ZEGLIS: I don't know. But I will seize on your remark, this is what we call N against N minus 1, even places that we can't use the entire recombined platform in those very few jurisdictions, if we add one element, all

their elements minus 1, then I believe we still get platform prices and not into TSR mode. Yes?

A SPEAKER: My understanding is that many of the states' orders are actually interim orders, I'm wondering to what degree there is risk when the final orders are issued, it's not as good as it looks right now and also if you could articulate how many are—

JOHN ZEGLIS: I'm going to go to extended panel to give you exact numbers. I'll tell you that my opinion, having watched this, is we stand to gain probably as much on finishing off the unfinal orders as we stand to lose as in the case of Utah, which said that was a temporary rate, that was in the case of California, which they said they would come back to the rates for GTE in a 1997 proceeding. And as in the case of any nonrecurring noncost base charges, which we want a second bite at the apple for. As to how many of the solid blue, gentlemen, the '82 access lines covered are still subject to some further dealings in the state commissions we are going to give you our Chief of Staff to the local service division, our major dome in government affairs in the state.

A SPEAKER: We have 27 decisions today of which I think four to six are final, eleven are interim. Our expectation is, our prior history is the results in final tend to be a little bit better than even the results in interim. We are very very confident. Using John's paradigm of access lines, I think it breaks out in the 80s for final and the low teens, if at all, in the teens, on the interim, so we feel pretty good about where we stand today.

Just to follow up, if I might, John, on the question over here about minus 1, we had a lot of success with the 1 being operator services and DA in our arbitrations and our expectations are that if it does turn out to be N minus 1, we feel good about the opportunities, given our OS platforms.

A SPEAKER: Rick, Goldman Sachs. You said you didn't want to speculate on RBOC long distance entry, but

I'm going to ask you anyway. Could you, in light of the fact that the famous 13 words that you tried to get put into the bill did not get there, and you used the phrase the sequential and other carriers used sequential, the Bells of course call it simultaneous and I guess I'm just trying to ask, you know, your sense on the timing and where you see the sticky points going forward, particularly for BC and B, which you said were less specific.

JOHN ZEGLIS: Well, I stand on a lock on sequential, you can't have simultaneous if the requirement is to have the checklist fully implemented, an agreement under which the competing carrier is providing service and actual facilities competition running out there in both the business and residence markets. I know there is an issue here of rhetoric about simultaneous and sequential, but I think we have got that one knocked in the act.

Now as to the missing 13 words, what we are referring to here was a description of how much facility build-out there had to be, and it was like comparable to the exchange carriers' own operations in the state. That was not in the final version. It was taken out because of a misguided fear in our opinion that that meant a state-wide over-build, one for one as into every home and business in the nation. And we were assured at the time that nobody with a full deck would think that that means one loop or one switch, obviously we are looking for nontrivial, local facilities competition significant enough that it puts checks on unrestrained monopoly pricing that the carriers might otherwise use. That's why I say it's very hard at this moment to get into how much more than nontrivial is required and less than a full state-wide build-out.

A SPEAKER: If it is trivial because I'm guessing—

JOHN ZEGLIS: Nontrivial.

A SPEAKER: If it is a trivial degree of competition, a year or two years from now, is it the FCC or the DOJ or the state that you see standing in the way?

JOHN ZEGLIS: I think they're all standing in the way of the RBOCs.

A SPEAKER: Right.

JOHN ZEGLIS: They all get a bite of the apple. The state starts by affirming the checklist is implemented, that all of these checklist conditions are being provided pursuant to a signed agreement to a competing carrier. Probably they do a lot less on the extent of competition than the other two. DOJ, I think they are going to look at it. That's been their bent now for 15, 20 years. So you will get a look-see by the Justice Department, but they don't make the decision. They render an opinion which has to be given substantial weight at the FCC. Your question in some respects is easier than my answer. The FCC makes the final determination on that one with the state and DOJ. Who has got a mike?

A SPEAKER: A few weeks ago Bob Allen said access charges savings would be passed through to customers; is this a policy that you are actually promoting publicly in regulatory form? And the second question is, John Walter spoke about best in class cost position. And what you showed us was about cost reductions but didn't talk about how other competitors might be positioned differently. For example, what will the BT/MCI merger impact on cost relative to perhaps eliminate settlement and hubbing between those two companies?

JOHN ZEGLIS: The access flow through commitment is probably not our policy, it's a regulatory policy. That is to say we are at a point now where in order to get fundamental change and relief from that burden we are going to have to give the flow-through as the quid pro quo to get it. How much of an additional commitment that is over market which has required us to flow access and more through every year for the last 12 years, I don't know, but you get the drift there of my opinion.

As to cost advantages, on the access I think was your question. BT/MCI was your choice, we also worry about

things like NYNEX, Bell Atalntic, and the cost advantage we worry about is not our access against long distance companies access, it's the two-ended access advantage or even a one-ended access advantage that a carrier gets when it both supplies its own access and charges it, so the left pocket-right pocket transfer to us is a chance to squeeze by bidding up access and bidding down retail.

The answers are we are very concerned about that when you are dealing with local exchange carriers here, especially when you are in their regions. Traffic for both ends of the call, like NYNEX and Bell Atalntic, would expand a lot of territory to become subject to that. You have exactly the same thing going on with BT/MCI, although it's one ended it's in Britain, so yes, we are worried, yes, we are in the FCC, it's a condition to closing merger. They need to bring the settlement rate down from the existing 11 cents to the bottom of the FCC rate, 6 cents, which we think is close to the cost of access in Britain.

A SPEAKER: Basically between those two, can't BT/MCI say we are going to do a paper transfer of money in essence making it zero, which says you are not best in class, especially if they begin hubbing?

JOHN ZEGLIS: On this we won't have access until MCI metro substitutes all the lines, they have the same problem we do. On the other side they have the advantage of having it in their own enterprise. Unless we request, get access to the access, at cost, which is what we think 5 cents might yield. Yes, we worry that they will have that advantage and they can use it to price squeeze. So to get the answer down so they don't have room to price squeeze us since it's cost to both of us.

A SPEAKER: Todd Jacobs. You made the compelling case about the application of the FCC benchmarks reducing your settlement costs over the next five years. I assume that was using static minutes?

JOHN ZEGLIS: The same minutes that produced the 2 and a half billion.

A SPEAKER: My question is, isn't the risk to international information the risk—for the next—first time as opposed to the last ten years or 15 years, that prices could fall just as fast, if not faster, than settlement rates, given new networks springing up internationally, new placings to land traffic, you said the probability of sweetheart deals with local subsidiary networks in the U.S., et cetera, what's the risk that if the international calls have too much profit per minute built in that could be coming down over the next five years?

JOHN ZEGLIS: I think two risks. The one I spoke to was that our profit on a current international call that we earn from a U.S. subscriber outbound comes in two bites, one is what we collect minus what we pay, netted against what we collect from the incoming when the call comes to us as part of our proportionate return from that PT and T. What we are working on through the settlement case here is to make us indifferent to whether we get whip-sawed or traffic diverted disproportionate return. That at least puts us in control of our own destiny, we win the outbound call, we win the profit and we don't save all to somebody else's idea of return traffic diversion. I think, I think the benchmark settlement order and the FCC's rules against whip-sawing until it is in place.

The second part of your question I think is market, when we do get these down and in control of our destiny, what about margin of outbound calls, aren't we all going to have a go at lower prices to earn more customers? And for that we look forward to Gail McGovern and Jeff Weitzen's answers this afternoon on their panels.

A SPEAKER: Yes, a question. What is your view of three-way mergers of RBOCs? And secondly, your chart shows like 4 billion of access reduction on the right-hand side, which I guess was your compromise solution. Is that instantaneous or over time? How do you look at that? What do you think is the really most likely on access charge reform?

JOHN ZEGLIS: All right. My view on three-way mergers of RBOCs first is if they eliminate competition, potential competition in local Bells like NYNEX and Bell Atlantic threatens to, that three-way is worse than two-way. In addition, it will give more opportunity to price squeeze us on both ends of a call because three-way mergers will have more intracompany calling than two-way mergers have, so if it's bad in two-way for the reasons we have suggested at NYNEX, Bell Atlantic, it's worse in three-way. Now, on the access reduction, the right-hand chart was over there, so that you wouldn't draw a line back and get any estimate on what we expect to have. That was just to show lower than what we pay now and higher than Nirvana. As to any predictions on how this might come out, I'm going to let Jerry, our senior officer, shepherding the FCC in our Washington operation, add any refinements he wishes to or give a no comment. Your choice, Jerry.

A SPEAKER: I would like no comments, but let me try for a minute. We really think there are three ways we can win with access charges; one, you get immediate reduction and the SLOP is taken out of the system, which is right public policy. Again in line with what the consumers deserve.

Second, a significant initial reduction. We have identified on record to the FCC a number of ways in which using the current proceeding, the current record, before the commission, that they could reduce over 4 billion in access charges immediately. Those include just taking retail end user charges off the general support facility charges which are all embedded inappropriately in access charges by redefining the cost of capital. which is part of the price gap proceeding, so we do believe there is ample opportunity for the commission to right now reduce access charges significantly tied to that, also as you move costs explicitly to the end user, as you would with univer-

sal service charges, as you would with some of the per line charges and some of the other end user charges that could be put on the bill, you are reducing per minute access rate significantly. Again that is beneficial to the company.

And the third way we win that, John I think explained very well, was the unbundled elements platform. We don't pay access when we use the unbundled elements platform, if the FCC is consistent with what they said thus far. We are in a good position in access charges both on the FCC order on the 251 order did spell out what John said they are on the record before the Court, before the FCC is already making those determinations; and second on the pricing methodology they already looked for the pricing to be forward looking incremental cost and that's what the legislation calls for, is that we pay only the costs and don't add subsidies. So we believe we are in the best position initially to win and ultimately to survive any challenges. Again the states have been supportive, in the joint board they said you should have forward looking cost. We think we are in a good position on those.

JOHN ZEGLIS: Jerry, do you think there is a snowball's chance that the RBOCs would allow a three-way merger?

A SPEAKER: I think a three-way merger is going to raise more than arithmetic possibilities of obstacles being put in front.

JOHN ZEGLIS: Last question.

A SPEAKER: Jack from Solomon. First of all, John, if you could settle with our friends at Ameritech so we could get the transcript from the conference with our friends in December.

JOHN ZEGLIS: We will be accepting service of process at lunch for any agreed analyst.

A SPEAKER: Exactly. On the access, something Jerry said or this per line trigger, a corollary thought from the discussion of maybe putting the onus of access charges, whomever collects it, on the originating as opposed to terminating end, which the theory being, I guess, you know, competitors can control the originating end much more so. First of all, do you think that will occur?

Second of all, in your bar charts there did that include that phenomenon, and if it didn't, I would guess that for you and the other IXCs in so much as the onus has shifted toward the originating versus terminating ends, that would add above and beyond whatever you would think you would chop out of that excess?

JOHN ZEGLIS: Jack, that's hard to respond to. The bar charts were illustrative of mega movement and didn't account for shift of access from one end to the other. Our view of terminating access for the moment is when we are on the platform we are going to get as much as we receive. Whatever it is it completely washes in terms of payment out and collection in. It's almost like bill and keep. As to what do you want to know, the cost shift in the FCC moves it back on to the originating? I don't think it's going to change much of what I said. I think it's just a shift in whether we pay it on one end or the other we have to work it off by the platform.

A SPEAKER: I guess in theory you are going to go after certain customers, so in theory you will have more of a platform on the originating end, then say the random number generator on the terminating end.

JOHN ZEGLIS: It certainly makes the blue stacks I had next to the uni customer higher and more attractive if we move it on the front end and eliminate it. Jerry, do you want to respond?

A SPEAKER: Reed Hunt and the other members of the commission have recognized the fact if you are going to

use a market base approach, it depends on the market, there is greater competition on the originating end than the terminating end. In a speech last Tuesday, Reed Hunt reiterated you would expect you would reduce access charges more on the originating end than the terminating end at the outset because that would be more responsive to what you need to do.

The other thing is it does actually help those stacks as we get into the market while we are signing people onto the MB one platform, it does help us to have terminating end access charges reduced to a certain degree.

A SPEAKER: I think you meant reduced on the terminating end.

JOHN ZEGLIS: I have to get off here. Last word to my colleagues and secondarily to the analysts, our president wants me to remind my colleagues, the 2.6 billion cost reduction does not include any advantage that we deliver up here on this settlement on the access so for you all redouble your efforts and for the analysts, you can make that additive. Thank you very much.

CONNIE WEAVER: Thank you, John. Next we are going to take a little bit of a break and go to lunch. Let me give you a couple of logistical details. We have a message center set up outside in the mid hallway as you are walking down the foyer toward the main registration area. So please check there if you have any inbound faxes or messages, they will be posted there.

We also have copies of this morning's speeches. Bob Allen's speech and also John Walter's speech, if you would like to have a copy, at that same information desk. They will be there available for you. We will have an informal lunch today, we will make it fairly quick, no remarks at lunch, it's an opportunity for you to meet and get to know some of our senior team that's here today, they will be sitting amongst you. That will be over where you regis-

tered where you came in in the main lobby, some tables set up in the lobby, but also in Cuisine and the Watson's restaurants there will be people to tell you where that is. I would like to reconvene at about 12:45 today, in about an hour and 15 minutes. Enjoy lunch.

Thank you.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 96-3321/3406/3410/3414/3416/3418/3424/
3430/3436/3444/3450/3460/3507/3519/3520/
3603/3608/3696/3708/3709/3756/3901/3906/3982

IOWA UTILITIES BOARD,
Petitioner,

BELL ATLANTIC CORPORATION, *et al.*,
Intervenors on Appeal,

v.

FEDERAL COMMUNICATIONS COMMISSION;
UNITED STATES OF AMERICA,
Respondents.

Submitted: January 15, 1998

Filed: January 22, 1998

ORDER ON MOTIONS FOR ENFORCEMENT OF THE MANDATE

Before BOWMAN, WOLLMAN, and HANSEN, Circuit Judges.

HANSEN, Circuit Judge.

I.

Several petitioners have filed motions requesting this court to issue and enforce our mandate in the case of *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997).[1] On October 14, 1997, after granting motions for panel rehearing, we amended our July 18, 1997, decision and issued the mandate. *See id.* at 813 (replacing Section II(G)(1)(f)); *id.* at 818 n.38 (clarifying scope of vacatur); *id.* at 819 n.39 (clarifying scope of vacatur). We expressly reserved jurisdiction over the petitioners' motions to enforce the mandate. Today, following oral argument on the motions, we address that issue.

One of the core holdings of our July 18, 1997, decision was that the Federal Communications Commission (FCC) has no jurisdiction to issue pricing regulations for interconnection, unbundled access, resale, and transport and termination of local telecommunication services under section 252(d) of the Telecommunications Act of 1996.[2] We held that the Act vests exclusive authority to establish the pricing requirements of this section in the state

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[1] Petitions for writs of certiorari have been filed and are currently pending before the Supreme Court. *See AT&T Corp. v. Iowa Utils. Bd.*, 66 U.S.L.W. 3387 (U.S. Nov. 17, 1997) (No. 97-826); *MCI Telecomm. Corp. v. Iowa Utils. Bd.*, 66 U.S.L.W. 3387 (U.S. Nov. 18, 1997) (No. 97-829); *Association for Local Telecomms. Servs. v. Iowa Utils. Bd.*, 66 U.S.L.W. 3387 (U.S. Nov. 18, 1997) (No. 97-830); *FCC v. Iowa Utils. Bd.*, 66 U.S.L.W. 3387 (U.S. Nov. 19, 1997) (No. 97-831); *Ameritech Corp. v. FCC*, 66 U.S.L.W. 3459 (U.S. Dec. 24, 1997) (No. 97-1075); *GTE Midwest Inc. v. FCC*, 66 U.S.L.W. 3459 (U.S. Dec. 30, 1997) (No. 97-1087); *US West Inc. v. FCC*, 66 U.S.L.W. 3459 (U.S. Jan. 5, 1998) (No. 97-1099); *Southern New England Tel. v. FCC*, —— U.S.L.W. —— (U.S. Jan. 8, 1998) (97-1141).

[2] The Telecommunications Act of 1996 (the Act) is codified in Volume 47 of the United States Code. We refer to it throughout by reference to the applicable section number. "Section 252(d)," for example, denotes 47 U.S.C. § 252(d).

commissions, and we vacated the FCC's pricing regulations in which the FCC purported to arrogate that power to itself. Today we hold that the FCC violated this central tenant of our decision when it issued its Ameritech Michigan Order of August 19, 1997.[8] Because that portion of the Ameritech Order which offends our decision is, in our view, an advisory opinion of the FCC, we need not review the FCC's denial of Ameritech's application or even determine whether we have jurisdiction to do so. Rather, Petitioners request and we grant prospective relief in the form of a writ of mandamus. Specifically, we direct the clerk of this court to issue a writ of mandamus ordering the FCC to abide by our mandate and to refrain from subsequent attempts to apply either directly or indirectly its vacated pricing policies regarding the pricing of interconnection, unbundled access, resale, and transport and termination of local telecommunications traffic. For reasons which we explain, it has no authority to do so under section 271(d)(3)(A) or section 271(d)(3)(C) of the Act.

II.

A. The Mandate

In our July 18 decision, we held in the clearest possible terms that the state commissions have exclusive jurisdiction to regulate the prices that incumbent local exchange carriers (LECs) may charge their competitors for access to the incumbent LECs' local telephone network facilities. After a detailed analysis of sections 251 and 252 of the Act, we concluded that "the Act plainly grants the state commissions, not the FCC, the authority to determine the rates involved in the implementation of the local competi-

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[8] *See In re Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan*, FCC 97-298, 1997 WL 522784 (Aug. 19, 1997) (memorandum opinion and order denying application of Ameritech Michigan pursuant to section 271, as amended, to provide in-region, interLATA services in Michigan) (petitions for recon. pending) [hereinafter *Ameritech Order*].

tion provisions of the Act." *Iowa Utils. Bd.*, 120 F.3d at 796. Elsewhere we wrote that

> the terms of the Act clearly indicate that Congress did not intend for the FCC to issue any pricing rules, let alone preempt state pricing rules regarding the local competition provisions of the Act. Because the Act clearly grants the states the authority to set the rates for interconnection, unbundled access, resale, and transport and termination of traffic, the FCC has no valid pricing authority over these areas of new localized competition for the states to negate. . . . [S]ubsections 252(c)(2) and 252(d) clearly assign jurisdiction over the rates for the local competition provisions of the Act to the state commissions[.]

Id. at 798-799 (internal citations omitted). In short, our decision made very clear that "Congress did not envision the FCC's participation in determining the prices that the incumbent LECs will be able to charge for opening their networks to new entrants." *Id.* at 795. We held that in promulgating regulations purporting to govern the types of pricing systems state commissions were to adopt, the FCC had exceeded its statutory authority and violated the plain meaning of the 1996 Federal Communications Act. Accordingly, we vacated the national pricing rules that the FCC had promulgated.

B. The FCC's Ameritech Order

We filed our *Iowa Utils. Bd.* decision on July 18, 1997. On August 19—scarcely one month later—the FCC made clear its intention to disregard those portions of our decision with which it disagreed. It did so in the memorandum opinion and order which it issued denying Ameritech Michigan's application to provide in-region interLATA services in Michigan. In that opinion, the FCC reasserted its authority to do precisely what we held in *Iowa Utils. Bd.* it had no power to do. It asserted that it had the authority to interpret section 252(d) of the Act, and it

adopted a policy which will coerce state commissions to adopt its vacated TELRIC-based pricing rules for implementation of the local competition provisions of the Act in spite of our order.

The Ameritech Order denied Ameritech's application for authorization under section 271 of the Communications Act of 1934, as amended, to provide in-region, interLATA services in the State of Michigan. It denied the application because it found that Ameritech had failed to satisfy section 271's competitive checklist's requirements of access to its operations support systems, interconnection, and access to its 911 and E911 services. Finding these three failures to be dispositive, the FCC determined that it need not and would not address whether Ameritech had satisfied the other requirements of the competitive checklist. *See Ameritech Order* ¶¶ 5-6, 280-81. Specifically, it "[did] not reach the question of whether Ameritech's pricing of checklist items complies with the requirements of section 271[.]" *Id.* ¶ 281. Thus, paragraphs 280-297, wherein the FCC reasserts its authority to establish the prices for the local competition provisions, do not address the merits of Ameritech's application, but instead constitute an advisory opinion. The FCC explained its issuance of such an opinion by stating that it sought to provide guidance as to what showing would be required in future applications to demonstrate full compliance with the checklist. *Id.* ¶¶ 6, 281.

It is not for us to address the propriety of the FCC's issuance of an important policy statement in an advisory opinion separate from the merits determination of a section 271 order. Rather, our inquiry is limited to the question of whether the issuance of this particular advisory opinion and its content constitute a violation of our mandate. It clearly does. The FCC admits in paragraph 283 that "the Eighth Circuit has held that the Commission lacks jurisdiction to issue national rules establishing a methodology by which the states determine the rate for interconnection, unbundled network elements, resale, and

transport and termination in state-arbitrated interconnection agreements pursuant to section 252." Inexplicably, it then proceeds to establish just such a methodology, stating that the cost-based standard of § 252(d) is contained in a federal statute and is "therefore[] presumed to have a uniform meaning nationwide." *Id.* ¶ 286. This attempt to reassert the vacated pricing rules by imposing them as conditions for entry by the Bell Operating Companies into the in-region, interLATA telecommunications business does by indirection what we told the FCC in *Iowa Utils. Bd.* it could not do. The FCC cannot do in an advisory opinion in a ruling on a section 271 application that which we have expressly forbidden it from doing in its rule-making procedure. A more clear violation of our mandate could hardly be imagined.

C. Section 252

Section 271(d)(3) requires the FCC to determine whether an applicant has implemented the competitive checklist of Section 271(c)(2)(B). Items (i), (ii), (xiii), and (xiv) of that checklist in turn require a Bell Operating Company (BOC) to provide interconnection, access to unbundled network elements, transport and termination, and resale prices that are "in accordance with" subsections (c) and (d) of section 252.[4] In other words,

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[4] 47 U.S.C. § 271(c)(2)(B), the Competitive Checklist, provides in relevant part:

> Access or interconnection provided or generally offered by a Bell operating company to other telecommunications carriers meets the requirements of this subparagraph if such access and interconnection includes each of the following:
>
> (i) Interconnection in accordance with the requirements of sections 251(c)(2) and 252(d)(1) of this title.
>
> (ii) Nondiscriminatory access to network elements in accordance with the requirements of section 251(c)(3) and 252(d)(1) of this title.
>
> * * *

[Continued]

items (i), (ii), (xiii), and (xiv) of the competitive checklist do nothing more than incorporate by reference the specific requirements of sections 251 and 252. As discussed above, our July 18 decision clearly held that only the state commissions have the statutory authority to set prices under sections 251(c) and 252(d).

The FCC does not contest the fact that section 271 (c)(2)(B) merely requires compliance with sections 251(c) and 252(d) of the Act, and it concedes that it "lack[s] authority to prescribe a national pricing methodology to implement the requirements of section 252(d)." *See id.* ¶ 284. Nonetheless, it engages in a lengthy discussion of its interpretation of section 252(d), *see id.* ¶¶ 282-294, and ends this discussion by concluding that subsections (i), (ii), and (xiii) of section 271(c)(2)(B) all require that the rates charged by the applicant BOC must be based on TELRIC principles. *Id.* ¶¶ 292-93. It clearly announces that it will not grant a section 271 application unless the rates are based on TELRIC principles. *Id.* In so doing, the FCC reinstates the substance of the pricing rules we vacated in our prior decision. In other words, in order to receive future FCC approval, a BOC will have to show that it prices its interconnection, unbundled access, resale, and transport and termination offerings under prices determined by the FCC's methodology. This violates our mandate. As discussed above, the very core of our holding was that the state commissions—not the FCC—have the exclusive authority to determine the pricing requirements of section 252(d).

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[4] [Continued]

> (xiii) Reciprocal compensation arrangements in accordance with the requirements of section 252(d)(2) of this title.
>
> (xiv) Telecommunications services are available for resale in accordance with the requirements of sections 251(c)(4) and 252(d)(3) of this title.

The FCC cites subsections (i), (ii), and (xiii) in support of its assertion of pricing authority. *See Ameritech Order* ¶¶ 292-93. We additionally discuss subsection (xiv) to clarify that nothing on the checklist could possibly be interpreted to grant such authority.

The FCC's justification for its reassertion of local pricing authority lacks even the scent of merit. It argues, in effect, that practical necessity requires it to violate the clear direction of this court. It writes:

> Because the Eighth Circuit concluded that the Commission lacked authority to prescribe a national pricing methodology to implement the requirements of section 252(d), if that decision stands, the meaning of section 252(d) ultimately will be determined through de novo review of state determinations by the federal district courts. The Act provides that parties aggrieved by state determinations under section 252 may sue in federal district court. Consequently, the district courts will review numerous interconnection agreements from some, if not all, of the states and the District of Columbia. The Courts of Appeals and, perhaps ultimately, the Supreme Court, will resolve the issue of what the statutory requirement that rates be cost-based means. This litigation will take years, however, and inevitably will run the risk of impeding or significantly delaying the development of competition in the local exchange market, and, consequently, delaying the deregulation of the telecommunications markets that Congress envisioned.
>
> While the question of what constitutes cost-based pricing under section 252(d) wends it [sic] way through the courts, the Commission, pursuant to section 271, must determine whether the BOCs have fully implemented the competitive checklist, which incorporates the section 252(d) cost-based standard. The BOCs will file section 271 applications in the meantime, and the Commission is obligated by section 271 to issue a written determination approving or denying the authorization requested not later than 90 days after receiving an application.

Ameritech Order ¶¶ 284-85. The FCC uses this policy of expediency argument to justify its decision to flout this court's decision. However, the policy argument is both flawed and beside the point.

The FCC's policy argument is flawed because, counter to the assertion in paragraph 285 of the Ameritech Order, the FCC need not wait for the courts to review the state pricing regimes before it can apply them. Rather, the decisions of the state commissions are binding the moment they are issued. It is true that the pricing schemes established by the state commissions are appealable to the federal district courts by aggrieved parties, as Congress has directed. However, pending any such appeals, the pricing determinations of the state commissions constitute binding law. Thus, the parade of horribles descibed by the FCC will never arise. The FCC's role is, in fact, quite simple: It must ascertain whether each individual applicant BOC has complied with the individual state commission's pricing scheme applicable to it and in effect at the time of the application. This can be done in part by simply asking the state commission whether the applicant BOC has complied with the state commission's pricing rules, as contemplated by section 271(d)(2)(B).[5] There will therefore be no occasion for the FCC to invent a requirement that pricing be done according to TELRIC principles. In fact, the FCC is expressly barred fom limiting or extending the checklist "by rule or otherwise." *See* 47 U.S.C. § 271(d)(4).

The arguments advanced by the FCC are also beside the point. Notwithstanding its merits, a policy argument bottomed on an agency's view of expediency can never justify the agency's disregard of the existing mandate of

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[5] The FCC is required to consult with the state commissions to verify the compliance of the BOCs with the checklist. *See* 47 U.S.C. § 271(d)(2)(B). We are not convinced by the FCC's argument that Congress intended section 271(d)(2)(B) to have no effect.

a federal court in a case in which the agency was a party litigant. "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). After a court has spoken, the FCC is bound to follow that court's mandate, because the FCC "is not a court nor is it equal to [a] court in matters of statutory interpretation." *Yellow Taxi Cab Co. of Minneapolis v. NLRB*, 721 F.2d 366, 382 (D.C. Cir. 1983). The FCC's disagreement with this court's decision is "simply an academic exercise that possesses no authoritative effect[,]" and in predicating its reassertion of pricing authority on its disagreement with this court's interpretation of section 252, the FCC "operate[s] outside the law." *International Bhd. of Elec. Workers, Local Union No. 474 v. NLRB*, 814 F.2d 697, 705 n.24 (D.C. Cir. 1987) (NLRB is bound by court's articulation of the law); *accord Taxi Cab Co. of Minnesota*, 721 F.2d at 382; *Ithaca College v. NLRB*, 623 F.2d 224, 228-29 (2d Cir.), *cert. denied*, 449 U.S. 975 (1980); *Allegheny Gen. Hosp. v. NLRB*, 608 F.2d 965, 970 (3d Cir. 1979), *abrogation on other grounds recognized, St. Margaret Mem'l Hosp. v. NLRB*, 991 F.2d 1146, 1152 (1993). The FCC is free to ask (and indeed has asked)[6] the Supreme Court to reverse our decision, and it is free to ask the Congress to give it the authority to regulate the intrastate pricing of the local competition provisions we have said it does not now have. But in the absence of reversal or Congressional amendment, the FCC may not reassert its interpretation of section 252(d) or reassert its purported authority to mandate TELRIC pricing schemes for the local competition provisions when our order so clearly denies it that authority.[7]

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[6] *See* note 1.

[7] The FCC also argues that a uniform national pricing scheme would be easier to administer. *See Ameritech Order* ¶ 286. This additional expediency-based policy argument is similarly precluded by our clear mandate that, under the law, the state commissions have the exclusive authority to determine the price-setting mechanisms.

The FCC's attempt to continue to exercise pricing authority through section 271 is reminiscent of its earlier attempt to do so through section 208. We rejected that attempt in our prior decision. *See* 120 F.3d at 804. As we noted in our prior opinion, section 2(b) of the Communications Act of 1934, 47 U.S.C. § 152(b), as construed by the Supreme Court in *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 370 (1986), fences off intrastate matters from FCC regulation. *See Iowa Utils. Bd.*, 120 F.3d at 796-800. Where there is no unambiguous grant of intrastate authority to the FCC and the impossibility exception to section 2(b) does not apply, section 2(b) prevents "the FCC from intruding on the states' intrastate turf." 120 F.3d at 800. We held in our prior decision, and we reiterate today, that no section or subsection of the Telecommunications Act allows the FCC to break through that fence. We reject not only its attempt to utilize section 271(d)(3)(A), but also its attempt to utilize section 271(d)(3)(C) to accomplish this purpose. The FCC may not accomplish indirectly that which we have held it may not do directly.

D. Relief

The All Writs Act, 28 U.S.C. § 1651(a) (1994), gives federal courts the power to issue writs of mandamus. A federal court's power to utilize mandamus to enforce its prior mandate against an administrative agency is firmly established. *See City of Cleveland v. Federal Power Comm'n*, 561 F.2d 344, 346 (D.C. Cir. 1977) (directing Federal Power Commission to come into compliance with the court's prior mandate); *International Ladies' Garment Workers' Union v. Donovan*, 733 F.2d 920, 922-23 (D.C. Cir.) (remanding to district court for additional discovery and determination of whether Secretary of Labor's reimplementation of rules vacated by District of Columbia Circuit violated the mandate, and directing district court to issue writ of mandamus if Secretary's action did violate the mandate), *cert. denied*, 469 U.S. 820 (1984);

see also Oswald v. McGarr, 620 F.2d 1190, 1196 (7th Cir. 1980) ("Mandamus is appropriate to review compliance with discretionary standards and nondiscretionary commands set forth in an earlier opinion concerning the parties."); *Greater Boston Television Corp. v. FCC*, 463 F.2d 268, 278 (D.C. Cir. 1971) ("An appellate court likewise has continuing power to accept and pass upon a petition to clarify an outstanding mandate."), *cert. denied*, 406 U.S. 950 (1972). In *City of Cleveland*, the District of Columbia Circuit explained:

> The decision of a federal appellate court establishes the law binding further action in the litigation by another body subject to its authority. The latter is without power to do anything which is contrary to either the letter or spirit of the mandate construed in the light of the opinion of the court deciding the case, and the higher tribunal is amply armed to rectify any deviation through the process of mandamus. That approach, we have said, may appropriately be utilized to correct a misconception of the scope and effect of the appellate decision. These principles, so familiar in operation within the hierarchy of judicial benches, indulge no exception for reviews of administrative agencies.

561 F.2d at 346 (internal quotations, alterations, and footnotes omitted).

We have not only the power, but also a duty to enforce our prior mandate to prevent evasion. *See American Trucking Ass'ns, Inc. v. Interstate Commerce Comm'n*, 669 F.2d 957, 961 (5th Cir. 1982) ("Having the power, we also have the duty to clarify the mandate and to direct future compliance with it by mandamus."), *cert. denied*, 460 U.S. 1022 (1983). Failure to clarify the mandate and direct future compliance where mandamus is the only adequate remedy would "reward bureaucratic misconduct and encourage judicial anarchy." *Department of the Navy*

v. Federal Labor Relations Auth., 835 F.2d 921, 923 (1st Cir. 1987).

The mandate doctrine is a specific application of the doctrine of law of the case. Our mandate encompasses "everything decided, either expressly or by necessary implication." *City of Cleveland*, 561 F.2d at 348 (internal quotations omitted). A federal court of appeals can use mandamus to preclude an agency from taking steps to evade the effect of its mandate, even if these steps were not expressly contemplated by the prior decision. For example, in *MCI Telecomm. Corp. v. FCC*, 580 F.2d 590 (D.C. Cir.), *cert. denied*, 439 U.S. 980 (1978), the District of Columbia Circuit was asked to enforce its mandate against the FCC and AT&T. The court conceded that AT&T's position was not explicitly precluded by the language of the prior decision, *see id.* at 595, but nonetheless granted mandamus-type relief, because it found that the FCC position was "clearly inconsistent with the basic themes of our [] decision" and "deliberately frustrates the purpose of the litigation . . . and the intended effect of our decree." *Id.* at 597; *see also id.* at 595.

Respondents correctly point out that this court declines to grant mandamus relief unless there is "no other adequate alternative administrative or judicial remedy." *See In re Lane*, 801 F.2d 1040, 1042 (8th Cir. 1986). In *American Trucking Ass'ns*, the Fifth Circuit clarified that a remedy is not "adequate," if it unduly burdens the aggrieved party. It noted that repeated litigation in "scores of cases" might eventually lead to resolution of the matter before it, but held that this alternative remedy was not adequate. *See* 669 F.2d at 961; *see also Department of the Navy*, 835 F.2d at 923 (requiring substantial relitigation of issues already decided would not constitute adequate alternative remedy).

The FCC's choice to promulgate its policy decision not in rules or regulations, but rather in an advisory opinion appended to a section 271 order was, in our view, clearly

calculated so as to evade ordinary appellate review. We are concerned that the advisory nature of the portion which contradicts our mandate may render it unreviewable on direct appeal. We are also concerned by the fact that the offensive portion of the FCC's Order has, by its own terms, nothing to do with the actual denial of Ameritech's application—we suspect that this naked policy statement was added to the Ameritech Order in an attempt to forum-shop. Having lost in its bid to usurp the power to determine intrastate prices in the Eighth Circuit, the FCC now seeks to have another bite at the apple in the District of Columbia Circuit.

This is the type of "evasion" that necessitates mandamus relief. The FCC's advisory opinion is clearly calculated to have a chilling effect on the state commissions' employment of non-TELRIC pricing schemes, and to do so in a way that avoids our review. It is a plain-faced reassertion of section 252(d) pricing authority over the local competition provisions of the Act by the FCC in clear violation of our mandate, and it therefore triggers our inherent jurisdiction to enforce our mandate.

Respondents argue that we can take no action with regard to the Ameritech Order, because jurisdiction over section 271 disputes is given exclusively to the District of Columbia Circuit. Although we have noted that the offensive portion of the Ameritech Order was not used as a reason for denying Ameritech's section 271 application, we conclude that we do not need to reach this question. The FCC specifically stated that it was not deciding whether Ameritech had satisfied the requirements of section 252(d). The FCC was simply using the advisory portion of its order as a vehicle by which it could intimidate state commissions into complying with the substance of the rules we vacated in our July 18 decision. If this intimidation tactic is successful, a case or controversy will never arise to challenge its validity, because all states will be forced to adopt the FCC determined pricing schemes.

The harm we wish to address is therefore entirely prospective: we seek to assure state commissions that the pricing authority granted to them under section 252 is not eviscerated. Since the harm we seek to remedy is entirely prospective, we believe that a forward-looking remedy will suffice.

We therefore leave the FCC's Ameritech Order untouched. However, we grant mandamus to enforce our mandate in order to disabuse the FCC of the mistaken notion that it has the power to enforce the pricing policy judgment articulated in paragraphs 280-297 of the Order.[8] We order the FCC to apply section 252(d) in the context of section 271 as our *Iowa Utils. Bd.* decision requires. In other words, we order the FCC to cease and desist from attempting to give effect to its interpretation of the substantive requirements of section 252(d). We order the FCC to confine its pricing role under section 271(d)(3)(A) to determining whether applicant BOCs have complied with the pricing methodology and rules adopted by the state commissions and in effect in the respective states in which such BOCs seek to provide in-region, interLATA services. The FCC has no authority under section 271(d)(3)(A) or section 271(d)(3)(C) to issue rules, regulations, orders, policy statements, or any other genre of opinions regarding how the local competition provisions of the Act involving interconnection,

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[8] The remedy we grant today is not unlike the remedy granted by the Fifth Circuit in *American Trucking Ass'ns*, 669 F.2d at 957. There the court issued mandamus in response to the Interstate Commerce Commission's (ICC's) continued application of a rule the Fifth Circuit had found to be invalid. There, as here, the agency had regulated beyond the scope of its statutory authority. Like the FCC in the case at hand, the ICC continued to impose the substance of the rule in various separate individual administrative adjudications, notwithstanding the mandate of the court of appeals. The Fifth Circuit granted petitioners' request that it issue a writ of mandamus ordering the ICC to "comply in all pending actions before it with the full scope of this Court's opinion." *Id.* at 960 (internal quotes omitted).

unbundled access, resale, or transport and termination of traffic should be priced.

The motions to enforce the mandate are granted.

A true copy.

Attest.

Clerk, U.S. Court of Appeals, Eighth Circuit.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 96-3321/3406/3410/3414/3416/3418/3424/
3430/3436/3444/3450/3453/3460/3507/3519/3520/
3603/3608/3696/3708/3709/3756/3901/3906/3982

IOWA UTILITIES BOARD,
Petitioner,

BELL ATLANTIC CORPORATION, *et al.*,
Intervenors on Appeal,

vs.

FEDERAL COMMUNICATIONS COMMISSION;
UNITED STATES OF AMERICA,

Before BOWMAN, WOLLMAN, HANSEN, Circuit Judges.

Filed: January 22, 1998

WRIT OF MANDAMUS

To the Federal Communications Commission:

In accordance with the order of the United States Court of Appeals for the Eighth Circuit herein delivered, the Federal Communications Commission is hereby ordered to obey the Court's October 14, 1997, mandate in Appeal No. 96-3321, *Iowa Utilities Board v. Federal Communica-*

tions Commission. The Federal Communications Commission is ordered to apply section 252(d) of the Telecommunications Act of 1996 in the context of section 271 as the Court's decision in *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997) requires. It is further ordered that the Federal Communications Commission cease and desist from attempting to give effect to its interpretation of the substantive requirements of section 252(d) of the Act. The Federal Communications Commission is ordered to confine its pricing role under section 271(d)(3)(A) to determining whether applicant BOCs have complied with the pricing methodology and rules adopted by the state commissions and in effect in the respective states in which such BOCs seek to provide in-region, interLATA services.

It is so ordered.

A true copy.

Attest.

Clerk, U.S. Court of Appeals, Eighth Circuit.

Supreme Court, U.S.
FILED
JUL 1 1998
CLERK

Nos. 97-826, 97-829, 97-830, 97-831,
97-1075, 97-1087, 97-1099, and 97-1141

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

AT&T CORP., *et al.*,
Petitioners,
v.
IOWA UTILITIES BOARD, *et al.*,
Respondents.

AT&T CORP., *et al.*,
Petitioners,
v.
CALIFORNIA, *et al.*,
Respondents.

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On Writs of Certiorari to the United States Court of Appeals for the Eighth Circuit

JOINT APPENDIX
VOLUME II

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FCC 96-182

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
	)	
	)	

NOTICE OF PROPOSED RULEMAKING

Adopted: April 19, 1996 Released: April 19, 1996

Comment Date: May 16, 1996
Reply Date: May 30, 1996

Separate Dates for Dialing Parity/Number Administration/Notice of Technical Changes Access to Rights of Way:
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By the Commission:

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I. INTRODUCTION AND OVERVIEW

1. In enacting the Telecommunications Act of 1996 (1996 Act),[1] Congress sought to establish "a pro-competitive, de-regulatory national policy framework" for the United States telecommunications industry.[2] The statute imposes obligations and responsibilities on telecommunications carriers, particularly incumbent local exchange carriers (LECs), that are designed to open monopoly telecommunications markets to competitive entry.[3] The 1996 Act also includes provisions that are intended to promote competition in markets that already are open to new competitors. The 1996 Act seeks to develop robust competition, in lieu of economic regulation, in telecommunications markets.[4] The Act envisions that removing legal and regulatory barriers to entry and reducing economic impediments to entry will enable competitors to enter markets freely, encourage technological developments, and ensure that a firm's prowess in satisfying consumer demand will determine its success or failure in the marketplace.

2. Congress entrusted to this Agency the responsibility for establishing the rules that will implement most quickly and effectively the national telecommunications policy embodied in the

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[1] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 [hereinafter 1996 Act].

[2] S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 1 (1996) [hereinafter Joint Explanatory Statement].

[3] According to Senator Larry Pressler, "The more open access takes hold, the less other government intervention is needed to protect competition. Open access is the principle establishing a fair method to move local phone monopolies and the oligopolistic long distance industry into full competition with one another." 141 Cong. Rec. S7889 (daily ed. June 7, 1995) (statement of Sen. Pressler). Senator Ernest F. Hollings has said, "Competition is the best regulator of the marketplace. But until that competition exists, until the markets are opened, monopoly-provided services must not be able to exploit the monopoly power to the consumers' disadvantage. Competitors are ready and willing to enter the new markets as soon as they are opened." *Id.* at S7984 (statement of Sen. Hollings).

[4] In some areas, increased competition has already made possible significant reductions in economic regulation. *See, e.g., Motion of AT&T Corp. to be Reclassified as a Nondominant Carrier*, Order, 11 FCC Rcd 3271 (1995), *recon. pending*; *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, Notice of Proposed Rulemaking, FCC 96-123 CC Docket No. 96-91, (rel. March 25, 1996) (proposing to forbear from requiring tariffs for nondominant interexchange carriers).

1996 Act. Those rules should promote the competitive markets envisioned by Congress.[7] As Senator Pressler has observed, "Progress is being stymied by a morass of regulatory barriers which balkanize the telecommunications industry into protective enclaves. We need to devise a new national policy framework -- a new regulatory paradigm for telecommunications -- which accommodates and accelerates technological change and innovation."[8] The purpose of this proceeding is to adopt rules to implement the local competition provisions of the Communications Act of 1934, as amended by the 1996 Act, particularly Section 251. These rules will establish the "new regulatory paradigm" that is essential to achieving Congress's policy goals.

3. This rulemaking is one of a number of interrelated proceedings designed to advance competition, to reduce regulation in telecommunications markets and at the same time to advance and preserve universal service to all Americans. We are especially cognizant of the interrelationship between this proceeding, our recently initiated proceeding to implement the comprehensive universal service provisions of the 1996 Act and our upcoming proceeding to reform our Part 69 access charge rules.[9] Although these proceedings will be conducted in separate dockets, and the 1996 Act prescribes different completion dates for two of the proceedings, we intend to conduct and conclude all of these proceedings in a comprehensive, consistent, and expedited fashion. We ask commenters in this proceeding to bear in mind the relationship between these parallel proceedings and to frame their proposals within the pro-competitive, deregulatory context of the 1996 Act as a whole.

A. Background

4. In contrast to the 1996 Act, the common carrier provisions of the Communications Act of 1934 were grounded in the notion that interstate telecommunications services would be offered and regulated on a monopoly basis. For decades, state legislatures also followed this traditional approach in regulating LECs' intrastate services. Local and long distance telephone monopolies were created and maintained on the grounds that the provision of telecommunications

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[7] According to Representative Fields, "[Congress] is decompartmentalizing segments of the telecommunications industry, opening the floodgates of competition through deregulation, and most importantly, giving consumers choice . . . and from these choices, the benefits of competition flow to all of us as consumers -- new and better technologies, new applications for existing technologies, and most importantly . . . lower consumer price." 142 Cong. Rec. H1149 (Feb. 1, 1996)(statement of Rep. Fields).

[8] 141 Cong. Rec. S7881-2, S7886 (June 7, 1995) (statement of Sen. Pressler).

[9] *Federal-State Joint Board on Universal Service*, Notice of Proposed Rulemaking and Order Establishing Joint Board, FCC 96-93 CC Docket No. 96-45, (rel. Mar. 8, 1996) (*Universal Service NPRM*) (proposing rules to implement Section 254 of the 1996 Act). This proceeding also is relevant to our price cap regulations and our regulation of the interstate, interexchange marketplace. *Price Cap Performance Review for Local Exchange Carriers*, Second Further Notice of Proposed Rulemaking, FCC 95-393 (rel. Sept. 20, 1995) (*Price Caps Second Further Notice*) (soliciting comments on proposed and other possible changes to the price cap plan to reflect emerging competition in telecommunications services); *Price Cap Performance Review for Local Exchange Carriers*, Fourth Further Notice of Proposed Rulemaking, 10 FCC Rcd 13659 (1995) (*Price Caps Fourth Further Notice*) (seeking comment on issues relating to revisions of the long-term price cap plan); *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, Notice of Proposed Rulemaking, FCC 96-123 CC Docket No. 96-91 (rel. March 25, 1996) (proposing to forbear from requiring tariffs for nondominant interexchange carriers). We also plan to initiate a proceeding that will review our existing jurisdictional separations rules in the context of the new statute.

services was a natural monopoly[8] and, consequently, service could be provided at the lowest cost to the maximum number of consumers through a single regulated telecommunications network. The monopoly paradigm was thought to further goals of universal service, service quality, and reliability. The Modification of Final Judgment (MFJ) that required AT&T to divest the Bell Operating Companies (BOCs) in 1984 was not so much a repudiation as a reduction in the scope of this paradigm.[9] It reflected the judgment that the markets for interexchange services, telecommunications equipment, and information services could become competitive. At the same time, the local exchange continued to be treated as a natural monopoly that required rigorous regulatory oversight by state and federal authorities.

5. Even as the MFJ was implemented, academic criticism of the natural monopoly model for the local network was developing. During the past 12 years, many commenters and businesses have asserted that technological innovation has eroded any arguable natural monopoly in the local exchange, and that government should eliminate any legal impediments to entry. This view is now embodied in the 1996 Act. The extent to which it can be proved in the marketplace depends on the capabilities of inventors, entrepreneurs, and financiers, as well as this Commission and its state counterparts. At the time the 1996 Act was signed, 19 states had in place some rules opening local exchange markets to competition, including seven states in which competing firms had already begun to offer switched local service.[10] Even these 19 states, however, vary widely in their efforts to promote competitive entry into local markets. Moreover, as of 1996, more than 30 states had not adopted laws or regulations providing for local competition. Many of those states that had not adopted laws or regulations permitting local competition had provisions that specifically limited competitive entry into local telecommunications markets. Section 253(a) of the 1996 Act prohibits these affirmative legal barriers to entry,[11] and authorizes the Commission to preempt enforcement of such entry barriers.[12]

6. We believe that, in enacting the 1996 Act, Congress recognized that although removing legal barriers to entry is necessary, it is still not sufficient to enable competition to replace monopoly in the local exchange. Congress acknowledged that incumbent LECs have

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[8] A market is characterized as a natural monopoly if a single firm can serve the market at a lower cost than two or more firms. This result is due to one provider being able to exploit economies of scale throughout the range of output likely to be demanded by the market. *See, e.g.*, Alfred Kahn *The Economics of Regulation* Vol. II 119 (1988); *see also* Daniel Spulber *Regulation and Markets* 3 (1989).

[9] *United States v. AT&T*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983), *vacated sub nom. United States v. Western Elect. Co.*, slip op. CA 82-0192 (D.D.C. Apr. 11, 1996).

[10] The following states have competing firms offering switched local service: Massachusetts, Michigan, California, Illinois, Maryland, New York, and Washington. At least some local competition rules are in place in Virginia, North Carolina, Colorado, Louisiana, Arizona, Connecticut, Florida, Georgia, Iowa, Ohio, Oregon, and Tennessee. *See* Common Carrier Competition, CC Report No. 96-9, Federal Communications Commission, Common Carrier Bureau, Spring 1996. "Generally, new competitors are small and are still experimenting in the market." *Id.* at 3.

[11] Section 253 provides that "[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." 1996 Act, sec. 101, § 253(a).

[12] 1996 Act, sec. 101, § 253(d).

constructed and put in place high quality, reliable, redundant local networks that can provide virtually ubiquitous service, and that they possess an approximate 99.7 percent share of the local market as measured by revenues.[13] Because of this existing infrastructure, an incumbent LEC typically can serve a new customer at a much lower incremental cost than could a new entrant that is denied access to the incumbent LEC's facilities, and thereby is denied access to as many central office switches and as much trunking and subscriber loops as the incumbent LEC operates. Moreover, because virtually all existing customers subscribe to the incumbent LEC, a consumer of local switched service would not subscribe to a new entrant's network if the customer could not complete calls to the incumbent LEC's end users. As Congress appeared to recognize in enacting section 251, if the incumbent LEC has no obligation to interconnect and to arrange for mutual transport and termination of calls, it could effectively block or greatly retard entry into switched local service by using its economies of scale and network externalities as impediments to entry.

7. Congress expressly recognized that "it is unlikely that competitors will have a fully redundant network in place when they initially offer local service, because the investment necessary is so significant."[14] AT&T, for example, in filings before the Commission, has estimated that it would have to invest approximately $29 billion to construct new facilities in local markets in order to be able to provide full facilities to reach 20 percent of the 117 million access lines served by the BOCs.[15] Similarly, cable[16] and wireless[17] systems will require

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[13] *Telecommunications Industry Revenue: TRS Fund Worksheet Data*, FCC Industry Analysis Division, Feb 1996, Tables 14 and 15 show that LEC revenues in 1994 were $98.4 billion, while total Competitive Access Provider revenue was $287 million. Even though competitive access provider (CAP) revenues have grown to approximately $1.15 billion in 1995, they still represent a *de minimis* portion of the market. *Local Telecommunications Competition Annual 1995-96*, Connecticut Research, Glastonbury, Conn. (1995) at i-5, Table 1.3.

[14] Joint Explanatory Statement at 148.

[15] AT&T submission, Mar. 18, 1996. By contrast, AT&T's capital construction cost for 1995 was $4.96 billion. *See* Merrill Lynch, *Telecom Services-Long Distance, Fourth Quarter Review: How Much Longer Can the Equilibrium Last? The Catalyst: The Telecommunications Act of 1996*, Feb. 15, 1996 at Table 6. Since January 1994, MCI Metro has spent $500 million to deploy a total of 2,338 route miles of fiber and 11 switches in 25 cities across the country.

[16] Cable systems pass 96 percent of homes in the United States. *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Second Annual Report, 11 FCC Rcd 2060 (1995) (based on a total of 91.6 million television households as of year-end 1994). The provision of telephony over cable systems, however, is largely in the experimental stages today. For example, Motorola recently announced that it will provide cable-telephony products to TCI Telephony Services, enabling TCI to begin cable-based telephony services in the Chicago area this year. Motorola Multimedia Announces Purchase Agreement with TCI, Press Release (September 21, 1995). As of October 1995, Time Warner was providing telephony to approximately 50 homes in the Rochester area. *The Big Bell Cable Calling*, N.Y. Times, Oct. 19, 1995, at 1. Some other cable operators have announced plans to deploy cable-telephony systems by the end of 1996. *See* Paul Farhi, *Alexandria Cable Firm to Offer Phone Service: Company Would Compete With Bell*, Wash. Post, Feb. 17, 1996, at B1. Virtually all cable systems, however, will require significant network upgrades in order to provide telephony service, including additional deployment of fiber optic cable, additional electronics, and back-up power systems.

[17] Although wireless technologies are continuing to develop, some wireless carriers, particularly in urban areas, currently face serious capacity constraints. These will be alleviated through the conversion from analog to digital service, further advances in compression technology, and the deployment of personal communications

substantial investment before either is capable of providing a widespread substitute for wireline telephony services.

8. In the 1996 Act, Congress boldly moved to restructure the local telecommunications market so as to remove economic impediments to efficient entry that existed under the monopoly paradigm. In order to offset the economies of scale and network externalities that would inhibit efficient entry of competitors into markets currently monopolized by incumbent LECs, the 1996 Act requires those LECs to offer interconnection and network elements on an unbundled basis, and imposes a duty to establish reciprocal compensation arrangements for the transport and termination of calls.[18] As the 1996 Act further recognizes, these duties of incumbent LECs are only meaningful in conjunction with the Act's limitations on the rates that can be charged; otherwise, an incumbent LEC could offer interconnection, unbundling, and transport and termination, but at prices that perpetuate its market power.[19] To constrain the incumbent LEC's ability to perpetuate its market power through the pricing of interconnection and unbundled elements, Congress specified that the prices for such transactions should be cost-based and just and reasonable.[20] By freeing new entrants from having to build facilities that totally duplicate the LECs' networks, the 1996 Act has dramatically increased the opportunities for competitive entry and minimized the otherwise overwhelming competitive advantages of large established carriers. We also note that the new law provides for exemption, suspension, or modification of certain requirements, under certain conditions, with respect to small and rural LECs.[21]

9. Different entrants may be expected to pursue different strategies that reflect their competitive advantages in the markets they seek to target.[22] For example, interexchange carriers and competitive access providers may combine their own facilities with unbundled loops and other LEC elements and perhaps augment their own loop facilities over time. Cable systems may choose to develop more extensive networks within their service areas, and thus require fewer unbundled elements from LECs; but, like all entrants, they will require termination arrangements with incumbent LECs. Outside their franchise areas, or in areas not passed by their existing systems, cable companies will need to find some other technique for offering

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service (PCS). Huge investments to reduce cell size and increase frequency reuse may be required to give wireless systems a significant fraction of the traffic-carrying capacity of the incumbent LECs' networks. There is also currently a significant price difference between wireless and wireline service. A wireless call, for example, is typically priced at several times the price of a wireline call. Sprint Spectrum offers an introductory price for its wireless service of $15 per month, which includes access to the system, 15 minutes of air time, and $.31 per minute thereafter. *See A Beginner's Guide to the Cellular Maze*, Wash. Post, Dec. 4, 1995. In contrast, the average price paid by residential customers for local wireline service is about $.03 per minute. *See Trends in Telephone Service*, FCC Industry Analysis Division, Feb. 1995, Tables 6 and 19.

[18] 1996 Act, sec. 101, §§ 251(b)(5), (c)(2), and (c)(3).

[19] Because the ability to send and receive calls between a new entrant's customers and an incumbent LEC's customers is essential to the new entrant's viability, we believe that incumbent LECs have vastly superior bargaining power in negotiations for mutual termination.

[20] 1996 Act, sec. 101, §§ 252(d)(1), (d)(2).

[21] 1996 Act, sec. 101, § 251(f).

[22] For example, in Rochester, AT&T has entered the local market by reselling capacity on the local network, while Time Warner plans to offer local service over its cable system, which will be interconnected with the local network. *See The Big Boys Come Calling*, *supra* note 16.

telecommunications services, such as resale of incumbent LEC services or purchase of unbundled LEC elements.[23]

10. In addition to imposing interconnection, termination, and unbundling requirements in the 1996 Act, Congress also provided for entrants to be able to resell a LEC's retail services.[24] Even if an entrant planned to construct its own facilities, it may still face marketing disadvantages, because of the time it takes to construct a new network. Resale enables new entrants to offer at the outset a conventional service to all customers currently served by an incumbent LEC. Some entrants also may choose to rely on resale as part of a longer term strategy as well.

11. At the same time, Congress plainly intended for LECs in the future to be vigorous competitors, to continue to offer high quality service, and to play a vital role in delivering universal service to all Americans. Nothing in the 1996 Act suggests that Congress intended to divest incumbent LECs of all or part of their local networks, even if some portions continue to be natural monopolies. Indeed, the Act expressly confirms that incumbent LECs may earn a reasonable profit for the interconnection services and network elements they provide.[25]

12. Consistent with this perspective on competition, we also note that the purpose and, given proper implementation, the likely effect of the unbundling and other provisions of the 1996 Act is not to ensure that entry shall take place irrespective of costs, but to remove both the statutory and regulatory barriers and economic impediments that inefficiently retard entry, and to allow entry to take place where it can occur efficiently. This entry policy is competitively neutral: it is pro-competition, not pro-competitor. Our discussion of the 1996 Act in this and other proceedings, therefore, is phrased in terms of removing statutory and regulatory barriers and economic impediments, in permitting efficient competition to occur wherever possible, and replicating competitive outcomes where competition is infeasible or not yet in place.

13. This foregoing discussion has focused on obligations created by the 1996 Act for incumbent LECs in order to reduce economic impediments to efficient market entry by new competitors. The statute, however, also creates general duties for all telecommunications carriers, and obligations for all local exchange carriers, whether classified as "incumbent" LECs or not.[26] These provisions are also important to facilitating competitive local telecommunications markets. We discuss those provisions below.

B. Overview of Sections 251, 252 and 253

14. In adding new sections 251, 252, and 253 to the Communications Act of 1934, Congress set forth a blueprint for ending monopolies in local telecommunications markets. As discussed above, sections 251(b) and (c) impose specific obligations on incumbent LECs to

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[23] Because of local franchising, a given cable operator may not have cable facilities in all parts of the geographic market in which it intends to offer telecommunications service.

[24] 1996 Act, sec. 101, § 251(c)(4).

[25] 1996 Act, sec. 101, § 252(d)(1).

[26] 1996 Act, sec. 101, § 252(a), (b).

open their networks to competitors.[27] Section 251(b)(5), in particular, requires all LECs, including incumbent LECs, to "establish reciprocal compensation arrangements for the transport and termination of telecommunications."[28]

15. Section 251(c) imposes on incumbent LECs three key and separate duties. They must make available to new entrants and existing competitors in local telecommunications markets interconnection, services, and unbundled network elements, and offer for resale at wholesale rates any telecommunications service that the incumbent LEC provides at retail to subscribers. Specifically, section 251(c)(2) requires an incumbent LEC to interconnect with any requesting telecommunications carrier at any technically feasible point in the LEC's network for the transmission and routing of telephone exchange service and exchange access. Section 251(c)(3) requires incumbent LECs to unbundle their network facilities and features so that an entrant can choose among them, combine them with any of its own facilities, and offer services that will compete with the incumbent's offerings. In addition, section 251(c)(4) directs an incumbent LEC to offer for resale, at a wholesale rate, any telecommunications service the incumbent LEC offers to end users at retail. Viewed as a whole, the statutory scheme of section 251(b) and (c) enables entrants to use interconnection, unbundled elements, and/or resale in the manner that the entrant determines will advance its entry strategy most effectively.[29]

16. Section 251(d)(1) directs the Commission to establish rules to implement the requirements of section 251, including the core interconnection, unbundling, and resale provisions of section 251(c). These rules, however, have much broader implications than merely implementing the requirements of section 251. In fact, these rules are central to a number of functions contemplated by the 1996 Act. As discussed below, these rules in varying ways relate to such issues as: (1) the voluntary negotiation process between incumbent LECs and telecommunications carriers; (2) the arbitration process; (3) state commission approval of arbitrated agreements; (4) the FCC's review of arbitrated agreements when a state commission fails to act; (5) judicial review of state commissions' and this Commission's actions; (6) statements of generally available terms and conditions by BOCs; (7) removal of barriers to entry; and (8) BOC entry into interLATA services.

17. Section 251(f)(1) provides that the obligations under section 251(c) shall not apply to a rural telephone company, as defined in the 1996 Act, "until (i) such company has received a bona fide request for interconnection, services, or network elements, and (ii) the State commission determines . . . that such request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 (other than sections (b)(7) and (c)(1)(D) thereof."[30] Section 251(f)(2) provides that a LEC "with fewer than 2 percent of the Nation's subscriber lines" may petition the state commission for a suspension or modification of the

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[27] 1996 Act, sec. 101, § 251(c). In addition, as discussed below, sections 251(a) and 251(b) impose other obligations on all telecommunications carriers and all LECs, respectively.

[28] 1996 Act, sec. 101, § 251(b)(5).

[29] Section 251(c)(2) would permit a cable operator to interconnect its facilities with an incumbent LEC's network. Section 251(c)(3) would enable a competitive access provider to combine its own switches and transport facilities with incumbent LEC loops in order to serve end users. Section 251(c)(4) would enable a new firm to enter a local market quickly and offer the incumbent LEC's subscribers resold services while the entrant constructed its local facilities.

[30] 1996 Act, sec. 101, § 251(f)(1).

requirements set forth in sections 251(b) and (c).[31]

18. Section 252 sets forth the procedures that incumbent LECs and new entrants must follow to transform the requirements of section 251 into binding contractual obligations. Under section 252, incumbent LECs and new entrants initially must seek to agree on the terms and conditions under which LEC facilities and services are made available to the new entrant. To the extent that the resulting agreements are based on voluntary negotiations rather than state arbitration, those agreements are not required to satisfy the provisions of sections 251 and our regulations issued thereunder, but such agreements must not discriminate against a telecommunications carrier not a party to the agreement, and all portions must be consistent with the public interest, convenience, and necessity.[32]

19. If an incumbent LEC and requesting carrier are unable to reach a negotiated agreement, section 252(c) authorizes a state commission to resolve disputed issues by arbitration, and requires the state commission to "ensure that such resolution and conditions meet the requirements of section 251, including the regulations prescribed by the Commission pursuant to section 251." The Commission's section 251 rules also guide states in their subsequent review of arbitrated arrangements.[33] A state commission may reject an arbitrated agreement (or any portion thereof) pursuant to section 252(e)(2)(B) "if it finds that the agreement does not meet the requirements of section 251, including the regulations prescribed by the Commission pursuant to section 251." The rules adopted in this proceeding also will guide the Commission in a similar context. In the event that the Commission must assume the responsibility of a state commission under section 252(e)(5), the section 251 rules will provide the substantive standards the Commission will apply to arbitrate and approve agreements pursuant to section 252.

20. Thus, the statutory scheme of sections 251 and 252 contemplates that the obligations imposed by section 251 and our regulations will establish the relevant provisions that will frame the negotiation process and will govern the resolution of disputes in the arbitration process. We recognize that the section 251 rules will tend to influence negotiations, pursuant to section 252(a)(1) and (2), between incumbent LECs and requesting carriers seeking interconnection, access to unbundled network elements, and resale of LEC services.[34] At least in some cases, the implementing Section 251 rules may serve as a *de facto* floor or set of minimum standards that guide the parties in the voluntary negotiation process.

21. Sections 271 and 273 create incentives for the BOCs to implement promptly the mandates of sections 251 and 252. Pursuant to section 271, a BOC may not offer interLATA services within its service area ("in region") until it is approved to do so (on a state-by-state basis) by the Commission, and section 273 allows a BOC to enter manufacturing at the same time the BOC is approved to offer in-region interLATA services.[35] One of the requirements for

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[31] 1996 Act, sec. 101, § 251(f)(2).

[32] 1996 Act, sec. 101, § 252(e)(2)(A).

[33] *See* 1996 Act, sec. 101, § 252(e)(2).

[34] As a practical matter, it seems reasonable to expect that requesting carriers will seek to negotiate terms and conditions that are, overall, at least as advantageous as those available pursuant to the Commission's rules.

[35] Under the terms of the MFJ, the BOCs were barred from manufacturing telecommunications equipment. Section 273 of the 1996 Act repealed that judicial prohibition and allows BOCS to manufacture such equipment subject to certain conditions.

obtaining approval for in-region interLATA services under section 271 is that the BOC must produce either an interconnection agreement that, among other things, has been approved under section 252 or, under certain circumstances, a statement of generally available interconnection terms and conditions. Under section 252, interconnection agreements that are arbitrated have to comply with section 251's mandates, as do all BOC statements of generally available terms. In addition, all agreements and statements must comply with a "competitive checklist" set out in section 271, several requirements of which expressly reference the mandates of section 251.[16] In these respects, compliance with section 251 and our regulations thereunder is a prerequisite to BOC entry into in-region interLATA services. But compliance may also facilitate BOC entry under section 271 in less obvious ways. For example, in reviewing a BOC application, the Commission must also consult with the Department of Justice and the relevant state commission, and it must decide whether granting the application serves the public interest. Each of these consultations and determinations could, in theory, be affected by considerations of the extent to which the BOC is regarded as complying with section 251 and our rules. Thus, the Commission's section 251 rules will play a central role regarding BOC entry into in-region interLATA services under section 271.

22. Section 253 bars state and local regulations that prohibit or have the effect of prohibiting entities from offering telecommunications services.[17] It also authorizes the Commission to preempt any law or regulation that is violative of this section.[18] The section 251 rules should help to give content and meaning to what state or local requirements the Commission "shall preempt" as barriers to entry pursuant to section 253.

23. Moreover, the section 251 rules will assist the judiciary in reviewing actions of state commissions and the Commission in this area. Subsection 252(e)(6) provides that any party aggrieved by a state determination regarding a negotiated or arbitrated agreement or a statement of generally available terms may bring an action in federal district court "to determine whether the agreement or statement meets the requirements of section 251," presumably including our rules thereunder. The federal district court will thus have to refer to our implementing regulations in determining whether a state commission acted properly in approving or rejecting an arbitrated agreement. Similarly, Commission action in this area will be subject to review by federal circuit courts of appeal. This might include, for example, review of Commission decisions regarding BOC petitions to provide interLATA services pursuant to section 271 or review of Commission action preempting state or local regulations pursuant to section 253. In all of these cases, the court will look to the Commission's section 251 rules to guide its review of the Commission's action.

24. These statutory provisions and the Commission's rules implementing the requirements of section 251 are designed to end the era of monopoly regulation for American telecommunications markets. By dismantling entry barriers and reducing the inherent advantages of incumbent LECs, they establish a national process for enhancing competition, increasing consumer choice, lowering rates, and reducing regulation. The Commission's rules implementing section 251 will have a pervasive and substantial impact in a variety of contexts under the 1996 Act and will serve as the cornerstone of the pro-competitive provisions of the statute. These rules will assist incumbent LECs, telecommunications carriers, state commissions, the FCC, and the courts in defining rights and responsibilities regarding interconnection.

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[16] 1996 Act, sec. 101, § 271(c)(2)(B).

[17] 1996 Act, sec. 101, § 253(a).

[18] 1996 Act, sec. 101, § 253(d).

unbundling, resale, and many other issues under the 1996 Act.

II. PROVISIONS OF SECTION 251

A. Scope of the Commission's Regulations

25. Section 251(d)(1) instructs the Commission, within six months after the enactment of the 1996 Act (that is, August 8, 1996), to "establish regulations to implement the requirements of [section 251]."[39] The Commission's implementing rules should be designed "to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition."[40] In addition to directing the Commission to establish rules to implement section 251, section 253 further requires the Commission to preempt the enforcement of any state or local statute, regulation, or legal requirement that "prohibit[s] or [has] the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."[41]

26. These specific statutory directives make clear that Congress intended the Commission to implement a pro-competitive, de-regulatory, national policy framework envisioned by the 1996 Act.[42] Given the forward-looking focus of the 1996 Act, the nationwide character of development and deployment of underlying telecommunications technology, and the nationwide nature of competitive markets and entry strategies in the dynamic telecommunications industry, we believe we should take a proactive role in implementing Congress's objectives. Thus, we intend in this proceeding to adopt national rules that are designed to secure the full benefits of competition for consumers, with due regard to work already done by the states that is compatible with the terms and the pro-competitive intent of the 1996 Act.

27. In accomplishing this objective, we need to determine the extent to which our rules should elaborate on the meaning of the statutory requirements set forth in sections 251 and 252. For example, we could adopt explicit rules to address those issues that are most critical to the successful development of competition, and with respect to which significant variations would undermine competition. This approach would further a uniform, pro-competitive national policy framework, as envisioned by the statute, and yet still preserve broad discretion for states to resolve, consistent with the 1996 Act, the panoply of other individual issues that may be raised in arbitration proceedings. This approach also would facilitate rapid private sector deployment of advanced telecommunications and information technologies and services by swiftly opening all telecommunications markets to competition. We seek comment on such an approach and whether it would accomplish Congress's goal of promoting efficient competition in local telecommunications markets throughout the country.

28. We see many benefits in adopting such rules to implement section 251. Such rules should minimize variations among states in implementing Congress's national telecommunications policy and guide states that have not yet adopted the competitive paradigm of the 1996 Act. Such rules also could expedite the transition to competition, particularly in

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[39] 1996 Act, sec. 101, § 251(d)(1).

[40] Joint Explanatory Statement at 1.

[41] 1996 Act, sec. 101, § 253.

[42] Joint Explanatory Statement at 1.

those states that have not adopted rules allowing local competition, and thereby promote economic growth in state, regional, and national markets.[43]

29. The adoption of explicit national rules to implement section 251 would not necessarily undermine the initiatives undertaken by various states prior to the enactment of the 1996 Act, and in fact, we anticipate that we will build upon actions some states have taken to address interconnection and other issues related to opening local markets to competition. Some states have been in the forefront of the pro-competitive effort to open local markets to competition, and these approaches may comport with the 1996 Act despite the fact that many of them pre-date it. Building on the progress made by these states, explicit national rules could be modelled on existing state statutes or regulations to the extent that they comply with the terms of the 1996 Act. For example, the Commission could conclude that a particular state's approach to unbundling of network elements is consistent with the 1996 Act and that it therefore may serve as a useful model for a national rule on unbundling. The Commission might also conclude that a range of different approaches used by several states to interconnection arrangements comply with the Act and therefore would be acceptable under a national rule. Throughout this item, we seek comment on the extent to which existing state initiatives are consistent with the new federal statute and, to the extent they are, the wisdom of using existing state approaches as guideposts or benchmarks for our national rules.

30. Explicit national rules implementing section 251 can be expected to reduce the capital costs of, and attract investment in, new entrants by enhancing the ability of the investment community to assess an entrant's business plan. Such rules would also permit firms to configure their networks in the same manner in every market they seek to enter. Uniform network configurations could achieve significant cost efficiencies for new entrants; if new competitors were required to modify their networks in different markets solely to be compatible with a patchwork of different regulations, they would likely incur additional expense, thereby increasing the cost of entry, a result that would be inconsistent with the pro-competitive goals of the statute.[44]

31. Explicit national rules under section 251 also could expedite the implementation of other provisions of the 1996 Act that require incumbent LECs, new entrants, the states, federal courts, and the Commission to apply the requirements of section 251 in other contexts. Section 252 provides that incumbent LECs and entrants initially will seek to arrive at interconnection and unbundling arrangements through voluntary negotiations. By narrowing the range of permissible results, concrete national standards would limit the effect of the incumbent's bargaining position on the outcome of the negotiations. In addition, the application of explicit national rules under section 251 could provide important guidance to federal district courts that are charged with reviewing state determinations of whether particular arbitration agreements are consistent with section 251 (presumably including our rules thereunder). Moreover, the absence of such rules could lead to varying or inconsistent decisions by individual district and circuit courts concerning the core requirements of the 1996 Act. We believe that such a result would be inconsistent with the intent of Congress in passing comprehensive telecommunications legislation.

32. Further, rules that elaborate on the statutory requirements of section 251 would

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[43] More than 30 states do not have rules governing local competition in place today; most of those states have not commenced proceedings to adopt the necessary rules.

[44] A uniform network design can be expected to reduce start-up costs, accelerate innovation, enhance interoperability of networks and equipment, and reduce the administrative burdens for both incumbent LECs and entrants.

establish clear guidelines that we will need to carry out our responsibilities under the 1996 Act. We will need explicit rules to guide our arbitration of disputes between incumbent LECs and new entrants if we are required, under section 252(e), to assume those responsibilities. In addition, BOCs must satisfy the checklist set forth in section 271(c)(2)(B) before they may offer in-region, interLATA services. The checklist requires BOCs to comply with specific provisions of section 251. Thus, the Commission needs to articulate clear rules that clarify what constitutes compliance with section 251 for purposes of our review under section 271.

33. On the other hand, there may be countervailing concerns that could weigh against rules that significantly explicate in some detail the statutory requirements of sections 251 and 252. Adopting explicit national rules, in certain circumstances, might unduly constrain the ability of states to address unique policy concerns that might exist within their jurisdictions. The case for permitting material variability among the states could be strengthened if there are substantial state-specific variations in technological, geographic, or demographic conditions in particular local markets that call for fundamentally different regulatory approaches. We seek comment on the nature of such variations, and on whether there are such variations that require fundamentally different regulatory approaches. States may also seek, to the extent permitted by sections 251, 252, 253, and 254, to ensure the uninterrupted delivery of certain services by the incumbent where competition might arguably threaten those services. It might also be argued that there is value to permitting states to experiment with different pro-competitive regimes to the extent that there is not a sufficient body of evidence upon which to choose the optimal pro-competitive policy. If we were to decline to adopt explicit rules at all, in effect we would be permitting states to set different priorities and timetables for requiring incumbent LECs to offer interconnection and unbundled network elements. Such an approach means that we would balance the need to swiftly introduce telecommunications competition against other policy priorities. We seek comment on these issues.

34. We also note that, under section 252, states must implement any rules we establish under section 251. Section 252 assigns to the states the responsibility for arbitrating disputes between the parties, including resolving factual disputes. We seek comment on how our national rules can best be crafted to assist the states in carrying out this responsibility.

35. In the succeeding sections of this Notice, we invite parties to comment, with respect to each of the obligations imposed by section 251, on the extent to which adoption of explicit national rules would be the most constructive approach to furthering Congress' pro-competitive, deregulatory goals of making local telecommunications markets effectively competitive. We seek comment on the relative costs and benefits of constraining or encouraging variations among the states in carrying out their responsibilities under section 252. We also invite parties to comment on whether our rules implementing section 251 can be crafted to allow states to implement policies reflecting unique concerns present in the respective states, without vitiating the intended effects of a scheme of overarching national rules. We further ask parties to comment on the consequences of fostering or constraining variability among the states.

36. As a separate matter, we note that section 251 and our implementing regulations govern the states' review of BOC statements of generally available terms and conditions, as well as arrangements arrived at through compulsory arbitration pursuant to section 252(b).[45] We tentatively conclude that we should adopt a single set of standards with which both arbitrated agreements and BOC statements of generally available terms must comply. We believe that this is consistent with both the language and the purpose of the 1996 Act. We seek comment on this tentative conclusion.

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[45] 1996 Act, sec. 101, §§ 252(b), (f).

37. On a separate jurisdictional issue, we tentatively conclude that Congress intended sections 251 and 252 to apply to both interstate and intrastate aspects of interconnection, service, and network elements, and thus that our regulations implementing these provisions apply to both aspects as well. It would make little sense, in terms of economics, technology, or jurisdiction, to distinguish between interstate and intrastate components for purposes of sections 251 and 252. Indeed, if the requirements of sections 251 and 252 regarding interconnection, and our regulations thereunder, applied only to interstate interconnection, as might be argued in light of the lack of a specific reference to intrastate service in those sections, states would be free, for example, to establish disparate guidelines for intrastate interconnection with no guidance from the 1996 Act. We believe that such a result would be inconsistent with Congress' desire to establish a national policy framework for interconnection and other issues critical to achieving local competition. As Senator Lott observed, "In addressing *local* and long distance issues, creating an open access and sound interconnection policy was the key objective . . . ."[46] Representative Markey noted that, "[W]e take down the barriers of *local* and long distance and cable company, satellite, computer, software entry into any business they want to get in."[47]

38. We also tentatively conclude that it would be inconsistent with the 1996 Act to read into sections 251 and 252 an unexpressed distinction by assuming that the FCC's role is to establish rules for interstate aspects of interconnection and the states' role is to arbitrate and approve intrastate aspects of interconnection agreements. Because the statute explicitly contemplates that the states are to follow the Commission's rules, and because the Commission is required to assume the state commission's responsibilities if the state commission fails to act to carry out its section 252 responsibilities, we believe that the jurisdictional role of each must be parallel. We seek comment on our tentative conclusion. The argument has also been raised that sections 251 and 252 apply *only* with respect to intrastate aspects of interconnection, service, and network elements. We seek comment on this argument as well.

39. Section 2(b) of the 1934 Act does not require a contrary tentative conclusion. Section 2(b) provides that, except as provided in certain enumerated sections not including sections 251 and 252, "nothing in [the 1934] Act shall be construed to apply or to give to the Commission jurisdiction with respect to . . . charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier . . . ."[48] As stated above, however, we tentatively conclude that section 251 applies to certain "charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service." In enacting section 251 after section 2(b) and squarely addressing therein the issues before us, we believe Congress intended for section 251 to take precedence over any contrary implications based on section 2(b). We seek comment on this tentative conclusion.

40. We note that sections 251 and 252 do not alter the jurisdictional division of authority with respect to matters falling outside the scope of these provisions. For example, rates charged to end users for local exchange service, which have traditionally been subject to state authority, continue to be subject to state authority. Indeed, that section 251 does not disturb state authority over local end user rates may explain why Congress saw no need to amend section 2(b) expressly, whereas it did see such a need in its 1993 legislation establishing commercial mobile

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[46] 141 Cong. Rec. S7906 (June 7, 1995) (emphasis added).

[47] 142 Cong. Rec. H1151 (Feb. 1, 1996) (emphasis added).

[48] 47 U.S.C. § 152(b).

radio service (CMRS).[48] In the 1993 legislation, Congress eliminated the authority of states to regulate the rates charged for CMRS and so may have felt that an express amendment to section 2(b) would be especially helpful. We seek comment on these issues as well.

41. We also seek comment on the relationship between sections 251 and 252 and the Commission's existing enforcement authority under section 208. Section 208 of the Act gives the Commission general authority over complaints regarding acts by "any common carrier subject to this Act, in contravention of the provisions thereof."[49] Does this mean that the Commission has authority over complaints alleging violations of requirements set forth in sections 251 or 252? If not, in what forum would such complaints be reviewed? In state commissions? In courts? Is there a relevant distinction here between complaints concerning the formation of interconnection agreements and complaints regarding implementation of such agreements? We also seek comment on the relationship between sections 251 and 252 and any other source of Commission enforcement authority that may be applicable. We further seek comment on how we might increase the effectiveness of the enforcement mechanisms available under the 1934 Act, as amended. We seek comment on how private rights of action might be used under sections 206-208 of the 1934 Act, as amended, and the different roles the Commission might play, for example, as an expert agency, to speed resolution of disputes in other forums used by private parties.

B. Obligations Imposed by Section 251(c) on "Incumbent LECs"

42. We now turn to the particular provisions of section 251 that the Commission is obligated to implement under section 251(d)(1). We begin with section 251(c) because we believe that provision is the cornerstone of Congress's plan for opening local telecommunication markets to competitive entry.

43. Section 251(c) establishes obligations for "incumbent local exchange carriers."[51] An "incumbent local exchange carrier" for a particular area is defined in section 251(h)(1) as a LEC that: (1) as of the enactment date of the 1996 Act, both "provided telephone exchange service in such area" and "was deemed to be a member of the exchange carrier association pursuant to Section 69.601 of the Commission's regulations," or (2) "is a person or entity" that, on or after the enactment date of the 1996 Act, "became a successor or assign of a member" of the exchange carrier association.[52]

44. In addition, under Section 251(h)(2), the Commission may, by rule, treat another LEC or class of LECs as an incumbent LEC if (1) "such carrier occupies a position in the market for telephone exchange service within an area that is comparable" to that of an incumbent LEC, (2) "such carrier has substantially replaced" an incumbent LEC, and (3) "such treatment is consistent with the public interest, convenience, and necessity and the purposes" of Section 251.[53] We seek comment on whether we should establish at this time standards and procedures by

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[48] 47 U.S.C. § 332(c).

[49] 47 U.S.C. § 208(a).

[51] Incumbent local exchange carriers also have obligations under sections 251(a) and (b), as discussed *infra* at Sections II.C. and D.

[52] 1996 Act, sec. 101, § 251(h)(1).

[53] 1996 Act, sec. 101, § 251(h)(2).

which carriers or other interested parties could seek to demonstrate that a particular LEC should be treated as an incumbent LEC pursuant to Section 251(h)(2).

45. We further seek comment on whether state commissions are permitted to impose on carriers that have not been designated as incumbent LECs any of the obligations the statute imposes on incumbent LECs. We understand that some states have found that the negotiation process between incumbent LECs and their potential competitors may move more smoothly if the arrangements offered by an incumbent LEC are made reciprocal. Under this approach, for example, a potential competitor would be required to make available to an incumbent LEC directory assistance information on the same basis that the LEC agreed to furnish the information. Some parties have alleged, however, that imposing on new entrants the obligations imposed on incumbent LECs would undermine the competitive goals of the 1996 Act.[54] We seek comment on whether imposing on new entrants requirements that the 1996 Act imposes on incumbent LECs would be consistent with the Act's distinction between the obligations of all telecommunications carriers, all LECs and the additional obligations of all incumbent LECs.

1. Duty to Negotiate in Good Faith

46. As noted in section I.B., above, if the parties fail to negotiate an agreement voluntarily, they must submit to arbitration.[55] Section 251(c)(1) states that "each incumbent local exchange carrier has the . . . duty to negotiate in good faith in accordance with section 252 the particular terms and conditions of agreements to fulfill the duties" described in section 251(b) for LECs and section 251(c) for incumbent LECs.[56] In addition, section 252(b)(5) provides that, pursuant to the arbitration process, the refusal of a party to "participate further in the negotiations, to cooperate with the State commission in carrying out its function as an arbitrator, or to continue to negotiate in good faith in the presence of, or with the assistance of, the State commission shall be considered a failure to negotiate in good faith."[57] The state commission is required to resolve, within 9 months after the incumbent LEC receives a request under section 252, any issues that were submitted for arbitration.[58]

47. We seek comment on the extent to which the Commission should establish national guidelines regarding good faith negotiation under section 251(c)(1), and on what the content those rules should be. We note that carriers have submitted some information alleging that LECs already have employed certain tactics that the Commission should determine violate the duty to negotiate in good faith.[59] For example, carriers have alleged that incumbent LECs have refused to begin to negotiate until the requesting telecommunications carrier satisfies certain conditions.

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[54] Letter from Daniel L. Brenner, Vice President for Law and Regulatory Policy, National Cable Television Association, to Regina M. Keeney, Chief, Common Carrier Bureau, FCC (Apr. 15, 1996).

[55] 1996 Act, sec. 101, § 252(b).

[56] 1996 Act, sec. 101, § 251(c)(1).

[57] 1996 Act, sec. 101, § 252(b)(5).

[58] 1996 Act, sec. 101, § 252(b)(4)(C).

[59] *See, e.g., Implementing Local Competition Under the Telecommunications Act of 1996, A Proposed Handbook for the FCC*, Association for Telecommunications Services (ALTS), March 1996 (ALTS Handbook) at 10. *See also* Letter from Richard J. Metzger, general counsel, ALTS, to Reed E. Hundt, Chairman, FCC (Mar. 25, 1996).

such as signing a nondisclosure agreement, or agreeing to limit its legal remedies in the event that negotiations fail. We believe that such tactics might impede the development of local competition, and may be inconsistent with provisions of the 1996 Act.[60] We seek comment on the extent to which these or other practices should be deemed to violate the duty to negotiate in good faith. We note that courts and the Commission previously have addressed issues regarding good faith negotiation.[61] We seek comment on specific legal precedent regarding the duty to negotiate in good faith that we should rely on in establishing national guidelines regarding section 251(c)(1).

48. A related issue is what effect section 252 has on agreements regarding service, interconnection, or unbundled network elements that predate the 1996 Act. Section 252(e)(1) states: "Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission." Section 252(a)(1) states that an agreement for interconnection, service, or network element, "including any interconnection agreement negotiated before the date of the enactment of the Telecommunications Act of 1996, shall be submitted to the State commission under subsection (e) of this section."[62] We seek comment on whether these provisions require parties that have existing agreements to submit those agreements to state commissions for approval.[63] We also seek comment on whether one party to an existing agreement may compel renegotiation (and arbitration) in accordance with the procedures set forth in section 252.

2. Interconnection, Collocation, and Unbundled Elements

a. Interconnection

49. Section 251(c)(2) imposes upon incumbent LECs "the duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network . . . for the transmission and routing of telephone exchange service and exchange access."[64] Such interconnection must be: (1) provided by the incumbent LEC at "any technically feasible point within [its] network;"[65] (2) "at least equal in quality to that provided by the local exchange carrier to itself or . . . [to] any other party to which the carrier provides interconnection;"[66] and (3) provided on rates, terms, and conditions that are "just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the

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[60] *See e.g.*, 1996 Act, sec. 101, §§ 252(b), (i).

[61] *See e.g., Southern Pacific Communications Co. v. American Tel. & Tel.*, 556 F.Supp. 825 (D.D.C. 1983).

[62] 1996 Act, sec. 101, § 252(a)(1).

[63] ALTS argues that preexisting interconnection agreements between BOCs and independent, incumbent LECs must be submitted to state agencies for approval and that the terms of those agreements must be made generally available pursuant to section 252(a)(1), (e) and (i). ALTS Handbook at 24. *See also* Letter from Richard J. Metzger, General Counsel, ALTS, to Craig A. Glazer, Chairman, Ohio Public Utilities Commission (April 1, 1996). *See also* Letter from Gary R. Lytle, Vice President, Federal Relations, Ameritech, to Reed E. Hundt (April 12, 1996) (responding to the April 1 letter from ALTS).

[64] 1996 Act, sec. 101, § 251(c)(2)(A).

[65] 1996 Act, sec. 101, § 251(c)(2)(B).

[66] 1996 Act, sec. 101, § 251(c)(2)(C).

agreement and the requirements of this section and section 252."[47] The interconnection obligation plays a vital role in promoting competition by ensuring that a requesting carrier can on reasonable rates, terms and conditions transmit telecommunications traffic between its network and the incumbent's network in a reliable and efficient manner.[48]

50. We believe that uniform national rules for evaluating interconnection arrangements would likely offer several advantages in advancing Congress's desire to create a pro-competitive national policy framework regarding local telephone service. For example, national standards would likely speed the negotiation process by eliminating potential areas of dispute. We note that, in the past, disputes before the FCC between LECs and interconnectors have arisen most often where our rules lacked specificity, or where no standards had been adopted.[49] Lingering disputes over the terms and conditions of interconnection due to confusion or ambiguity create the potential for incumbent LECs to delay entry. For these reasons we tentatively conclude that uniform interconnection rules would facilitate entry by competitors in multiple states by removing the need to comply with a multiplicity of state variations in technical and procedural requirements.

51. We also, however, seek comment on the consequences of not establishing such specific rules for interconnection. We seek comment on whether there are instances wherein the aims of the 1996 Act would be better achieved by permitting states to experiment with different approaches. Would permitting substantial variation make it easier for states to respond more appropriately to technical, demographic, or geographic issues specific to that state or region without detracting from the overall purposes of the 1996 Act? For example, might technical differences, such as a lack of digital switching capability in a particular network, affect the technically feasible interconnection points on the network? Would variations in technical requirements among states affect the ability of new entrants to plan and configure regional or national networks? For example, how would variations in the definition of "technical feasibility," the number of required points of interconnection, and methods of interconnection, affect the ability of new entrants to plan and configure regional or national networks? How would such variations affect the entrant's ability to deploy alternative network architectures, such as synchronous optical network (SONET) rings, which may deliver telephone service more efficiently? Would a lack of explicit national standards reduce predictability and certainty, and thereby slow down the development of competition? Would a lack of explicit guidelines impair the state's ability to complete arbitration within 9 months of the date that the interconnection request was made, or our ability to evaluate BOC compliance under section 271 within 90 days? Would a lack of clear national standards impair our ability under section 252(e) to assume a state commission's responsibilities if the state commission fails to act to carry out its responsibilities under section 252?

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[47] 1996 Act, sec. 101, § 251(c)(2)(D).

[48] Senator Burns has stated that the "rules on interconnection will empower competitors by ensuring that they can gain access on fair and reasonable terms to existing local telephone facilities . . ." 142 Cong. Rec. S687-01 (Feb. 1, 1996). Senator Pressler has explained that "Interconnection . . . will put new competitors . . . on the same footing with former monopolies." 141 Cong. Rec. S8188 (June 12, 1995).

[49] *See, e.g., Local Exchange Carrier's Rates, Terms, and Conditions for Expanded Interconnection for Special Access*, Order Designating Issues for Investigation, 8 FCC Rcd 6909 (1993) (*Special Access Physical Collocation Designation Order*); *Local Exchange Carrier's Rates, Terms, and Conditions for Expanded Interconnection Through Virtual Collocation for Special Access and Switched Transport*, Phase II, Order Designating Issues for Investigation, 10 FCC Rcd 11116 (1995) (*Virtual Collocation Designation Order*).

52. We also encourage parties to submit information regarding the approaches taken by those states that have allowed interconnection.[70] A number of states already have adopted a variety of approaches to interconnection.[71] For example, New York sets basic "expectations" that constitute default provisions if the parties fail to agree. These provisions include the availability of two-way trunking facilities and combined trunking arrangements.[72] California has adopted what it calls a "preferred outcomes" approach. Under this approach, parties are encouraged to use 13 broad criteria regarding interconnection arrangements (the "preferred outcomes") that were established by the State commission to guide the negotiation and arbitration process. Although parties may develop different outcomes, preferred outcomes receive expedited review and approval. Arbitration judges may also use the preferred outcomes as guidelines in cases where the negotiations fail, and they have the discretion to mandate interconnection provisions that go beyond the preferred outcomes.[73] With respect to each of the issues discussed below, we invite commenters to analyze the advantages and the disadvantages of the approaches states have adopted with respect to interconnection arrangements. We also seek comment on whether any elements of these state approaches would be suitable for incorporation into national standards implementing the 1996 Act. Finally, we ask commenting parties to identify state approaches to interconnection that they believe are inconsistent with or preempted by the 1996 Act, or that are inadvisable from a policy perspective.

53. We further seek comment on the relationship between the obligation of incumbent LECs to provide "interconnection" under 251(c)(2) and the obligation of the incumbent LEC, and all LECs, to establish reciprocal compensation arrangements for the "transport and termination" of telecommunications pursuant to 251(b)(5). The issue is significant mainly because, in section 252(d)(2), there is one pricing standard for "interconnection" under section 251(c)(2) and a separate one for "transport and termination" under 251(b)(5).

54. On the one hand, the term "interconnection," as used in section 251(c)(2), might refer only to the facilities and equipment physically linking two networks and not to transport and termination services provided by such linking -- in which case there is no overlap in the coverage of the two sections. On the other hand, the term "interconnection" as used in section 251(c)(2) might refer to both the physical linking of the two networks *and* to transport and termination services -- in which case there is considerable overlap. We seek comment on how to "interpret" the term "interconnection" in section 251(c)(2). Parties that advocate the broader meaning should also comment on the overlap in the coverage of the sections and how the overlap affects which section 252(d) pricing standards apply.

55. In the following paragraphs, we discuss the requirements of the 1996 Act concerning interconnection in more detail. More specifically, we address issues of technically feasible points of interconnection, just, reasonable, and nondiscriminatory terms and conditions, and quality and

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[70] We note again that, although some states have implemented detailed interconnection rules, most states either have instituted only general guidelines, or have no interconnection rules at all. A number of states have not yet certified any new entrants to provide competitive local telecommunications services.

[71] Examples of various state substantive rules regarding different aspects of interconnection are discussed in more detail below.

[72] *See Order Instituting Framework for Carrier Interconnection*, Case 94-C-0095, (N.Y. Pub. Serv. Comm'n Sept. 27, 1995) (*NYPSC Interconnection Order*).

[73] *See Competition for Local Exchange Service*, Order, Decision 95-12-056 (Cal. Pub. Util. Comm'n Dec. 20, 1995).

methods of interconnection.

(1) Technically Feasible Points of Interconnection

56. Subsection (c)(2)(B) requires that incumbent LECs provide interconnection "at any technically feasible point within the [incumbent LEC's] network."[74] We seek comment on what constitutes a "technically feasible point" within the incumbent LEC's network for purposes of this section. In this regard, we note that network technology continues to advance and emphasize that we seek to avoid a static definition that may artificially limit future interconnection. Is there a definition of "technically feasible" that will provide the necessary flexibility in determining interconnection points as network technology evolves? Further, to what extent, if any, should a risk to network reliability or other potential harm to the network be considered in determining whether interconnection at a particular point is technically feasible? We tentatively conclude that, if risks to network reliability are considered in determining whether interconnection at a certain point is technically feasible, the party alleging harm to the network will be required to present detailed information to support such a claim. We seek comment on these issues and our tentative conclusion concerning claims of network harm.

57. We also tentatively conclude that the minimum federal standard should provide that interconnection at a particular point will be considered technically feasible within the meaning of section 251(c)(2) if an incumbent LEC currently provides, or has provided in the past, interconnection to any other carrier at that point, and that all incumbent LECs that employ similar network technology should be required to make interconnection at such points available to requesting carriers. For example, many LECs already provide interconnection at the trunk- and loop-side of the local switch, transport facilities, tandem facilities, and signal transfer points.[75] We thus tentatively conclude that interconnection at those points should be technically feasible for all incumbent LECs that use technology similar to that used by LECs currently offering interconnection at those points. We believe that as technology advances, the number of points at which interconnection is feasible may change and acknowledge that the federal standard for minimum interconnection points should change accordingly.

58. Alternatively, we could allow states to determine whether interconnection at a greater number of points would also be technically feasible. We seek comment on whether allowing states to designate additional technically feasible interconnection points would make it more difficult for a carrier to develop a regional or national network. In this regard, commenters should address additional points at which LECs currently provide interconnection and on other possible points of interconnection that may be technically feasible. Because the statute imposes an affirmative obligation on incumbent LECs to provide interconnection at any technically feasible points in their networks, we further tentatively conclude that, where a dispute arises, the incumbent LEC has the burden of demonstrating that interconnection at a particular point is technically infeasible. We seek comment on this tentative conclusion.

59. We also invite parties to submit information concerning interconnection obligations and policies that state commissions have adopted for incumbent LECs to help us determine what points of interconnection states have found to be technically feasible. We note, for example, that the New York Public Service Commission (NYPSC) has established options for interconnection

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[74] 1996 Act, sec. 101, § 251(c)(2)(B).

[75] We also note that the Illinois Commission has ordered LECs to make available interconnection at subloop points. *See Adoption of Rules on Line-side Interconnection and Reciprocal Interconnection*, Interim Order, No. 94-0049 (Ill. Comm. Comm'n April 7, 1995).

points that range from the incumbent LEC's premises to the requesting carrier's premises, and include any point in between. These options are deemed reasonable by the NYPSC, although they are not requirements (in contrast to other interconnection requirements, which New York sets up as default provisions). The parties are to negotiate the actual interconnection points, however.[76] We also seek comment on approaches that other states have adopted for determining the technical feasibility of interconnection at particular points. We also seek comment on which state policies are either inconsistent with the language of the 1996 Act or unwarranted from a policy perspective.

(2) Just, Reasonable, and Nondiscriminatory Interconnection

60. Section 251(c)(2)(D) requires that the interconnection provided by the incumbent LEC be "on rates, terms, and conditions that are just, reasonable, and nondiscriminatory."[77] We address the pricing of interconnection, collocation, and unbundled elements in section II.B.2.d below.

61. We seek comment on how to determine whether the terms and conditions for interconnection arrangements are just, reasonable, and nondiscriminatory. For example, should we adopt explicit national standards for the terms and conditions for interconnection? In particular, we seek comment on whether we should adopt uniform national guidelines governing installation, maintenance, and repair of the incumbent LEC's portion of interconnection facilities. We also seek comment on whether we should adopt standards for the terms and conditions concerning the payment of the non-recurring costs associated with installation.[78] We seek comment on whether the Commission should establish incentives to encourage incumbent LECs to provide just, reasonable, and nondiscriminatory interconnection and, if so, what those incentives should be. For example, should LECs be required to meet agreed upon performance standards for installing or repairing interconnection facilities and pay liquidated damages for any failure to satisfy the agreement?[79] Are there means of accomplishing this result that do not require the propagation of rules detailing specific performance standards?

62. If we were to establish national guidelines on this issue, we seek comment on state policies regarding the terms and conditions for interconnection that might serve as models. For example, with respect to meet point interconnection arrangements,[80] the state of Washington requires that each company pay for and be responsible for building and maintaining its own facilities up to the meet point, as is typical in this type of interconnection arrangement.[81] We note that New York permits earnest fees on interconnection arrangements to ensure the good

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[76] *See NYPSC Interconnection Order*.

[77] 1996 Act, sec. 101, § 251(c)(2)(D).

[78] ALTS Handbook at 18.

[79] *See generally* Implementing the Telecommunications Act of 1996: Encouraging Local Exchange Competition, TCG, Apr. 4, 1996 (*TCG Submission*).

[80] A meet point is a point, designated by two carriers, at which one carrier's responsibility for service begins and the other's ends. A meet point interconnection arrangement requires each carrier to build and maintain its network to the meet point. Each carrier also pays its share of the cost of the interconnection arrangement.

[81] Washington Utilities and Transportation Commission, Fourth Supplemental Order, Docket UT-941464 *et al.* (Oct. 1995) (*Washington State Order*).

faith nature of interconnection requests before the incumbent LEC begins construction or other necessary arrangements for interconnection. That fee is then applied to the requesting party's costs for interconnection.[82] We recognize, however, that LECs potentially could use such fees and other terms and conditions to delay and deter entry. We invite parties to comment on this approach as well as on other states' policies. We specifically seek comment on whether such policies are consistent with the pro-competitive and deregulatory tenor of the Act. We seek comment on whether any state substantive rules regarding the terms and conditions for interconnection might be adopted as a national standard, as well as comment on which state rules might be inconsistent with the 1996 Act.

(3) Interconnection that is Equal in Quality

63. Section 251(c)(2)(C) requires that the interconnection provided by the incumbent LEC be "at least equal in quality to that provided by the [incumbent LEC] to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection."[83] We seek comment on what criteria may be appropriate in determining whether interconnection is "equal in quality." We seek comment on whether these criteria should be adopted as a national standard, or whether competitive objectives would be achievable by allowing variations and experimentation among states. We also seek comment on relevant state requirements, such as those in Iowa, which prohibit a rate-regulated incumbent from providing inferior interconnection to another provider.[84] We invite parties to comment on this and other provisions that might guide our efforts in implementing the "equal in quality" requirement of the 1996 Act.

(4) Relationship Between Interconnection and Other Obligations Under the 1996 Act

64. Section 251(c)(2) further requires incumbent LECs to provide interconnection with the LEC's network "for the facilities and equipment of any requesting telecommunications carrier." In comparison, section 251(c)(6) imposes upon incumbent LECs "the duty to provide . . . for physical collocation of equipment necessary for interconnection."[85] We note that section 251(c)(6) regarding physical collocation does not expressly limit the Commission's authority under section 251(c)(2) to establish rules requiring incumbent LECs to make available a variety of technically feasible methods for interconnection. These methods may, for example, include meet point arrangement as well as physical and virtual collocation. We tentatively conclude that the Commission has the authority to require, in addition to physical collocation, virtual collocation and meet point interconnection arrangements, as well as any other reasonable method of interconnection. We seek comment on this tentative conclusion.

65. We seek comment on the various state requirements concerning methods for interconnection. For example, in the state of Washington, the commission has ordered that companies establish mutually agreed upon meet points for purposes of exchanging local traffic. Incumbent LECs may establish, through negotiations, separate meet points for each company, or

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[82] *See* New York Optical Transport Service Tariff, No. 913 (1992).

[83] 1996 Act, sec. 101, § 251(c)(2)(C).

[84] Iowa Code, § 476.101(2).

[85] 1996 Act, sec. 101, § 251(c)(6).

a common hub by which multiple companies can come together efficiently.[66] Oregon requires that requesting carriers be permitted to interconnect with incumbent LECs by negotiating mutually acceptable arrangements, including meet points.[67] Maryland allows the incumbent LEC the option of using virtual or physical collocation, subject to commission review.[68] We seek information on these and other similar state requirements. We seek comment on whether any state requirements concerning methods for interconnection might be appropriately adopted as a national standard. We also seek comment concerning those state requirements that may be inconsistent with the 1996 Act or inappropriate from a policy standpoint.

b. Collocation

66. Section 251(c)(6) of the Act requires incumbent LECs to provide "for the physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier, except that the carrier may provide for virtual collocation if the local exchange carrier demonstrates to the State commission that physical collocation is not practical for technical reasons or because of space limitations."[69] Section 251(c)(6) fosters competition by ensuring that a competitor may install equipment necessary for interconnection or access to unbundled network elements on LEC premises and gives competitors access to the LEC central office to install, maintain, and repair this equipment.

67. The establishment of national rules with respect to at least some issues regarding collocation would appear to offer several important benefits. For example, we believe that national standards would speed the negotiation process by eliminating potential areas of dispute. Lingering disputes or ambiguity regarding the parties' obligations may delay competitive entry. In addition, uniform standards would probably facilitate entry by competitors in multiple states by removing the need to comply with a patchwork of state variations in technical and procedural requirements. Finally, clear uniform rules could add speed, fairness, and simplicity to the arbitration process, and reduce uncertainty. We also note that beginning in 1992, the Commission adopted both physical and virtual collocation rules and that these rules were then used by several states to develop their own approaches to collocation.[70] We therefore tentatively conclude that we should adopt national standards where appropriate to implement the collocation requirements of the 1996 Act.

68. We also seek comment on the extent to which we should establish national rules for collocation that allow for some variation among states, and on the advantages and disadvantages of permitting such variation. Would permitting material variation foster competition and make it

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[66] *Washington State Order*.

[67] *Applications for Certificate of Authorization to Provide Telecommunications Service in Oregon*, Order No 96-021 (Oregon Pub. Util. Comm'n Jan. 12, 1996).

[68] *Chesapeake & Potomac Telephone Company of Maryland*, Order No. 70357 in Case No. 8533, (Md. Pub. Serv. Comm'n Feb. 11, 1993).

[69] 1996 Act, sec. 101, § 251(c)(6).

[70] *Expanded Interconnection With Local Telephone Company Facilities*, Report and Order and Notice of Proposed Rulemaking, 7 FCC Rcd 7369 (1992) (*Special Access Expanded Interconnection Order*); *Special Access Physical Collocation Designation Order*, 8 FCC Rcd 6909; *Expanded Interconnection With Local Telephone Company Facilities*, Memorandum Opinion and Order, 9 FCC Rcd 5154, 5166, ¶¶ 31-32 (1994)(*Virtual Collocation Expanded Interconnection Order*); *Virtual Collocation Designation Order*, 10 FCC Rcd 11116.

easier for states to respond more appropriately to issues specific to that state or region? Would variations in technical requirements among states affect the ability of new entrants to plan and configure regional or national networks? Would a lack of specific national standards reduce predictability and certainty, and thereby slow down the development of competition? Would a lack of explicit guidelines impair the state's ability to complete arbitration within 9 months of the date that the interconnection request was made, or our ability to evaluate BOC compliance under section 271 within the statutory time-frame? Would a lack of specific national standards impair our ability under section 252(e) to assume a state commission's responsibilities if the state commission fails to act to carry out its responsibilities under section 252?

69. We also encourage parties to submit information concerning specific state approaches regarding collocation that might provide useful models for national guidelines. In several states, including California and New York, incumbent LECs currently provide physical collocation. Under California's "preferred outcomes" approach,[91] the "preferred outcome" concerning physical collocation is similar to rules the FCC previously established for physical collocation.[92] California presently allows LECs to offer virtual or physical collocation. New York applies a comparably efficient interconnection (CEI) standard to both new entrants and incumbent LECs, that requires that interconnection be technically and economically comparable to actual physical collocation. New York does not have detailed physical collocation requirements under the CEI standard, but rather leaves such matters to negotiation between the parties.[93] Currently in New York, Rochester Telephone and NYNEX both offer physical collocation to satisfy the CEI standard. In other states, incumbent LECs currently provide only virtual collocation. Illinois, which had originally mandated physical collocation, recently adopted rules regarding virtual collocation. The state of Washington also permits virtual collocation and has stated that such charges for virtual collocation should be no higher than charges for physical collocation. The Washington Commission also concluded that, if meet point interconnection arrangements are established by mutual agreement, decisions about where equipment is placed will be resolved as part of that negotiation, and therefore a virtual collocation tariff probably would not be necessary.[94] Finally, Florida permits LECs to offer both virtual and physical collocation, but has left the details of such arrangements to negotiation between the parties.

70. We seek comment on whether one or more of these state collocation policies would be suitable for use as a national standard. We also seek comment on state policies that commenters believe are inconsistent with the goals of the 1996 Act, or that are inadvisable from a policy perspective. In this regard, parties are specifically asked to comment on the possible consequences of requiring new entrants with regional or national business plans to comply with divergent state requirements.

71. In light of our tentative conclusion that we should adopt national guidelines concerning physical and virtual collocation, we seek comment on what specific regulations would foster opportunities for local competition. For example, section 251(c)(6) mandates physical

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[91] *See Competition for Local Exchange Service*, Order, Decision 95-12-056, (Cal. Pub. Util. Comm'n Dec. 20, 1995).

[92] The Commission's rules regarding mandatory physical collocation are no longer in effect. *Bell Atlantic Telephone Companies v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994) (*Bell Atlantic v. FCC*).

[93] *NYPSC Interconnection Order*.

[94] Washington Utilities and Transportation Commission, Fourth Supplemental Order, Docket UT-941464 et al. (Oct. 1995).

collocation at the "premises" of an incumbent LEC. Consistent with the ordinary meaning of the term "premises,"[95] we tentatively conclude that "premises" includes, in addition to incumbent LEC central offices or tandem offices, all buildings or similar structures owned or leased by the incumbent LEC that house LEC network facilities. We seek comment on this tentative conclusion. We also seek comment on whether structures housing LEC network facilities on public rights of way, such as vaults containing loop concentrators, or similar structures should be deemed to be LEC premises. We note that collocation of facilities inside such structures would still be subject to the technical feasibility and space availability limitations of section 251(c)(6).

72. Section 251(c)(6) requires the incumbent LEC to provide for the physical collocation of equipment necessary for interconnection or access to unbundled network elements. We seek comment on what types of equipment competitors should be permitted to collocate on LEC premises. Section 251(c)(6) also allows the incumbent LEC to provide virtual collocation instead of physical collocation in specific locations if "the local exchange carrier demonstrates to the state commission that physical collocation is not practical for technical reasons or because of space limitations."[96] We seek comment on whether we should establish guidelines for states to apply when determining whether physical collocation is not practical for "technical reasons or because of space limitations," and, if so, what those guidelines might be.[97] For example, to what extent, if any, should the risk of reduced reliability or other harm to the network be considered as a technical reason justifying a refusal to offer physical collocation, and what type of evidence must the LEC offer to prove its claim? We also seek comment on whether national guidelines may be necessary to prevent anticompetitive behavior by the manipulation or unreasonable allocation of space by either the incumbent LEC or new entrants.

73. Finally, we seek comment on whether we should adopt comprehensive national standards for collocation by readopting our prior standards governing physical and virtual collocation that we established in the *Expanded Interconnection* proceeding.[98] In that proceeding, we addressed standards governing, among other things, the following: space exhaustion and allocation; types of equipment that could be placed, or designated for placement, in incumbent LEC offices; points of entry; insurance; and exemptions from physical collocation requirements based on space limitations. We also seek comment regarding whether we should modify those standards, in light of: (1) the new statutory requirements; (2) disputes that have arisen in the

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[95] "Premises" is defined as "a building together with its grounds or other appurtenances." Random House College Dictionary 1046 (revised ed. 1980).

[96] 1996 Act, sec. 101, § 251(c)(6).

[97] In the *Special Access Expanded Interconnection Order*, the Commission established general rules addressing collocation space limitation. The Commission stated that LECs should be required to provide virtual collocation when space for physical collocation is exhausted, and that LECs should be required to offer central office space on a first-come, first-served basis. The Commission also required that, although LECs did not have to relinquish space reserved for their future use, they were required to consider interconnector demand for central office space when remodeling or building new central offices just as they consider demand for other services when undertaking such projects. *Special Access Expanded Interconnection Order*, 7 FCC Rcd 7369 (1992). In the *Special Access Physical Collocation Designation Order*, the Commission set forth for investigation issues relating to space warehousing. *Special Access Physical Collocation Designation Order*, 8 FCC Rcd 6909 (1993).

[98] *Special Access Expanded Interconnection Order*, 7 FCC Rcd 7369; *Special Access Physical Collocation Designation Order*, 8 FCC Rcd 6909; *Virtual Collocation Expanded Interconnection Order*, 9 FCC Rcd 5154; *Virtual Collocation Designation Order*, 10 FCC Rcd 11116.

subsequent investigations regarding the LECs' physical and virtual collocation tariffs;[99] or (3) additional policy considerations.[100] We also tentatively conclude, in light of the court decision in *Pacific Bell v. FCC*,[101] that our existing policies on expanded interconnection for interstate special access and switched transport services should continue to apply pursuant to our authority under sections 201 and 251(g). We seek comment on this tentative conclusion.

c. Unbundled Network Elements

74. Section 251(c)(3) imposes a duty upon incumbent LECs "to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252." Incumbent LECs are required to provide these network elements "in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service." In addition, section 251(d)(2) provides that the Commission, in determining which network elements incumbent LECs should unbundle, "shall consider, at a minimum, whether (A) access to such network elements as are proprietary in nature is necessary; and (B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer."[102]

75. Together, sections 251(c)(3) and 251(d)(2) foster competition by ensuring that new entrants wishing to compete with incumbent LECs can purchase access to those network elements that they do not possess, without paying for elements that they do not require.[103] The ability to purchase, at reasonable, cost-based prices, access only to those network elements a carrier needs allows new entrants to enter the LEC's market gradually, building their own networks over time, and purchasing fewer unbundled elements as their own networks develop. Further, new entrants can purchase access to those elements incumbent LECs can provide most efficiently, and at the same time build their own facilities only where it would be efficient.

76. In addition, the requirement that rates, terms, and conditions be just, reasonable, and

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[99] Tariffs for both virtual and physical collocation offerings filed by the LECs pursuant to the *Virtual Collocation Expanded Interconnection Order* are currently under investigation. *Special Access Physical Collocation Designation Order*, 8 FCC Rcd 6909; *Virtual Collocation Designation Order*, 10 FCC Rcd 11116. In these designation orders, we addressed disputes that arose over various standards issues, for example: space size, space warehousing, termination notice and reasons, cage inspections, and insurance.

[100] We address the pricing requirements for collocation in section II.B.2.d below.

[101] *Pacific Bell v. FCC*, No. 94-1547 (D.C. Cir. Mar. 22, 1996). The court remanded for reconsideration the Commission's virtual collocation order, 9 FCC Rcd 5145, concluding that the Commission's regulations implementing the 1996 Act would render moot the questions about the future effect of the order. The petitioners had argued that the Commission lacked statutory authority to order incumbent LECs to provide virtual collocation.

[102] 1996 Act, sec. 101, § 251(c)(3).

[103] The conferees recognized this critical function of section 251(c)(3): "[I]t is unlikely that competitors will have a fully redundant network in place when they initially offer local service, because the investment necessary is so significant. Some facilities and capabilities . . . will likely need to be obtained from the incumbent [LEC] as network elements pursuant to new section 251." Joint Explanatory Statement at 148.

nondiscriminatory: (1) prevents the incumbent LEC from offering unbundled elements on rates, terms, and conditions so overpriced or burdensome as to discourage competition; (2) enables new entrants to discipline the incumbent's pricing; and (3) allows entrants to take market share from the incumbent if the new entrant is more efficient or if the incumbent attempts to charge prices above competitive levels.

77. Section 251(d)(2) provides that the Commission will "determin[e] what network elements should be made available for purposes of subsection (c)(3)." As a result of this provision, and the obligation created by section 251(d)(1), we tentatively conclude that section 251 obligates the Commission to identify network elements that incumbent LECs should unbundle and make available to requesting carriers under subsection (c)(3). Rather than itemize an exhaustive list of network elements, however, some of which competing carriers may not desire, we further tentatively conclude that the Commission should identify a minimum set of network elements that incumbent LECs must unbundle for any requesting telecommunications carrier, and, to the extent necessary, establish additional or different unbundling requirements in the future as services, technology, and the needs of competing carriers evolve. We seek comment on these tentative conclusions.

78. Carriers may, of course, voluntarily negotiate agreements for unbundling elements that differ from those addressed by the Commission under section 251(c)(3).[104] In addition, section 252(e)(3) preserves a state's authority to impose other requirements of state law in its review of arbitrated agreements.[105] Thus, to the extent such requirements are consistent with the provisions of section 251(c)(3) and our rules,[106] we tentatively conclude that states may require additional unbundling of LEC networks.

79. In light of our obligations under sections 251(d)(1) and 251(d)(2), we also seek comment on whether and to what extent, beyond merely identifying network elements that incumbent LECs must provide on an unbundled basis pursuant to subsection (c)(3), the Commission should establish minimum requirements governing such unbundling. These requirements could include, for example, provisioning and service intervals, nondiscrimination safeguards, and technical standards. We believe that minimum national requirements governing the unbundling of network elements would likely offer several advantages. Such requirements would provide uniform technical requirements, and would enhance the ability of new entrants to take advantage of economies of scale and to plan and deploy networks stretching across state and LEC boundaries. We note that telecommunications equipment has heretofore been provided by national manufacturers selling to a nation-wide market, without substantial regional or state-to-state variation in equipment design. Minimum national requirements also may ensure some level of network and equipment interoperability between both competing and noncompeting carriers. Further, Commission minimums would reduce or eliminate the need for certain duplicative decision-making by the states, provide a ready framework for the many states that have not acted to unbundle LEC networks, and speed the negotiation and arbitration processes by reducing any ambiguity in the parties' obligations. Thus, states could rely on a set of generally applicable minimum requirements, while prescribing additional rules of unbundling tailored to their particular circumstance.

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[104] 1996 Act, sec. 101, § 252(a).

[105] 1996 Act, sec. 101, § 252(e)(3). Such requirements could include intrastate telecommunications service quality standards. Section 251(d)(3) also preserves the right of states to enforce consistent access and interconnection regulations. 1996 Act, sec. 101, § 251(d)(3).

[106] *See, e.g.*, 1996 Act, sec. 101, § 252(c)(1).

80. We also seek comment on whether and to what extent we should establish national rules for unbundled network elements that allow for some variation among states. For example, we seek comment on the extent to which such rules should permit states to impose different obligations to address state-specific concerns and to experiment with alternative approaches, and whether permitting such variation would better achieve the goals of the 1996 Act. Would variations in technical requirements among states affect the ability of new entrants to plan and configure regional or national networks? Would a lack of explicit requirements impair a state's ability to complete arbitrations within the prescribed time-frame, or our ability to evaluate BOC compliance under section 271 within 90 days? Would a lack of clear national rules impair our ability under section 252(e) to assume a state commission's responsibilities if the state commission fails to act to carry out its responsibilities under section 252?

81. We also encourage parties to provide us with information regarding the policies that states have adopted to address network unbundling. While many states have not acted at all to unbundle LEC networks, several states have ordered some amount of LEC network unbundling. States such as Illinois, New York, California, and Maryland require, or plan to require, LECs to unbundle at least local loops. New York, for example, has implemented a request-based approach that requires unbundling only for requested elements (to date local loops and ports), and then only if essential facilities are involved. Other states, such as Maryland and Florida, require LECs to unbundle all network elements to the extent technically feasible and "reasonable" or "economically feasible," and address unbundling requirements for a specific element when that element is requested.[107] In contrast to these request-based approaches, some states, such as Colorado, Hawaii, and California, determine an essential or "key" set of LEC network elements that LECs must unbundle. We seek comment on the policies that other states have adopted.

82. Finally, with respect to each of the issues discussed below, we request comment on whether any existing state approaches, alone or in combination, would be suitable for incorporation into national rules implementing section 251(c)(3). We also ask commenting parties to identify state approaches that they believe are either inconsistent with the 1996 Act or that are inadvisable from a policy perspective.

(1) Network Elements

83. Section 3(29) defines a "network element" as both "a facility or equipment used in the provision of a telecommunications service" as well as "features, functions, and capabilities that are provided by means of such facility or equipment."[108] According to the Joint Explanatory Statement, "[t]he term 'network element' was included to describe the facilities, such as local loops, equipment, such as switching, and the features, functions, and capabilities that a [LEC] must provide for certain purposes under other sections of the conference agreement."[109] We believe that under this broad definition, an entire local loop, for example, could constitute a single network element, or comprise several network elements.[110] An alternative interpretation,

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[107] 85 Md. PSC 38, 54 (1994).

[108] 1996 Act, sec. 3, § 3(29).

[109] Joint Explanatory Statement at 116.

[110] The simplest example of an existing local loop is a single twisted pair of copper wires connecting a customer premises to a LEC central office. Local loop traffic, however, may be combined with that of other loops prior to arriving at a LEC central office, such as where traffic from a single loop is switched or

albeit one that would provide competitors less flexibility, is that a network element, once defined, cannot be subdivided. We seek comment on our more flexible interpretation of "network element," and how to apply the definition in accordance with the unbundling proposals discussed below.

84. We also seek comment on the apparent distinction, drawn in the definition of "network element" in the 1996 Act, between the "facility or equipment used in the provision of a telecommunications service," and the service itself. We request comment on the meaning and significance of such a distinction in general and with respect to particular elements. For example, because the nature of a network element, under the definition in the 1996 Act, is a facility or function, and is not dependent upon the particular services offered by means of such facility or function, does the purchase of access to such an element entitle, or indeed obligate the requesting carrier to provide the customer with all services, intrastate and interstate, that use the element? Under this reading of the statute, a telecommunications carrier that purchased local switching as a network element would use that element to provide whatever intrastate and interstate switching services the customer desired. As discussed more fully below in section II.B.2.e., such an entitlement or obligation to provide all of the services that a particular network element currently is used to furnish may distinguish network elements from existing access services.

85. In addition, we request comment on the relationship between section 251(c)(3),[111] concerning unbundling, and section 251(c)(4),[112] which addresses resale of incumbent LEC services. Specifically, may requesting carriers order and combine network elements to offer the same services an incumbent LEC offers for resale under subsection (c)(4)? Does subsection (c)(3) in effect provide new entrants with an alternative way to "resell" the services of incumbent LECs in addition to the specific resale provision in subsection (c)(4)? In this regard, we note that section 252(d) provides different pricing standards for these two subsections, and we ask commenters to address the implications of this difference.[113] To the extent that section 251(c)(3) contemplates the purchase of unseparated facilities (*i.e.* facilities used to provide both intra- and interstate services), as discussed above, we note that a telecommunications carrier would not necessarily be purchasing the same service(s) it would under section 251(c)(4). Does the difference, if any, between network elements and the services provided by means of such elements play a meaningful role in distinguishing these two subsections?[114] We invite parties to

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concentrated onto a single multiplexed line at a remote site. Thus, a "loop" may actually be composed of feeder plant (linking a LEC central office to a remote site), feeder/distribution interface elements at the remote site, and distribution plant (linking the remote site to a customer premises).

[111] Section 251(c)(3) imposes a duty upon incumbent LECs "to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point." 1996 Act, sec. 101, § 251(c)(3).

[112] Section 251(c)(4) imposes a duty upon incumbent LECs to "offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers." 1996 Act, sec. 101, § 251(c)(4).

[113] Some parties have asserted, for example, that allowing interexchange carriers to offer the same services over combined LEC network elements that the LEC already offers would enable such carriers to circumvent the section 271(e)(1) joint marketing restriction.

[114] For example, under the Illinois Local Switching Platform concept, discussed in detail below, requesting carriers may offer services by means of the unbundled platform that the incumbent LEC does not offer.

comment on these and any other issues raised by the interplay of subsections (c)(3) and (c)(4). Parties should base their comments on specific statutory language.

(2) Access to Network Elements

86. Section 251(c)(3) requires incumbent LECs to provide "access" to network elements "on an unbundled basis."[115] We interpret these terms as requiring incumbent LECs for a fee to provide requesting carriers with the ability to obtain a particular element's functionality, such as a local loop's function of transmitting signals from a LEC central office to a customer premises, separate from that of other functionalities or network elements, such as the local switch. Further, the term "unbundled" suggests that there must be a separate charge for each purchased network element.[116] We seek comment on this and any alternative interpretations of section 251(c)(3).

87. Section 251(c)(3) further mandates that incumbent LECs provide access to network elements on an unbundled basis "at any technically feasible point."[117] Parties are asked to identify and describe, in brief, each network element for which they believe access on an unbundled basis is technically feasible at this time. Further, we seek comment on whether a dynamic definition of "technically feasible" is practical for identifying elements beyond those discussed here,[118] and, if so, what such a definition should be. We also ask whether the states, rather than the Commission, may apply the definition during the arbitration process. We further request that parties comment on experiences with providing or purchasing access to elements currently unbundled by the states, and any state approaches to determining the technical feasibility of unbundling elements that the Commission could use in a national model. We also seek comment on whether the technical feasibility of interconnection at a particular point affects, at least in part, the technical feasibility of providing access to a network element on an unbundled basis at that point. Finally, because subsection (c)(3) imposes an affirmative obligation on incumbent LECs to provide unbundled elements, we tentatively conclude that LECs have the burden of proving that it is technically infeasible to provide access to a particular network element. We also tentatively conclude that the unbundling of a particular network element by one LEC (for any carrier) evidences the technical feasibility of providing the same or a similar element on an unbundled basis in another, similarly structured LEC network. We seek comment on these tentative conclusions.

88. In addition to technical feasibility, section 251(d)(2) requires that the Commission "consider, at a minimum, whether . . . access to such network elements as are proprietary is necessary, and [whether] the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer."[119] We seek comment on the extent to which the Commission must "consider" these standards, how these standards should be interpreted, and on any additional considerations, such as possible risks to network reliability or other harm. We note that the 1996 Act uses the terms

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[115] 1996 Act, sec. 101, § 251(c)(3).

[116] "Access" is defined as the "ability or permission to approach, enter, . . . or use." *Random House College Dictionary* 9 (revised ed. 1980). "Unbundle" is defined as "to separate (the charges for related products and services usually offered in a single transaction at one all-inclusive price)." *Id.* at 1428.

[117] 1996 Act, sec. 101, § 251(c)(3).

[118] *See* section II.B.2.c.3, below.

[119] 1996 Act, sec. 101, § 251(d)(2).

"technically feasible" and "economically reasonable" together in other sections of the Act,[119] and we seek comment on what effect the absence of the term "economically reasonable" in section 251(c)(3) has on economic considerations. Further, we request comment on whether this omission could be construed to imply that Congress intended for carriers requesting unbundling to pay its cost, and on whether that construction is consistent with the intent of the 1996 Act.[120]

89. We also request comment on whether the Commission should establish minimum requirements governing the "terms" and "conditions" that would apply to the provision of all network elements. For example, should the Commission require incumbent LECs to provide network elements using the appropriate installation, service, and maintenance intervals that apply to LEC customers and services? Alternatively, should the Commission require LECs to comply with national or industry-based standards? Would minimum national requirements for electronic ordering interfaces reduce the time and resources required for new entrants to compete in regional markets? What standard unbundling terms and conditions, if any, should the Commission use in evaluating applications under section 271(b)? Would national rules aid the states in arbitrating agreements within the statutory period? If parties believe that the Commission should specify minimum terms and conditions, we seek comment on what those terms and conditions should be, and how those terms and conditions might be enforced. Parties are encouraged to cite specific examples from the states that could be incorporated into minimum national requirements.

90. In addition, we request comment on the meaning of the requirement in section 251(c)(3) that LECs provide unbundled network elements "in a manner that allows requesting carriers to combine such elements in order to provide . . . telecommunications service."[122] For example, should the required facilities or services associated with a particular network element vary depending on the services the requesting carrier wishes to provide or on the types of facilities the requesting carrier will use in combination with the requested elements? We also seek comment on the relationship between this provision and section 251(d)(2)(B), discussed above, which requires the Commission to consider whether the failure to provide access to an element would impair the ability of a requesting carrier to provide a desired service.

91. Section 251(c)(3) further requires incumbent LECs to provide requesting carriers with "nondiscriminatory" access to unbundled network elements.[123] That section also requires LECs to provide access on "terms and conditions that are . . . nondiscriminatory."[124] We seek comment on what minimum requirements, if any, we should adopt to ensure that LECs do not discriminate among requesting carriers. For example, one criterion might be whether an end user could perceive any differences in the quality of service provided by one carrier as compared with another. Another criterion might be to require LECs to make it as easy to switch local service providers as it is for customers to switch interexchange providers. Further, unlike subsection

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[119] *See, e.g.*, 1996 Act, sec. 101, § 254(h)(2). The House Committee, in considering H.R. 1555, dropped the term "economically reasonable" from its unbundling provision, reporting that "this requirement could result in certain unbundled . . . elements . . . not being made available." H. Rep. 104-204, 71 (1995).

[120] In any event, access to network elements must be available at rates, terms, and conditions that are just, reasonable, and nondiscriminatory. 1996 Act, sec. 101, § 251(c)(3).

[122] 1996 Act, sec. 101, § 251(c)(3).

[123] *Id.*

[124] *Id.*

(c)(2), which requires that interconnection offered requesting carriers be "at least equal in quality to that provided" by the LEC itself, subsection (c)(3) does not contain such a requirement. Nevertheless, we request comment on whether we can and should prohibit an incumbent LEC from providing requesting carriers with access inferior to that which it provides itself.[125]

(3) Specific Unbundling Proposals

92. We now consider particular network elements to which incumbent LECs must provide access on an unbundled basis under section 251(c)(3). As discussed above, we propose to identify a minimum number of elements that incumbent LECs must unbundle, and we seek comment on what minimum requirements of unbundling, if any, the Commission should adopt for each element. AT&T, for example, has publicly advocated that the Commission should require the unbundling of eleven network elements: loop distribution, concentration, and feeder plant; local and access tandem switches; dedicated and common transport; SS7 signalling links, signal transfer points, and signal control points; and operator services.[126] MCI advocates, in addition, the unbundling of loop and trunk ports from local switching.[127] Some LECs favor the unbundling of significantly fewer elements.[128]

93. We address below four categories of elements: loops, switches, transport facilities, and signaling and databases. For each of the proposed network elements discussed in these categories, we request that parties comment on the following issues:

(1) the technical feasibility of providing access to that or an equivalent element on an unbundled basis, how such access should be provided, and any demonstrable network reliability concerns;
(2) whether and to what extent LECs currently allow other carriers to access such elements;
(3) whether the Commission should establish a standard for defining the element, and if so, what level of technical detail is required in the definition, and what facilities or functionalities should be included or excluded from the definition;
(4) whether the Commission should establish minimum requirements for the terms and conditions of provisioning the element, and if so, what they should be;
(5) whether the failure to unbundle the element would impair a requesting carrier's ability to provide the services that it seeks to offer;
(6) whether proprietary interfaces or technology are involved in providing the element, and if so, whether unbundled access to the element is necessary; and
(7) any other issues presented by the unbundling of this element that are important to effectuating the goals of section 251(c)(3) and the 1996 Act.

(a) Local Loops

94. We propose to require incumbent LECs to provide local loops as unbundled network elements. The Joint Explanatory Statement accompanying the 1996 Act expressly cites the local

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[125] We note that there may be network elements, such as particular switching functionalities unbundled from other functionalities, for which it is technically infeasible for LECs to provide equal access to requesting carriers.

[126] AT&T Letter to Regina Keeney, Chief, Common Carrier Bureau (Mar. 21, 1996).

[127] MCI Presentation to Chairman Reed Hundt (Mar. 29, 1996).

[128] Ameritech Letter to Regina Keeney, Chief, Common Carrier Bureau (Mar. 1996).

loop as an example of a network element.[129] In addition, the competitive checklist of section 271(c)(2)(B) specifies the unbundling of local loops from local switching or other services as a precondition to BOC provision of in-region interLATA services.[130] Further, several states have ordered, and LECs currently offer, loops unbundled from local switching,[131] and thus we tentatively conclude that the unbundling of local loops is technically feasible.

95. We first seek comment on whether and the extent to which the Commission should prescribe a set of minimum requirements for unbundling and provisioning loops. For example, we could require only that incumbent LECs must, upon request, provide at central offices individual transmission links to customer premises regardless of the technology involved.[132] It appears, however, that in states that already have ordered loop unbundling, the general requirement to unbundle is merely the first step in a process of providing new entrants with meaningful facilities with which to compete.

96. The New York Commission, for example, having anticipated and addressed many of the problems associated with unbundling loops and ports, is still grappling with issues such as operational interfaces between carriers, the timing of loop provisioning relative to number porting, and underlying delivery systems supporting loop-provisioning.[133] In view of such complex and resource-intensive issues, we seek comment on whether there are minimum requirements that would build upon the progress of preexisting state initiatives and facilitate the provisioning of unbundled loops. What requirements, for example, would avoid the need for duplicative decision-making by states and variations among states in the effectiveness of loop unbundling, while better enabling new entrants to plan and fund regional networks? To what extent is the avoidance of interstate duplication and variation necessary to achieving the goals of the 1996 Act? How should the Commission structure national requirements to provide sufficient flexibility to carriers and the states for use of different or new "loop" technologies or services?

97. In addition, we tentatively conclude that we should require further unbundling of the local loop. We seek comment on which subloop elements are technically feasible to unbundle. For example, the Commission could require incumbent LECs to provide access to loop feeder and distribution plant on an unbundled basis at remote switching or concentration sites, in

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[129] Joint Explanatory Statement at 116.

[130] 1996 Act, sec. 151, § 271(c)(2)(B). Our obligation under that section to review BOC applications to provide such services implicitly requires some standard by which to judge the applications.

[131] NYNEX, Rochester Telephone, and Ameritech, among others, are providing unbundled local loops. NYNEX estimates, for example, that approximately 10,000 unbundled loops are currently in service in its region. Illinois defines a loop as "a transmission path capable of transporting analog or digital signals from the network interface at a customer's premises to a distribution frame, digital signal cross-connect panel, or similar demarcation which is accessible to the interconnector." Ill. Admin. Code tit. 83, § 790.10.

[132] We note that some local switches in LEC central offices can process concentrated loop traffic without prior demultiplexing of the individual loop traffic. This complicates the task of providing an interconnecting carrier access to a particular loop.

[133] *Order Considering Loop Resale and Links and Ports Pricing*, Case Nos. 95-C-0657, 94-C-0095, and 91-C-1174 (NYPSC Feb. 1, 1996).

addition to access to the switching or concentration equipment itself.[134] Hawaii, for example, divides local loop functions into these three categories.[135] Illinois also recently required LECs to provide subloop elements in response to a bona fide request.[136] Such requests may come from carriers deploying cable or fiber feeder facilities that lack distribution plant. We thus seek comment on whether requiring access to loops prior to their concentration or multiplexing would allow requesting carriers to provide services they could not provide at LEC central offices, and whether such access would involve proprietary equipment. Finally, we request comment on what minimum requirements for subloop unbundling, at this early stage where few if any states have addressed the issue, would pave the way for rapid adoption and provision of subloop elements.

(b) Local Switching Capability

98. In addition to the local loop, we tentatively conclude that incumbent LECs should provide unbundled local switching capability as a network element. The Joint Explanatory Statement expressly cites switching equipment as an example of a network element.[137] In addition, the competitive checklist of section 271(c)(2)(B) specifies the unbundling of local switching from transport, local loop transmission, or other services as a precondition to BOC provision of in-region interLATA services. Finally, we believe unbundling of local switching capability is critical to the implementation of section 251(c)(3) and the provision of competing telecommunications services.

99. Unlike a local loop, local switching equipment is often shared by thousands of customers. As a result, it may be difficult to identify or define the use of such equipment for a particular customer. One possible way to identify a switching element is to define the element in terms of the *capacity* of a local switch to switch traffic from line to line, line to trunk, trunk to line, or trunk to trunk.[138] This is both the most essential and rudimentary capacity of a local switch. Today's modern switches, however, are capable of significantly more advanced functions, such as call waiting, conference calling, signaling, and centrex. Under the 1996 Act's definition of network element, these functions could constitute individual network elements separate from the basic switching functionality, or could be grouped in part or whole with the basic functionality, which would allow requesting carriers, in turn, to offer the functions they desire.

100. Illinois, for example, is investigating a "local switching platform" approach to unbundling the local switch. The platform is described in terms of "virtual" switch capacity, including all the services and functions performed by the switch on a per line basis, such as dialtone, telephone number provision, all CLASS and CCF features, originating and terminating

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[134] In discussing the 1996 Act, Representative Watts of Oklahoma addressed the need for subloop unbundling. "As rules that define facilities-based competition are developed and implemented, I expect those charged with that responsibility to make certain . . . [that] all local exchange service providers . . . provide line-side interconnection and unbundling of the local loop into its functional sub-elements -- feeder and distribution." 142 Cong. Rec. H1145-06.

[135] Hawaii PUC Order No. 14129, 3 (August 14, 1995).

[136] Ill. Admin. Code tit. 83, § 790.320(b). To date, the Illinois Commission has not addressed a specific request for unbundled loop subelements.

[137] Joint Explanatory Statement at 116.

[138] Such a definition could include functions of dialtone, digit reception, number translations, etc.

usage, and 911 services.[139] According to its advocates, unlike merely reselling a single switching service, under the platform structure requesting carriers incur added risk because the cost of the platform includes the cost of all functionalities provided by the switch on a per line basis, regardless of the functionalities ultimately purchased by an end user. This added risk translates into added profits if the requesting carrier is able to sell a combination of these switching functionalities at a higher profit than would have been possible under a simple resale arrangement. Moreover, because requesting carriers are not tied to the incumbent LEC's retail price structure, concerns about possible price squeezes are reduced.

101. Other states have defined a switching "port," which usually includes all the capabilities of the local network provided at the main distribution frame of a LEC central office. For example, New York treats a port essentially as an interconnection point into the rest of the NYNEX network. Thus a port defined in this way is not in the nature of an unbundled element that a competing carrier could combine with its own transport and other loop facilities to provide a competing telecommunications service. Rather, such a port is effectively equivalent to the LEC's bundled retail local service offering minus the loop. We seek comment on whether such a definition of "port" is consistent with the requirements of section 251(c)(3), especially the requirement that incumbent LECs provide elements in a manner that allows carriers to combine them to provide telecommunications services. Further, we seek comment on alternative definitions of "port,"[140] and on whether the port should be a separate unbundled element from the switch.

102. We also request comment on these and alternative approaches to unbundling the local switch, and on the technical feasibility of such approaches. Under the switching platform approach, for example, what control, if any, can and should requesting carriers have over the operations of a LEC local switch, and is access to proprietary functions or equipment necessary? Further, should the Commission identify several permissible approaches to switch unbundling, and what minimum requirements, if any, should apply? What requirements of switch unbundling would help the Commission in evaluating applications under section 271(b), and the states and the courts in arbitrating and evaluating agreements between carriers?

103. Finally, in conjunction with the next section addressing transport facilities, we request comment on whether requirements governing a local switching element could be tailored to apply to a tandem switching element. Parties should address the issues discussed above in the context of tandem switches.

(c) Local Transport and Special Access

104. We also propose to require incumbent LECs to provide access to unbundled transport facilities as network elements. We note that the competitive checklist of section 271(c)(2)(B) requires the provision of local transport from the trunk side of a LEC switch unbundled from switching or other services as a precondition to BOC provision of in-region interLATA services. We tentatively conclude that the unbundling of local transport and special access facilities is technically feasible. We note that the Commission's action in the *Expanded Interconnection* proceeding effectively required substantial unbundling of these facilities.

105. We propose to require unbundling of LEC facilities that correspond to the current

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[139] *See* Ill. Comm. Comm'n Docket Nos. 95-0458, 95-0531.

[140] For example, MCI defines a port as the link from the LEC main distribution frame to the switch. MCI Presentation to Chairman Reed Hundt (Mar. 29, 1996).

interstate transport and special access rate elements. For direct-trunked transport networks, transport trunks would be unbundled from local switches, and the link from the serving wire center (SWC) to the IXC point of presence (POP) would be unbundled from the link between the central office and the SWC. For tandem-switched transport networks, the elements could include, among other options, unbundled trunks from the end office to the tandem office, trunks from the tandem office to the SWC, trunks from the SWC to the IXC POP, and the tandem switch itself. Finally, for special access we propose to require the unbundling of channel termination facilities from interoffice facilities.

106. We seek comment on the technical feasibility of unbundling direct-trunked and tandem-switched transport and special access facilities in this or in any alternative manner,[41] and on how LECs should unbundle any other network facilities used to transport traffic from LEC central offices to IXC POPs or to other LEC central offices.

(d) Databases and Signaling Systems

107. The 1996 Act contemplates the unbundling of incumbent LECs' signaling systems and databases. Congress specifically included "databases" and "signaling systems" in the definition of network elements.[42] The 1996 Act also requires BOCs to provide access to "databases and associated signaling necessary for call routing and completion" as a precondition for entry into in-region interLATA services.[43] Therefore, we tentatively conclude that requiring incumbent LECs to unbundle their signaling systems and databases is consistent with the intent of the 1996 Act.

108. Many incumbent LECs have Signaling System 7 (SS7) networks that are separate from, but interconnected with, the telecommunications networks that carry voice and data communications between end users. SS7 networks perform three primary functions: (1) call set up, which establishes transmission paths for calls; (2) access to remote databases, which provides specialized call routing information to switches; and (3) custom local area signaling service (CLASS) features, such as caller ID, which require the transmission of certain information between the calling and called parties. We request that commenters identify the points at which carriers interconnect with LEC SS7 networks today and the signaling and database functions currently provided by incumbent LECs on an unbundled basis. Commenters should also discuss the technical feasibility of establishing other points of interconnection and other unbundled signaling and database functions not currently offered by incumbent LECs.

109. An example of unbundling particular signaling and database elements is Colorado's requirement that incumbent LECs provide unbundled access to signaling links, signal transfer points, and service control points as well as access to non-proprietary signaling protocols used in the routing of local and interexchange traffic, 800 service, alternative billing service, and line

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[41] As discussed above, we ask parties to address the unbundling of tandem switches in accordance with the issues raised in the local switching section, and comment on any issues pertaining exclusively to tandem switching.

[42] 1996 Act, sec. 3, § 3(29). *See also* statement of Sen. Pressler, noting that "access to signaling and databases [is] important if you are going to compete and get into the market." 141 Cong. Rec. S8163 (June 12, 1995).

[43] 1996 Act, sec. 151, § 271(c)(2)(B)(x).

information database (LIDB) service.[144] Colorado has not specified whether access to signaling and databases is limited to those particular services. Hawaii has taken a similar approach by requiring incumbent LECs to unbundle signaling links, signal transfer points, and service control points, and has not specified which services provided by these network elements must be made available to competitors.[145] By contrast, Louisiana has ordered unbundled access to incumbent LEC databases for all services that the incumbent LEC provides itself, including 800 service, LIDB, and advanced intelligent network (AIN) services.[146] Does the variation among the Colorado, Hawaii, and Louisiana regulations governing unbundled signaling and databases reflect differing circumstances that should be accommodated in our rules? Would such variation among states be consistent with the goals of the 1996 Act? Would new entrants be better served by uniform federal rules concerning unbundled access to signaling systems and databases? If so, would any of the regulations adopted by the states be useful to incorporate into national rules?

110. We also seek comment on the relative importance to potential entrants of the various functions performed by incumbent LECs' signaling systems and databases. For example, call set up plays an important role in the transmission of calls that are routed through more than one switch. Thus, it would appear that such functionality will be needed by entrants to provide competing local exchange service. However, we are aware that there are alternative suppliers of call set up services other than incumbent LECs. What bearing, if any, should this have on our adoption of unbundling rules for call set up? Are there existing suppliers for other functions performed by incumbent LECs' signaling systems and databases?

111. In addition, a competitor may seek to provide certain call processing features to its customers by reselling the incumbent LEC's call processing services. We seek comment on the importance of unbundled access to the incumbent LEC's advanced call processing features, such as single number service,[147] in the market entry decisions of potential competitors. We also seek comment on whether the software "building blocks" used by incumbent LECs to create call processing services are network elements to be unbundled. Given the array of existing and potential call processing services that could be provided by incumbent LECs' signaling systems and databases, we seek comment on whether the establishment of uniform national guidelines governing all call processing services provided via remote databases would facilitate the state arbitration process, judicial review, and/or Commission activities under section 253. We also seek comment on whether it would be consistent with the 1996 Act to permit variation among states with regard to unbundling call processing services provided via remote databases.

112. Under another scenario, a competitor that is providing resold local exchange service might seek to distinguish its offerings by connecting its own call processing database to the

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[144] *Proposed Rules Regarding Implementation of §§ 40-15-101 Et. Seq. – Requirements Relating To Interconnection and Unbundling*, Commission Decision Adopting Rules, Docket No. 95R-556T (Co. Pub. Util. Comm'n Apr. 1, 1996).

[145] *Instituting a Proceeding on Communications, Including an Investigation of the Communications Infrastructure of the State of Hawaii*, Order, Docket No. 7702 (Haw. Pub. Util. Comm'n Aug. 14, 1995) at 3.

[146] *Regulations For Competition in the Local Telecommunications Market*, General Order (La. Pub. Serv Comm'n Mar. 15, 1996) (Louisiana PSC Order). AIN is an evolving network architecture that uses centralized databases to provide certain call processing services.

[147] With single number service, a subscriber is assigned a telephone number which, when dialed, causes the network to call a series of numbers until the subscriber is located or determined to be unreachable. Such numbers might include the subscriber's home, office, and mobile phone.

incumbent LEC's network, which would allow the competitor to provide call processing features not offered by the incumbent LEC. Enabling new entrants to offer their own call processing services in this way would likely stimulate local exchange competition. We seek comment on whether this type of interconnection is technically feasible without jeopardizing network reliability.

113. We also note that in our *Intelligent Networks* (IN) proceeding,[148] we are considering unbundling advanced intelligent network (AIN) elements, which include signaling systems and databases. In the IN NPRM, we tentatively proposed ordering Tier 1 LECs[149] to provide access to several specific AIN elements in order to promote competition in the provision of AIN services. Subsequently, a group of Tier 1 LECs filed a joint proposal calling for a two-year testing plan to explore methods of third-party interconnection to LEC AINs.[150] We seek comment on what role, if any, the LEC proposal for a testing program should play with regard to access to signaling and database elements that we address in this proceeding.[151]

114. We further note that our IN proceeding has focused on providing all interested third parties with access to Tier 1 LECs' AIN elements, primarily for the purpose of providing competing AIN services. Section 251 of the 1996 Act provides any requesting telecommunications carrier unbundled access to incumbent LECs' network elements "for the provision of a telecommunications service."[152] We seek comment on whether mandating the unbundling of signaling systems and databases pursuant to section 251 would be sufficient to meet the objectives of the IN proceeding. To the extent that section 251 does not require incumbent LECs to provide certain third parties with access to unbundled AIN elements, we seek comment on whether we should use our section 201 authority to require such access. We also seek comment on how the unbundling of signaling systems and databases in this proceeding should affect our actions in the IN proceeding.

115. Requiring incumbent LECs to provide unbundled access to their signaling and database networks could also potentially permit competing carriers to gain access to competitively sensitive data. Louisiana has addressed this potential problem by specifically prohibiting incumbent providers from accessing the customer proprietary network information (CPNI) of an interconnecting carrier in order to market services to the interconnecting carrier's customers.[153] We seek comment on whether such a restriction should be implemented in federal

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[148] *Intelligent Networks*, Notice of Inquiry, 6 FCC Rcd 7256 (1991); *Intelligent Networks*, Notice of Proposed Rulemaking, 8 FCC Rcd 6813 (1993).

[149] Tier 1 LECs are those exchange carriers having annual revenues from regulated telecommunications operations of $100 million or more. *Commission Requirements for Cost Support Material to be Filed with 1990 Annual Access Tariffs*, 5 FCC Rcd 1364 (1990).

[150] Letter from Sandra Wagner, Director, Federal Regulatory, SBC Communications, Inc., to William F. Caton, Acting Secretary, FCC (June 23, 1995).

[151] We incorporate the record compiled in the IN proceeding into this proceeding by reference.

[152] 1996 Act, sec. 101, § 251(c)(3).

[153] *Louisiana PSC Order*

standards.[154] Are there other state regulations concerning access to competitors' CPNI that would prevent this type of anticompetitive conduct while allowing us to establish interconnection and unbundling rules for signaling and database facilities?

116. Finally, we request comment on other network elements to which the Commission should require access on an unbundled basis, and specific standards that should govern their unbundling. For example, the statutory definition of network element includes "subscriber numbers" and "information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service."[155] We tentatively conclude that these elements should be unbundled and we request comment on the standards we should set for such unbundling. In addition, section 271 of the 1996 Act requires incumbent LECs to unbundle "operator call completion services" as a precondition for providing in-region, interLATA services.[156] In light of this, we tentatively conclude that incumbent LECs should be required to unbundle operator call completion services as a network element pursuant to section 251(c) of the Act. We seek comment on this tentative conclusion.

d. Pricing of Interconnection, Collocation, and Unbundled Network Elements

(1) Commission's Authority to Set Pricing Principles

117. Section 251, in some instances, explicitly sets forth requirements regarding rates for service, interconnection, and unbundled elements. For example, sections 251(c)(2), (c)(3), and (c)(6) require that incumbent LECs' "*rates*, terms and conditions" for interconnection, unbundled network elements, and collocation be "just, reasonable, and nondiscriminatory,"[157] and, with respect to interconnection and unbundled elements, in accordance with section 252. Section 251(c)(4) requires that incumbent LECs offer "for resale at wholesale *rates* any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers," without unreasonable conditions or limitations.[158] Section 251(b)(5) requires that all LECs "establish reciprocal *compensation* arrangements for the transport and termination of telecommunications."[159] We tentatively conclude that this statutory language establishes our authority under section 251(d) to adopt pricing rules to ensure that rates for interconnection, unbundled network elements, and collocation are just, reasonable, and nondiscriminatory. We also tentatively conclude that we have statutory authority to define what are "wholesale rates" for purposes of resale, and what is meant by "reciprocal compensation arrangements" for transport and termination of telecommunications. We seek comment on this tentative conclusion.

118. We note that, under the statutory framework established by Congress, states have

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[154] We plan to initiate a proceeding in the near future to implement the provisions of the 1996 Act that address CPNI.

[155] 1996 Act, sec. 3, § 3(29).

[156] 1996 Act, sec. 151, § 271(c)(2)(B)(vii)(II).

[157] 1996 Act, sec. 101, §§ 251(c)(2), (c)(3), (c)(6) (emphasis added).

[158] 1996 Act, sec. 101, § 251(c)(4) (emphasis added).

[159] 1996 Act, sec. 101, § 251(b)(5) (emphasis added).

the critical role under section 252 of establishing rates pursuant to arbitration and of reviewing rates under BOC statements of generally available terms.[160] Rates for both arbitrated agreements and BOC statements of generally available terms must be in accordance with section 252(d), which sets forth specific "pricing standards" for interconnection and unbundled elements, wholesale services, and transport and termination of traffic under reciprocal compensation arrangements. The 1996 Act appears to give a role to both the states and the Commission regarding rates for interconnection, unbundled network elements, wholesale services, and reciprocal compensation arrangements. We believe that the statute, and in particular our statutory duty to implement the pricing requirements of section 251, as elaborated in section 252, is reasonably read to require that we establish pricing principles interpreting and further explaining the provisions of section 252(d) for the states to apply in establishing rates in arbitrations and in reviewing BOC statements of generally available terms and conditions. Such an approach appears to be consistent with both the language and the goals of the statute.

119. Establishing national pricing principles would be likely to improve opportunities for local competition by reducing or eliminating inconsistent state regulatory requirements, thereby easing recordkeeping and other administrative burdens. In addition, national pricing principles would be likely to increase the predictability of rates, and facilitate negotiation, arbitration, and review of agreements between incumbent LECs and competitive providers. We seek comment on these tentative conclusions. We also seek comment on the potential consequences if the Commission does not set specific pricing principles. For example, would the lack of consistent rates, even in contiguous geographic areas, create a barrier to entry or to deployment of facilities throughout a multistate market? In addition, if the Commission is required to assume the responsibility of a state commission, pursuant to section 252(e)(5), would an absence of federal pricing principles impede the Commission's ability to arbitrate or review an agreement in a timely fashion?

120. Finally, consistent with our earlier discussion that sections 251 and 252 do not make jurisdictional distinctions between interstate and intrastate services and facilities, we tentatively conclude that the pricing principles we establish pursuant to section 251(d) would not recognize any jurisdictional distinctions, but would be based on some measure of unseparated costs. We do not believe section 2(b) requires a different conclusion. We seek comment on this tentative conclusion. We also seek comment on whether we need to revise our cost allocation rules in Part 64, or whether we need to adopt a similar set of cost allocation rules to remove the costs and revenues of services provided pursuant to sections 251 and 252 before the separations process is applied.

(2) Statutory Language

121. Section 251(c)(2)(D) requires that incumbent LECs provide interconnection "on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the requirements of this section and section 252." Section 251(c)(3) similarly requires incumbent LECs to provide "nondiscriminatory access to network elements on an unbundled basis . . . on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with . . . the requirements of this section and section 252." Likewise, section 251(c)(6) requires incumbent LECs to provide "on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment." Section 252(d)(1) provides that state determinations of

> the just and reasonable rate for the interconnection of facilities and equipment for

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[160] 1996 Act, sec. 101, §§ 252(c)(2) and (f)(2).

purposes of subsection (c)(2) of section 251, and the just and reasonable rate for network elements for purposes of subsection (c)(3) of such section –

> (A) shall be (i) based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element . and (ii) nondiscriminatory, and
> (B) may include a reasonable profit.[161]

We seek comment on the proper interpretation of each of these statutory provisions. We also seek comment on any specific principles that parties believe the Commission should promulgate to ensure that the rates established or approved by states are just, reasonable, and nondiscriminatory. We seek comment below on the national pricing principles that states might apply in setting and reviewing rates for interconnection, collocation, and access to unbundled network elements. We also seek comment on what enforcement or monitoring mechanism, if any, the Commission or the industry should adopt to ensure that all carriers comply with any pricing principles that the Commission establishes.

122. Further, we believe that any pricing principles we adopt should be the same for interconnection and unbundled network elements, because sections 251(c)(2) and (c)(3) and 252(d)(1) use the same standard for both types of services. We invite parties to comment on whether there are any reasons to make a distinction. In addition, we believe that the same pricing rules that apply to interconnection and unbundled network elements should apply to collocation as required under section 251(c)(6). We seek comment on this issue. In particular, we seek comment on whether the absence of any pricing rule for collocation in section 252 has any legal significance with regard to our authority to specify rules for pricing of collocation services. Alternatively, should collocation be considered a subset of interconnection services, pursuant to sections 251(c)(2) and 252(d)(1) for purposes of the statutory pricing principle?

(3) Rate Levels

123. As previously set forth, section 252(d)(1) provides that state determinations of just and reasonable rates for interconnection and providing network elements shall be "based on the cost (determined without reference to a rate-of-return or other rate-based proceeding)," "nondiscriminatory," and "may include a reasonable profit."[162] We tentatively conclude that this language precludes states from setting rates by use of traditional cost-of-service regulation, with its detailed examination of historical carrier costs and rate bases. Instead, the statute appears to contemplate the use of other forms of cost-based price regulation, such as price cap regulation that is indirectly based on costs, or the setting of prices based on a forward-looking cost methodology that does not involve the use of an embedded rate base, such as long-run incremental cost (LRIC).[163] We seek comment on this view of the meaning of section 252(d)(1).

124. Economists generally agree that rates based on LRIC give appropriate signals to producers and consumers and ensure efficient entry and utilization of the telecommunications infrastructure. They further agree that competitive markets, over the long run, tend to force

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[161] 1996 Act, sec. 101, § 252(d)(1).

[162] 1996 Act, sec. 101, § 252(d)(1).

[163] For possible definitions of LRIC, *see infra* paras. 126-33.

prices toward LRIC.[164] A broad range of parties appears to agree that rates for interconnection and unbundled elements should be based on some type of LRIC methodology, such as, for example, using what some parties refer to as a "total service long-run incremental cost" (TSLRIC) approach.[165] In the following section, we consider whether we should adopt a LRIC-based pricing methodology for states to use to set interconnection and unbundled element rates under the 1996 Act. Under such an approach, if voluntary negotiations between parties were unsuccessful, the state commissions would conduct arbitration proceedings under section 252 in order to develop the specific factual information required to specify the actual rates in accordance with the national policy. As discussed at greater length below, however, there appear to be considerable differences of opinion as to the precise form of the LRIC methodology that should be used.[166] Further, while pricing based on LRIC may be the theoretical ideal, significant practical and administrative problems are likely to arise in determining the LRIC of specific services and facilities for particular incumbent LECs, especially in the short term, given the contentious and often time-consuming proceedings that may be necessary to resolve the complex issues raised by incremental cost studies. We explore these and other issues concerning the use of a LRIC-based pricing methodology in the following section.

125. As an alternative to our specifying a methodology for states to follow in setting prices under section 252(d)(1), we could establish outer boundaries for rates for interconnection and unbundled network elements, within which states would have a range of flexibility to select a cost-based method of determining interconnection and unbundled element rates. In particular, we could establish an administratively simple methodology that is relatively easy to apply, potentially using proxies for cost-based rates, to set rate ceilings or upper bounds on the range of state ratemaking flexibility. The use of a proxy to set the ceiling would reduce the administrative burden that is inherent in the application of a LRIC-based methodology, and thus may be especially attractive in the near term. We discuss this proxy-based ceiling approach in detail below. We also discuss below the extent to which embedded (or historical) costs are relevant to the pricing rule for interconnection and unbundled network elements in the 1996 Act, the relationships between this pricing rule and policies on universal service and access charge reform, and whether certain methodologies are so fundamentally inconsistent with the 1996 Act that the statute precludes states from using such methodologies.

(a) LRIC-Based Pricing Methodology

126. As noted above, most economists -- and a broad range of parties that have

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[164] *See generally* Alfred E. Kahn, *The Economics of Regulation: Principles and Institutions* 69 (1988). *See also* Stephen Breyer, *Regulation and Its Reform* 52 (1982); Harold Hotelling, "The General Welfare in Relation to Problems of Taxation and of Railway and Utility Rates, 6 *Econometrica* 242 (1938). *See also Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket No. 95-185, Notice of Proposed Rulemaking, FCC No. 95-505 at para. 47 (rel. Jan. 11, 1996) (*CMRS Notice*).

[165] *See* Ameritech's March 25, 1996 submission at 1, 9-10; ALTS Handbook at 16; CompTel's March 29, 1996 submission at 22; NCTA submission at 2; AT&T submission at 39, 45-52.

[166] *See, e.g.*, Ameritech's March 25, 1996 submission at 9-10 (TSLRIC, joint and common costs, and residual costs to the extent they reflect forward-looking costs should be used to determine the pricing standard for interconnection and unbundled network elements); AT&T Submission at 47 (TSLRIC of a network element includes both the fixed equipment costs associated with the element and the normal competitive return to the capital that must be invested in order to supply that element). For a discussion of the precise definitions of the terms LRIC and TSLRIC, *see infra* paras. 126-33. The term "long-run service incremental cost" (LRSIC), used by some states and parties, appears to be synonymous with the term TSLRIC.

submitted materials related to this proceeding -- appear to agree that rates for interconnection and unbundled elements ideally should be based on a LRIC-type methodology. The economists and parties, however, do not appear to agree on the specifics of a LRIC or TSLRIC methodology. Parties sometimes assign different meanings to the same terms. We therefore ask commenters advocating this approach to define with specificity the costing methodology that they support. In particular, we seek comment on precise definitions for the following terms: LRIC, TSLRIC, forward-looking costs, joint costs, common costs, shared costs, and stand-alone costs.[167] We also seek comment on the definition of the following related terms: embedded costs, fully distributed costs (FDC), overheads, contribution, and residual costs. For example, many years ago the Commission defined LRIC as including "the full amount of incremental investment and expenses which would be incurred by reason of furnishing additional quantities of service, whether in a new or an existing service category," and added that, in estimating LRIC, one "determine[s] prospectively the effect on total costs, including the effect on common costs, . . . of adding units of service."[168] Does this continue to be an appropriate definition of LRIC? In what respects, if at all, does a TSLRIC analysis differ from a LRIC analysis? Commenters should explain how any methodology they support should be calculated, and how such an approach differs from other possible costing methodologies.

127. We note that some states already have adopted LRIC-based pricing methodologies to set rates for interconnection services and unbundled network elements that new entrants purchase from incumbent LECs. For example, the Illinois Commerce Commission has promulgated detailed rules regarding the use of TSLRIC studies to derive the rates for specified services offered by incumbent LECs.[169] Michigan law provides that incumbent LECs' rates for interconnection will be set at TSLRIC levels until January 1, 1997.[170] The California Public Utilities Commission has set prices for unbundled elements based on a forward-looking calculation of TSLRIC, which excludes shared and common costs.[171] The New York Public Service Commission has allowed incumbent LECs to establish tariffed rates for interconnection offerings with rates based on incremental cost plus, where appropriate, offsets to account for contribution loss and the impacts of "stranded plant."[172] Finally, the Local Competition Work Group of the NARUC Staff Subcommittee on Communications has recommended that network component prices should recover at least TSLRIC and, subject to state commission oversight and review, may include "a markup over TSLRIC to reflect a reasonable allocation of joint and common costs."[173]

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[167] *See, e.g.*, AT&T submission at 46 (defining TSLRIC); ALTS Handbook at 15 (defining LRIC); Ameritech's March 25, 1996 submission at 3-6 (defining TSLRIC and other types of costs).

[168] *American Telephone & Telegraph Co.*, 55 FCC 2d 224, 231 n.18 (1975) (citing *American Telephone & Telegraph Co.*, 18 FCC 2d 761, 766 (1969)).

[169] Ill. Admin. Code, tit. 83, § 791.

[170] 1995 Mich. Pub. Acts 216, Sec. 352(1).

[171] "Competition - The State Experience," Responses to FCC 3/1/96 Questions, NARUC (March 8, 1996) at 3 (NARUC Handbook).

[172] NARUC Handbook at 80.

[173] NARUC Staff Subcommittee on Communications, Local Competition Work Group Summary Report, February 1996 at 35 (NARUC Subcommittee Report).

128. We invite parties to comment on the costing methodologies used by these and other states, and on the extent to which these approaches are consistent with the pricing principles and goals of the 1996 Act. We also seek comment on whether the approach taken by any state regarding pricing interconnection, collocation, and unbundled network elements can be used as a model for a federal policy for these services and facilities. Are the existing state standards substantially the same or materially different? If there are significant differences, what are the costs and benefits of such variation to economic efficiency and a national, pro-competitive communications policy? We note that, while several states have identified specific costing methodologies and have ordered incumbent LECs to offer unbundled network elements at rates based on LRIC, most states have not yet acted in this area.

129. We can consider a number of different approaches if we were to require a LRIC-based methodology for states to follow. For example, we could require that prices be set based on a narrowly defined LRIC of interconnection service and unbundled network elements, with no allowance for joint or common costs, overheads, or any other added increment. There may, however, be a problem with basing rates on LRIC alone if there are significant joint and common costs among network elements, even if such costs are determined on a forward-looking basis. As a second option, we could require prices to be based on the LRIC of the applicable service or unbundled element plus a reasonable allocation of forward-looking joint and common costs.[176] Even then, however, under some LRIC methodologies, the sum of all LRIC-based service and element pricing may not cover all of the firm's forward-looking costs. Finally, Ameritech has suggested a LRIC-based methodology that includes, in addition to TSLRIC, an allocation of joint (or shared) costs, common costs (or overhead), and residual costs.[177] We seek comment on these alternative approaches, or variations, in terms of their compliance with the statute, including the statutory provision that rates "may include a reasonable profit," and their respective advantages and disadvantages.

130. We also seek comment on how, if rates are to be set above LRIC, to deal with the problems inherent in allocating common costs and any other overheads. First, it may be possible to minimize the costs to be allocated as joint and common by identifying a substantial portion of costs as incremental to a particular service or element.[178] The feasibility of minimizing the costs to be allocated as joint and common may depend, in part, on the degree to which unbundled elements are disaggregated.[179] Alternatively, joint and common costs could be minimized by establishing a pricing standard at a higher level of aggregation than individually unbundled subelements.[180] A second approach would be to allocate common costs and overhead among services in an inverse relationship to the sensitivity of demand for each of the services. This

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[176] *See, e.g.*, AT&T submission at 39; NARUC Subcommittee Report at 35 (recommending that, subject to state commission oversight and review, network component prices should be permitted to include "a markup over TSLRIC to reflect a reasonable allocation of joint and common costs").

[177] *See* Ameritech's March 25, 1996 submission at 1.

[178] *See, e.g., Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58*, CC Docket No. 87-266, Memorandum Opinion and Order on Reconsideration and Third Further Notice of Proposed Rulemaking, 10 FCC Rcd 244, 343-346 (1994) (*Video Dialtone Reconsideration Order*), *appeal pending sub nom. Montana Citizens Tel. Co. v. FCC*, No. 92-1404 (D.C. Cir. Sept. 9, 1992).

[179] *See* discussion in Section II.B.2.c.

[180] For instance, the pricing standard could apply to loops, even though there may be sub-loop unbundling. *See supra* Section II.B.2.c.(3)(a).

"Ramsey" approach, in theory, minimizes reductions in consumer welfare due to prices above LRIC.[179] On the other hand, Ramsey pricing principles were developed in the context of regulated monopolies, and may not be desirable for markets in which competition is developing.[180] A third approach would be to allocate common costs and overheads among all services based on some specified allocator. For example, shared costs and overheads could be allocated among services in proportion to each service's LRIC or direct costs, or could be apportioned based on some measure of usage.[181] We seek comment on these approaches, and on the expected magnitude of forward-looking costs under each approach that cannot be attributed to specific services or elements. We also seek comment on whether, regardless of the method of allocating common costs, we should limit rates to levels that do not exceed stand-alone costs.[182]

131. Parties should specify their reasons for supporting or objecting to a particular costing model, and on what types of LRIC-based pricing methodology would be consistent with the 1996 Act. Parties that favor a particular methodology should explain how their proposals satisfy the statutory requirement that cost-based rates be determined "without reference to a rate-of-return or other rate-based proceeding."[183] They should also address how their methodologies would comply with the statutory requirement that rates for interconnection and unbundled elements "may include a reasonable profit."[184] We also seek comment on whether the "reasonable profit" provision should be interpreted to mean that rates should yield reasonable levels of return on capital (including assessment of risk). Parties are encouraged to provide examples of states that have used the particular methodology that they support, or other illustrative evidence to indicate how such a standard would be applied. Should the LRIC-based methodology that any particular state has used be adopted as a national policy for interconnection and unbundled elements, or should a number of existing state approaches be identified as acceptable options? We invite parties to propose other approaches, and to delineate with particularity how their proposal differs from the approaches described above. Parties should also

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[179] *See* Frank P. Ramsey, *A Contribution to the Theory of Taxation*, 37 Econ. J. 47 (1927); *see generally* Kenneth E. Train, *Optimal Regulation: The Economic Theory of Natural Monopoly* 115-40 (1992) (discussing efficiency properties of Ramsey prices); Bridger M. Mitchell & Ingo Vogelsang, *Telecommunications Pricing: Theory and Practice* 43-61 (1991) (same). The sensitivity of demand is measured by the elasticity of demand, which is defined as the percentage change in the quantity of a service demanded for a given percentage change in price.

[180] Alfred E. Kahn & William B. Shew, *Current Issues in Telecommunications Regulation: Pricing*, 4 Yale J. on Reg. 191, 248 (1987) ("The standard formula for Ramsey pricing assumes a monopoly supplier. The competition in telecommunications markets is likely to alter the prices that satisfy the Ramsey principle. How it alters them will depend on whether regulation is confined to the incumbent firm or extended to competitive entrants as well."); *see also CMRS Notice* at para. 51.

[181] *See* United Kingdom Office of Telecommunications, *A Framework for Effective Competition: A Consultative Document on the Future of Interconnection and Related Issues*, para. 4.32 (Dec. 1994).

[182] A stand-alone cost test would require that the consumer of a service be charged a price no higher than that at which it could be offered by a specialized competitive supplier. William J. Baumol and Robert D. Willig, Verified Statement before the Interstate Commerce Commission, *Ex Parte* no. 347 (sub-No. 1), *Coal Rate Guidelines: Nationwide* at 7 (July 28, 1983); see also William J. Baumol, John C. Panzar, and Robert D. Willig, *Contestable Markets and the Theory of Industry Structure* (352-352) (Harcourt Bruce Jovanovich, Inc. 1982).

[183] 1996 Act, sec. 101, § 252(d)(1)(A)(i).

[184] 1996 Act, sec. 101, § 252(d)(1)(B).

address the practicality of such approaches in a state arbitration setting, including the extent to which they would be clear and relatively easy to derive with a minimum of controversy and delay, and the administrative burdens associated with such approaches.

132. We also seek comment on a transitional pricing mechanism during an interim time period. Should we adopt an easily implementable interim approach that would address concerns about unequal bargaining power in negotiations, followed by some sort of transition mechanism to a more permanent set of pricing principles? One possible approach would be to require that during an interim period, rates be set at short-run marginal cost. Such an approach might give incumbent LECs an incentive to reach a rapid agreement.

133. We seek comment on whether interconnection and unbundled element rates should be set on a geographically- and class-of-service-averaged basis for each incumbent LEC, or whether some form of disaggregation would be desirable.[185] On the one hand, averaged rates would be simpler to derive and administer, and would minimize the possibility of unreasonable or unlawfully discriminatory rate differences. On the other hand, averaged rates might be above the cost of service in relatively dense areas, and below cost in less dense areas. This could create uneconomic incentives for competitive entrants to use incumbent LECs' unbundled network elements rather than deploying their own facilities in high cost areas, even if their costs are lower than those of the incumbent LEC. Conversely, it might create incentives for competitive entrants to deploy their own more costly facilities, rather than using unbundled network elements provided by incumbent LECs, in low cost areas. This problem may be exacerbated if the incumbent LECs' local exchange or exchange access services are priced on a geographically averaged basis. If interconnection and unbundled element rates should be disaggregated, what level of disaggregation would be appropriate -- by density pricing zone,[186] LATA, exchange, or some other unit? What types of class-of-service disaggregation are appropriate? For example, should incumbent LECs be permitted to charge different rates for unbundled business and residential loops, or for unbundled loops using different technologies? What rate differentials would be reasonable? We further seek comment on whether some cost index or price cap system would be appropriate to ensure that rates reflect expected changes in unit costs over time.

(b) Proxy-Based Outer Bounds for Reasonable Rates

134. We also seek comment on the benefits, if any, of adopting a national policy of outer boundaries for reasonable rates instead of specifying a particular pricing methodology. For example, rate ceilings could define the maximum end of the reasonable range within which state commissions could establish rates for interconnection and unbundled elements in the arbitration process pursuant to sections 252(b)-(e). Properly set rate ceilings would prevent incumbent LECs from setting rates at levels so high as to prevent efficient competitive entry or to allow

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[185] Unlike with respect to interexchange telephone services, Congress did not address the question of whether interconnection and unbundled element rates should be geographically averaged. With respect to interexchange services, section 254(g) of 1996 Act directs the Commission to adopt rules to require that "rates charged by providers of interexchange telecommunications services to subscribers in rural and high cost areas shall be no higher than the rates charged by each such provider to subscribers in urban areas." *See Policy and Rules Concerning the Interstate, Interexchange Marketplace: Implementation of Section 254(g) of the Communications Act of 1934, as amended*, CC Docket No. 96-61, Notice of Proposed Rulemaking, FCC 96-123 (rel. March 25, 1996).

[186] *See Expanded Interconnection with Local Telephone Company Facilities*, Report and Order and NPRM 7 FCC Rcd 7369, 7451-57, paras. 172-84 (1992).

them to extract monopoly rents, and would ensure that rate levels bear some relationship to costs. If rates are too high, use of unbundled elements will be deterred and therefore competitive entry will take place only if competitors either resell incumbent LECs' existing offerings (using few or none of their own facilities) or use their own facilities to bypass the incumbent LEC network completely. Consequently, setting rates too high would contravene Congress's desire to allow new entrants to compete by purchasing, at cost-based rates, unbundled elements or services of the incumbent LEC network. We therefore seek comment on whether a ceiling to protect against excessive rates for unbundled elements and services would be the best means of furthering the pro-competitive goals of the 1996 Act.

135. We believe that, to be consistent with the pricing principles of the 1996 Act, any mechanism used to set rate ceilings for interconnection services and unbundled elements should: (1) make it possible for competitors efficiently to enter the local exchange market, even if all elements are priced at the rate ceiling; (2) constrain incumbent LECs' ability to preclude efficient entry, for example, by manipulating overheads and the allocation of common costs between services; and (3) be as simple to administer as possible. We seek comment on this approach, and request parties that favor a particular approach to explain how that approach is consistent with these principles.

136. Rate ceilings could be derived using a proxy or surrogate for cost-based rates that does not require use of a cost study. Such a proxy could approximate a rate derived through a detailed cost study, and could establish a level above which rates set by states would be too high to allow efficient entry by competitors. Such an approach might well be simpler and speedier to implement than a LRIC-based methodology. A proxy also might reduce or eliminate the need for recordkeeping and examinations of carrier rate bases, consistent with the deregulatory thrust of the 1996 Act. A proxy also would address the concern that incumbents, which have the best information about their own costs, might withhold or otherwise restrict access to those data. Finally, carriers may have an incentive to manipulate their costs and thus their rates. Using a methodology not directly related to costs could remove this incentive. We seek comment on the use of a proxy for a cost-based rate ceiling. Would setting a ceiling based on a proxy fulfill the statutory mandate of section 252(d)(1) and the obligation under section 251 to ensure that rates are just and reasonable? We also seek comment on other possible approaches that would satisfy the requirements of the statute.

137. One method for establishing proxies as a ceiling would be to use generic or averaged cost data. For example, some measure of nationally-averaged costs could be used in lieu of the actual costs of each incumbent LEC. Alternatively, a generic cost study could be used. For example, we could use the Benchmark Cost Model submitted by MCI, Sprint, NYNEX, and US WEST in the record of CC Docket No. 80-286, or the Hatfield study submitted by MCI.[187] We seek comment on whether this or other cost studies would serve as an appropriate proxy for constraining rates that states may set for interconnection and unbundled network elements. We also seek comment on the extent to which any study we rely on in establishing proxies should reflect geographically divergent factors such as population density.

138. A second method for establishing proxies would be to use rates in existing interconnection and unbundling arrangements between incumbent LECs and other providers of local service, such as neighboring incumbent LECs, CMRS providers, or other new entrants in the same service area. Possible disadvantages of using existing interconnection arrangements,

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[187] Benchmark Cost Model: A Joint Submission by MCI Communications, Inc., NYNEX Corporation, Sprint Corporation, US WEST, Inc., CC Docket No. 80-286 (1995); Hatfield Associates, Inc., *The Cost of Basic Network Elements: Theory, Modeling and Policy Implications* (March 1996).

however, are that they may reflect various historical public policy influences that resulted in prices that do not reflect underlying costs, and that they may reflect arrangements between parties with unequal bargaining power. In addition, these arrangements may not include rates for interconnection services or network elements that are comparable with the services and elements to be used by competitive entrants.

139. A third possible method for establishing a ceiling for the pricing of certain unbundled network elements could be a subset of the incumbent LECs' existing interstate access rates, charged for interconnection with IXCs and other access customers, or an intrastate equivalent. This method would have the advantage of setting ceilings that could be relatively easier to derive than ceilings based on cost studies. We would, however, want to be sure that any such ceilings would not effectively become the price targets for interconnection. These tariffs (and intrastate tariffs in many states), first, include flat rates for special access and dedicated transport that we have concluded, in general, are reasonably cost based.[188] These rates could serve as the upper limit for rates for unbundled network elements consisting of transmission facilities between networks or between central offices in the incumbent LEC's network. Second, for the unbundled network elements corresponding to local switching, a ceiling could be the lower of interstate or intrastate local switching access charges -- excluding part or all of the transport interconnection charge (TIC) and the carrier common line charge (CCLC), or their intrastate equivalents. Exclusion of the TIC and CCLC would reduce the effective per-minute local switching charges substantially, and intrastate charges could be lower.[189] The use of access charges as a proxy for cost-based rates to derive price ceilings may be reasonable, because interstate access charges were initially derived based on the accounting costs of incumbent LEC networks after various regulatory allocations, and, for the larger incumbent LECs, these charges have been subject to price cap regulation for five years. Thus, although access charges were not derived based on forward-looking costs, a subset of these charges might provide an appropriate and easily-implemented ceiling. We seek comment on this analysis. We also seek comment on whether this subset of access charges, or some other proxy, could be used on an interim basis, with some transition mechanism to move towards rate ceilings based on economic costs.

140. We seek comment on whether all or part of the CCLC and TIC should be excluded from any ceilings applicable to unbundled local switching or transport elements. The TIC was originally set at a residual level to recover costs not accounted for in our interim restructuring of local transport rates. To the extent that the costs in the TIC may be unrelated to the provision of local switching, a ceiling that included the entire TIC would exceed the incremental cost of those network elements.[190] The CCLC arguably should be excluded from the ceiling because it

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[188] *See Transport Rate Structure and Pricing*, CC Docket No. 91-213, 7 FCC Rcd 7006 (1992); *first recon.*, 8 FCC Rcd 5370 (1993), *second recon.*, 8 FCC Rcd 6233 (1993), *third recon.*, 10 FCC Rcd 3030 (1994), *fourth recon.*, 10 FCC Rcd 12979 (1995), *petn. for review pending*. *See also Local Exchange Carrier Switched Local Transport Restructure Tariffs*, 9 FCC Rcd 400 (Com. Car. Bur. 1993).

[189] *See CMRS Notice* at n.83.

[190] *See, e.g., Ameritech Operating Companies Petition for a Declaratory Ruling and Related Waivers to Establish a New Regulatory Model for the Ameritech Region*, Order, FCC 96-58 (rel. Feb. 15, 1996) (*Ameritech Customers First Order*); *The NYNEX Tel. Cos. Petition for Waiver, Transition Plan to Preserve Universal Service in a Competitive Environment*, Memorandum Opinion and Order, 10 FCC Rcd 7445 (1995), *reconsideration pending* (*NYNEX USPP Order*).

recovers local loop costs, rather than switching and transport costs.[191] In the *ONA* proceeding,[192] certain interstate prices were established for unbundled features and functions of the local switch. We seek comment on the possible use of these prices as ceilings for the same unbundled elements under section 251.

141. Deriving an appropriate ceiling for unbundled local loops using a method not requiring cost studies clearly raises its own set of difficulties. Using existing interstate access charges is problematic because interstate access charges were designed to recover only 25% of incumbent LECs' unseparated local loop costs, because the interstate access charge regime currently includes two different types of rate elements to recover loop costs -- the CCLC and the subscriber line charge (SLC) -- that are assessed in different ways to different categories of customers, and because the CCLC is a per-minute charge recovering costs that do not vary with usage.[193] To address the first issue, we seek comment on whether a ceiling for unbundled loop rates could be based on the sum of the following: (1) the existing SLC, (2) an imputed flat-rate charge based on the CCLC paid by a customer with average usage, such as that we permitted Rochester Telephone to implement last year,[194] and (3) some subset of intrastate local exchange rates. We solicit comment on how such a ceiling could be implemented. We recognize that, while using some subset of existing prices as a ceiling may be administratively simple, that ceiling may not tightly correlate with a TSLRIC definition of costs, and thus we seek comment more broadly on other possible administratively simple methods for setting a ceiling for the price of an unbundled loop to be applied by the states in an arbitration under sections 251 and 252. We note that we have referred to a Federal-State Joint Board established under section 254 the question of whether and how the existing subsidy to reduce the level of the SLC should be changed,[195] and we seek comment on how the current system for separating and recovering common line costs, as well as various pending proposals before the Joint Board, should affect our analysis.

142. Using any of the above proxy methodologies, the proxy rate may be usage-sensitive, while a service or element is sold on a flat-rated basis, or vice versa. In those situations the applicable ceiling could be derived through a conversion factor, such as average

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[191] *See Universal Service NPRM* at paras. 112-115 (seeking comment on reducing or eliminating implicit universal service support flows in CCLC).

[192] *Amendments of Section 64.702 of the Commission's Rules and Regulations*, Report and Order, CC Docket No. 85-229, 104 FCC 2d 958, 1063-64 (1986); *recon.*, 2 FCC Rcd 3035 (1987), *further recon.*, 3 FCC Rcd 1135 (1988), *second further recon.*, 4 FCC Rcd 5927 (1989), *Amendments of Sections 64.702 of the Commission's Rules and Regulations*, Report and Order, CC Docket No. 85-229, 2 FCC Rcd 3072 (1988), *recon.*, 3 FCC Rcd 1150, *vacated sub nom. California v. FCC*, 905 F.2d 1217 (9th Cir. 1990) (*Computer III Inquiry*); *Amendments to Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture*, CC Docket No. 89-79, Report and Order, Order on Reconsideration, and Supplemental Notice of Proposed Rulemaking, 6 FCC Rcd 4524 (1991), *modified on recon.* 7 FCC Rcd 5235 (1992), *further modified on recon.* 8 FCC Rcd 3114 (1993) (*ONA Proceeding*).

[193] *See Ameritech Customers First Order* at paras. 5-10 for a discussion of the current system for recovery of interstate separated common line costs.

[194] *See Rochester Telephone Corporation Petition for Waivers to Implement Its Open Market Plan*, Order, 10 FCC Rcd 6776 (1995).

[195] *See Universal Service NPRM* at paras. 112-115

usage.[196] We seek comment on whether such an average usage factor, a geographically disaggregated usage factor, or some alternative methodology, would be appropriate for converting per-minute rates to flat rates, or vice versa. We also seek comment on how such a proxy-based ceiling could be applied on a service-by-service or element-by-element basis if services are unbundled in different configurations from the methods set forth in the proxy.

143. As the counterpart to ceilings, we seek comment on whether it is necessary or appropriate for us to establish floors for interconnection and unbundled element prices, *i.e.*, the lower end of a reasonable range within which state commissions could establish rate levels. What would be the potential competitive benefits or detriments of setting a floor for interconnection, collocation, and unbundled element rates? Are they needed to protect incumbent LECs from confiscatory regulatory action? If they are needed, how should they be calculated? Below, we discuss a possible pricing rule under which the sum of the prices of unbundled services cannot exceed the retail price for those services if sold on a bundled basis.[197] Under such a rule, if retail rates are below cost-based levels due to universal service or other implicit subsidies, it may be necessary to price some or all of the unbundled services below LRIC in order for their sum not to exceed the subsidized retail rate.[198] How would this affect the implementation of price floors, or the desirability of such floors?

(c) Other Issues

144. We seek comment on the extent to which embedded or historical costs should be relevant, if at all, to the determination of cost-based rates under section 252(d)(1). Setting rates based on a detailed rate base examination of the incumbent LEC's book costs, with an allocation of residual costs among elements and services, would violate the requirement of section 252(d)(1)(A)(i) that rates for interconnection and network elements be "based on cost (determined without reference to a rate-of-return or other rate-based proceeding.)."[199] In economic terms, prices in competitive markets are based on firms' forward-looking costs rather than historic (sunk) costs.[200] We note however, since the statutory language precludes only use of costs determined on the basis of a "rate-based proceeding," it may be permissible to take some account of an incumbent LEC's embedded costs. Given that incumbent LECs provide services over shared facilities and that technological developments are consistently reducing the costs of

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[196] By usage sensitive, we mean that costs vary by some measure of usage, such as the number of messages or minutes of use. By flat-rated, we mean costs that vary by capacity rather than usage. To convert a per-minute interstate local switching rate to a ceiling for a flat-rate "switch platform" charge, the rate could be multiplied by the average total number of minutes through a local switch per month.

[197] The Illinois Commerce Commission refers to this as the "imputation rule." *See Illinois Bell Telephone Company Proposed Introduction of a Trial of Ameritech's Customer First Plan in Illinois*, nos. 94-0096, 94-0117, 94-0146, 94-0301 consolidated, (Ill. Comm. Comm'n. Apr. 7, 1995). *See infra* Section II.B.3.c.(3).

[198] *See infra* Section II.B.3.c.(3).

[199] *See Southwestern Bell Telephone Company's Tariff Sheets Designed to Structure Local Transport Rates*, Case No. TR-85-342, Report and Order at 8 (Mo. Pub. Serv. Comm. Mar. 6, 1996) (rejecting residual local transport interconnection charge tariff as not "cost-based" and therefore violative of the 1996 Act); Memorandum In Support of Motion to Dismiss on Behalf of the Louisiana Public Service Commission, Docket No. U-21474 at 6 (Louisiana Public Service Commission staff brief arguing that local residual interconnection charge is not based on cost and therefore violative of the 1996 Act).

[200] *See* Alfred E. Kahn, *The Economics of Regulation Principles and Institutions* 70 (1988).

providing service, setting the price of discrete services and elements equal to the forward-looking LRIC of each service or element is not likely to recover the historical costs of incumbent LECs' networks. We seek comment on the empirical magnitude of the differences between the historical costs incurred by incumbent LECs (or historical revenue streams) and the forward-looking LRIC of the services and facilities they will be providing pursuant to section 251. How much of this differential can be attributed to universal service support flows? To what extent can incumbent LECs reasonably claim an entitlement to recover a portion of such cost differences? According to the Local Competition Work Group of the NARUC Staff Subcommittee on Communications, a competitive local market would make the issue of recovery of "stranded" embedded costs moot, at least from a purely economic perspective. It notes that, in limited circumstances, other considerations could result in a regulatory decision that some recovery of past investment decisions by incumbents is appropriate.[201] Should we establish LRIC as a long-run standard, but permit some interim recognition of embedded costs in the short run? We seek specific comment on mechanisms for any such transition, including how to determine what costs should be recovered during the transition and, most importantly, how and when any such transition would end.

145. We also solicit comment on whether it would be consistent with sections 251(d)(1) and 254 for states to include any universal service costs or subsidies in the rates they set for interconnection, collocation, and unbundled network elements. For instance, New York has adopted a "play or pay" model in which interconnectors who agree to serve all customers in their self-defined service areas ("players") potentially pay a substantially lower interconnection rate than those who serve only selected customers ("payers"), who are liable to pay additional contribution charges.[202] In the long term, section 254 requires the Commission and the Joint Board established under section 254 to take actions to implement the following statutory principles: "All providers of telecommunications service should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service. . . . There should be specific, predictable, and sufficient Federal and State mechanisms to preserve and advance universal service."[203] Arguably, these principles can be interpreted as requiring competitively-neutral mechanisms for recovering universal service support, rather than recovering such support through rates for interconnection or unbundled network elements.[204] On the other hand, the statutory schedule for completion of the universal service reform proceeding (15 months from enactment of the 1996 Act) is different from that for this proceeding (6 months from the date of enactment of the 1996 Act). Also, intrastate universal service mechanisms will not be affected directly by the section 254 Joint Board proceeding. We also seek comment on whether the ability of states to take universal service support into account differs pending completion of the section 254 Joint Board proceeding or state universal service proceedings pursuant to section 254(f),[205] during any transition period that may be established in the Joint Board proceeding, or thereafter.

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[201] NARUC Subcommittee Report at 52-53.

[202] NARUC Handbook at 80.

[203] 1996 Act, sec. 101, §§ 254(b)(4), (b)(5).

[204] Any such universal service support payment should be, to the extent possible, "explicit, rather than implicit as many support mechanisms are today." Joint Explanatory Statement at 130-31. "In keeping with the conferees' intent that universal service support should be clearly identified, [section 254(e)] states that such support should be made explicit . . ." *Id.* at 131.

[205] 1996 Act, sec. 101, § 254(f).

146. We recognize that even though, as noted below,[206] the provision of interconnection and unbundled elements pursuant to sections 251 and 252 may not legally displace our interstate access charge regime, the two types of services have clear similarities. Radically different pricing rules for interconnection and unbundled elements, on the one hand, and levels of interstate access charges, on the other, may create economic inefficiencies and other anomalies. Indeed, under a long-term competitive paradigm, it is not clear that there can be a sustainable distinction between access for the provision of local service and access for the provision of long distance service. Thus, we are cognizant of the need to consider these issues in a coordinated manner, and believe it is critically important to reform our interstate access charge rules in the near future.

147. Finally, we note that certain incumbent LECs have advocated that interconnection rates be set based on the "efficient component pricing rule" (ECPR) proposed by economist William Baumol and others.[207] Under this approach, an incumbent carrier that sells an essential input service, such as interconnection, to a competing network would set the price of that input service equal to "the input's direct per-unit incremental costs plus the opportunity cost to the input supplier of the sale of a unit of input."[208] Under the ECPR, competitive entry will not place at greater risk the incumbent's recovery of its overhead costs or any profits that it otherwise would forego due to the entry of the competitor. In other words, the incumbent's profitability would not be diminished by providing interconnection or unbundled elements or both. Proponents of ECPR argue that the ECPR creates an incentive for services to be provided by the lowest-cost provider and that it makes the incumbent indifferent to whether it sells an input service to a competitor or a final service to an end user. Critics, however, have argued that these properties only hold in special circumstances.[209] The ECPR presupposes that the incumbent is the sole provider of a bottleneck service, and seeks to define efficient incentives for incremental entry based on that assumption. Under the ECPR, competitive entry does not drive prices toward competitive levels, because it permits the incumbent carrier to recover its full opportunity costs, including any monopoly profits. In general, the ECPR framework precludes the opportunity to obtain the advantages of a dynamically competitive marketplace. These arguments cast significant doubts on the claims that the rule will yield efficient outcomes over time. Finally, as an administrative matter, it would be difficult for a regulatory agency to determine a carrier's actual opportunity cost.

148. We tentatively conclude that use of the ECPR or equivalent methodologies to set prices for interconnection and unbundled network elements would be inconsistent with the section 252(d)(1) requirement that be based on "cost." We propose that states be precluded from using this methodology to set prices for interconnection and access to unbundled elements. Moreover, we seek comment on whether such a pricing methodology, if used by a state, would constitute a barrier to entry as under section 253 of the 1996 Act.[210]

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[206] *See* para. 164.

[207] *See* William J. Baumol, *Some Subtle Issues in Railroad Deregulation*, 10 Int'l J. Trans. Econ. 341 (1983); William J. Baumol & Gregory Sidak, *Toward Competition in Local Telephony* (1994); William Baumol & Gregory Sidak, *The Pricing of Inputs Sold to Competitors*, 11 Yale J. on Reg. at 171 (1994).

[208] William Baumol & Gregory Sidak, *The Pricing of Inputs Sold to Competitors*, 11 Yale J. on Reg. at 178.

[209] *See, e.g.*, Jean-Jacques Laffont & Jean Tirole, *Access Pricing and Competition*, 38 Eur. Econ. Rev. 1673 (1994).

[210] 1996 Act, sec. 101, § 253.

(4) Rate Structure

149. The structure of incumbent LEC rates for interconnection and unbundled network elements will influence the incentives for interconnectors to purchase and use these services, independent of the level at which rates are set.[211] For example, a usage-sensitive rate will create incentives for the purchaser to minimize usage, or to seek out end users with low usage, while a flat rate for an element will create incentives to utilize the maximum capacity available. Some possible rate structures for interconnection and access to unbundled network elements under the 1996 Act might produce rates that are not just, reasonable, and nondiscriminatory (as required under section 251), might conflict with the pricing standard in section 252(d)(1), or might be at odds with the pro-competitive goals of the 1996 Act. Establishing clear federal rules and principles concerning rate structures may assist states and the parties in arbitrating rates for interconnection and unbundled network elements. We therefore seek comment on some possible principles for analyzing rate structure questions, and some possible principles to guide state (and ultimately judicial) decisions in structuring rates for interconnection and unbundled network elements.

150. In general, we believe that costs should be recovered in a manner that reflects the way they are incurred. This approach is consistent with the 1996 Act's pricing standard for interconnection and unbundled network elements, which indicates that prices should be based on cost. Network providers incur costs in providing two broad categories of facilities, dedicated and shared. Dedicated facilities are those that are used by a single party -- either an end user or an interconnecting network. Shared facilities are those that are used by multiple parties. The cost of a dedicated facility can be attributed directly to the party ordering the service that uses that facility, and it is therefore efficient for that party to pay charges that recover the full cost of the facility. A non-traffic sensitive (NTS) or "flat-rated" charge is most efficient for dedicated facilities, because it ensures that a customer will pay the full cost of the facility, and no more.[212] It ensures that the customer will, for example, add additional lines only if the customer believes that the benefits of the additional lines will exceed their cost. It also ensures that the customer will not face an additional (and non-cost-based) usage charge.

151. We believe the costs of shared facilities should be recovered in a manner that efficiently apportions costs among users that share the facility. We seek comment on whether a capacity-based NTS rate or a traffic-sensitive (TS) rate may be efficient for recovering the cost of shared facilities in any given circumstance. For shared facilities whose cost varies with capacity, such as network switching, it may be efficient to set prices using any of the following: a usage-sensitive charge; a usage-sensitive charge for peak-time usage and a lower charge for off-peak usage; or a flat charge for the peak capacity that an interconnector wishes to pay for and use as though that portion of the facility were dedicated to the interconnector.

152. We seek comment on whether, pursuant to section 251(c)(2), (c)(3), (c)(6), and 251(d)(1), we should adopt rate structure principles for states to apply in meeting the pricing responsibilities under section 252(d)(1). We also seek comment on how such requirements might further our goal of having clear and administratively simple rules.[213] More specifically, we seek comment on whether we should require states to adopt rate structures that are cost-causative and

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[211] *See* AT&T submission at 52.

[212] *See CMRS Notice* at paras. 42-44.

[213] *See* AT&T submission at 52 (advocating a principle of cost causation as an element of defining "just and reasonable" rates).

in particular, whether we should require states to provide for recovery of dedicated facility costs on a flat-rated basis or, at a minimum, make LECs offer a flat-rate option. In the absence of such a standard, could usage sensitive rates for dedicated facilities cause serious inefficiencies, harm competition, or be contrary to the requirements of the 1996 Act? For example, a usage-based charge could cause parties with high traffic volumes to overpay (*i.e.*, pay more than the fixed cost of the facility), and parties with low traffic volumes to underpay (*i.e.*, pay less than the fixed cost of the facility). In addition, a usage-based charge could give all parties an uneconomic incentive to reduce their traffic volumes or to avoid connecting with networks that impose such charges. It also could give parties with low volumes of traffic, who face below-cost prices, an incentive to add lines that they valued less than their cost. The Washington Utilities Commission, for example, has concluded that measured use interconnection rates are not cost-based and could harm local consumers, and therefore rejected a measured use compensation structure as an exclusive compensation mechanism.[214]

153. We also seek comment on whether we should adopt any rules for pricing of shared facilities. Parties should address the circumstances under which TS rates or flat capacity-based rates would produce efficient results for shared facilities. Several parties have argued that, in the context of interconnection and access to unbundled incumbent LEC networks, interconnectors should have the option of paying for and using a portion of the capacity of incumbent LEC switches.[215] As proposed by some, interconnectors would pay a flat rate for the use of a certain amount of incumbent LEC's switching capacity, and this rate would be discounted based on volume and term commitments. The interconnector would be able to use this platform to provide both basic local switching service as well as vertical switching features -- such as caller ID and call forwarding -- to its end users without paying the incumbent LEC a separate charge for these services. The interconnector would assume the risk of generating sufficient traffic to justify the capacity it purchased from the incumbent LEC. We seek comment on the "switch platform" concept, on whether the 1996 Act requires that switching capacity be made available to new entrants on this basis, and on the competitive implications of such a rate structure. We also seek comment on whether, in the context of these bottleneck facilities offered by incumbent LECs to their competitors, any measures are necessary to prevent incumbent LECs from recovering more than the total cost of a shared facility from users of that facility. Finally, we seek comment on whether concerns about pricing of shared facilities could be alleviated if, as discussed below, sellers of facilities are not allowed to preclude purchasers from further reselling such facilities on a shared basis, which would create alternative sources of shared capacity.[216]

154. Additionally, we seek comment on whether under the 1996 Act we should require or permit volume and term discounts for unbundled elements or services. Commenters are also invited to suggest alternative rate structure principles. Parties should explain how their proposals are consistent with economic cost-causation principles, and with the language and intent of the 1996 Act.

(5) Discrimination

155. Sections 251 and 252 require that interconnection and unbundled element rates be

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[214] *See Washington Utilities and Transportation Commission*, Fourth Supplemental Order, Docket No. UT-941464, et al. (Oct. 1995).

[215] The concept is often referred to as the "switch platform." *See, e.g.*, AT&T submission at 53 (arguing that "the vast majority of unbundled network elements costs are not usage sensitive").

[216] *See infra* Section II.B.3.b.

"nondiscriminatory."[217] In addition, section 251(c)(4) requires that, in making resale available, carriers not impose "discriminatory conditions or limitations on resale".[218] Finally, section 252(e provides that states may reject a negotiated agreement or a portion of the agreement if it "discriminates" against a carrier not a party to the agreement and section 252(i) requires incumbent LECs to "make available any interconnection, service, or network element provided under an agreement . . . to which it is a party to any requesting telecommunications carrier upon the same terms and conditions."[219] By comparison, section 202(a) of the 1934 Act provides that "(i)t shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges . . . for . . . like communication service."

156. We seek comment on the meaning of the term "nondiscriminatory" in the 1996 Act compared with the phrase "unreasonable discrimination" in the 1934 Act. More specifically, in choosing the word "nondiscriminatory," did Congress intend to prohibit all price discrimination, including measures (such as density zone pricing or volume and term discounts) that are considered lawful under section 202(a)? We note that the legislative history of the new provisions prohibiting discrimination offers no explicit guidance on this question.[220] We seek comment on whether sections 251 and 252 can be interpreted to prohibit only unjust or unreasonable discrimination. For example, may carriers charge different rates to parties that are not similarly situated, such as when a carrier incurs different costs to provide service to such parties? We also seek comment as to whether we should allow such pricing as a policy matter.

(6) Relationship to Existing State Regulation and Agreements

157. Section 251(d)(3) of the 1996 Act expressly bars the Commission, when prescribing and enforcing regulations to implement section 251, from precluding enforcement of certain existing state regulations. Specifically, section 251(d)(3) prohibits us from

> "[precluding] the enforcement of any regulation, order, or policy of a State commission that--
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> (A) establishes access and interconnection obligations of local exchange carriers;
> (B) is consistent with the requirements of this section; and
> (C) does not substantially prevent implementation of the requirements of this section and the purposes of [the portion of the 1996 Act dealing with development of competitive markets] ."[221]

We ask parties to address the meaning of the specific terms of section 251(d)(3). What types of state policies would, or would not, be consistent with the requirements of section 251 and the purposes of Part II or Title II of the Act? We also seek comment on how the particular principles discussed above would affect existing state rules and policies, as well as existing negotiated agreements between carriers.

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[217] 1996 Act, sec. 101, §§ 251(c)(2), (3), (6), and 252(d)(1).

[218] 1996 Act, sec. 101, § 251(c)(4)(B). *See infra* Section II.B.3.b. for a discussion of this issue.

[219] 1996 Act, sec. 101, §§ 252(e), (i).

[220] *See, e.g.*, Joint Explanatory Statement at 121-22, 125-26.

[221] 1996 Act, sec. 101, § 251(d)(3).

e. Interexchange Services, Commercial Mobile Radio Services, and Non-Competing Neighboring LECs

158. In this section, we address whether the terms of section 251(c) cover interconnection arrangements between incumbent LECs and providers of interexchange services, CMRS providers, and non-competing neighboring LECs.

(1) Interexchange Services

159. Sections 251(c)(2) and 251(c)(3) impose duties upon incumbent LECs to provide interconnection and nondiscriminatory access to unbundled network elements, respectively, to "any requesting telecommunications carrier." In relevant part, "telecommunications carrier" is defined in section 3(44) of the 1934 Act, as amended, as "any provider of telecommunications services." Because interexchange services are a type of "telecommunications services," which are defined in section 3(46) as "the offering of telecommunications for a fee directly to the public . . . regardless of the facilities used," we conclude that carriers providing interexchange services are "telecommunications carriers." Thus, we believe that interexchange carriers may seek interconnection and unbundled elements under subsections (c)(2) and (c)(3), respectively.

160. With respect to section 251(c)(2), however, we believe the statute imposes limits on the purposes for which any telecommunications carrier, including interexchange carriers, may request interconnection pursuant to that section. Section 251(c)(2) imposes an obligation upon incumbent LECs to provide requesting carriers with interconnection where the request is for the "transmission and routing of telephone exchange service and exchange access." "Telephone exchange service" is defined in section 3(47) of the 1934 Act, as amended, as "service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange," or "comparable service[s]."[222] According to this definition, interexchange service does not appear to constitute a "telephone exchange service." We seek comment on this interpretation.

161. Interexchange service would not appear to qualify as "exchange access" either. "Exchange access" is defined in section 3(16) of the 1934 Act, as amended, as "the *offering* of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services."[223] This definition would appear to require a telecommunications carrier to request interconnection for purposes of "offering" access to exchange services. An interexchange carrier that requests interconnection to originate or terminate an interexchange toll call would not appear to be "offering" access services, but rather to be "receiving" access services. Thus, it would appear that the obligation to provide interconnection pursuant to section 251(c)(2) does not apply to telecommunications carriers requesting such interconnection for the purpose of originating or terminating interexchange traffic. This tentative conclusion seems consistent with section 251(i), which provides that "[n]othing in this section shall be construed to limit or otherwise affect the Commission's authority under section 201." Section 201 is the statutory basis on which interexchange carriers have long been entitled to interconnect for the purposes of originating and terminating interexchange traffic. Some have argued that our interpretation is also consistent with other provisions of section 251, such as section 251(g), and with Congress's focus on the local

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[222] 1996 Act, sec. 3(a)(1), § 3(47).

[223] 1996 Act, sec. 3(a), § 3(16) (emphasis added).

exchange market.[224] We seek comment on our tentative conclusion.

162. It follows from the above definition of "exchange access" that a telecommunications carrier may request cost-based interconnection under section 251(c)(2) for the purpose of *offering* access services in competition with the incumbent LEC. We seek comment, however, on whether a carrier may request cost-based interconnection under section 251(c)(2) *solely* for this purpose. The language in section 251(c)(2) indicating that interconnecting carriers must offer "telephone exchange service and exchange access" may mean that carriers must offer *both* "telephone exchange service and exchange access," or it may mean that telecommunications carriers may obtain interconnection from an incumbent LEC to provide one or the other service, or both. We believe that if we were to interpret this section to require requesting parties to offer both telephone exchange and exchange access services, such a requirement would exclude competitive access providers that currently interconnect with incumbent LECs in order to offer competing exchange access transport services, not telephone exchange service. On the other hand, if we interpret section 251(c)(2) to permit cost-based interconnection for the purpose of offering either telephone exchange or exchange access, that interpretation might permit an interexchange carrier to form an affiliate to obtain interconnection from an incumbent LEC for the purpose of offering a competing exchange access service. The affiliate then might offer its competing service exclusively to its interexchange affiliate, thereby enabling the latter to accomplish indirectly -- obtaining interconnection for the purpose of receiving exchange access service -- what the statute appears to prohibit it from doing directly under section 251(c)(2). This concern is real, of course, only if an exclusive relationship of this sort is otherwise lawful under the 1934 Act, as amended, which it may not be. We seek comment on this analysis. We also seek comment on the impact that any conclusion here would have on the Commission's *Expanded Interconnection* rules, which address the competitive provision of interstate access.

163. Section 251(c)(3) appears to limit the purposes for which telecommunications carriers may request access to unbundled network elements only in the sense that such carriers must seek to provide a "telecommunications service" by means of such elements. As discussed above, interexchange service is a "telecommunications service." Thus, we tentatively conclude that carriers may request unbundled elements for purposes of originating and terminating interexchange toll traffic, in addition to whatever other services the carrier wishes to provide over those facilities.

164. Some interested persons have suggested that this interpretation of section 251(c)(3) would allow interexchange carriers, in effect, to obtain network elements in order to avoid the Commission's Part 69 access charges, but would not require such carriers to use such elements to compete with the incumbent LEC to provide telephone exchange service to subscribers.[225] In opposition, others may argue that incumbent LECs are not obliged under section 251(c)(3) to provide access to unbundled elements, such as a local loop, *solely* for the purpose of originating and terminating interexchange toll traffic. Rather, the argument might go, the incumbent LEC's statutory obligation to provide network elements extends only to providing exclusive access to an entire loop, in which case an interexchange carrier could not, as a practical matter, purchase such access without having won over the local customer associated with the loop and providing that telephone exchange service to that customer (or arranging for others to provide it). This latter reading of the statute is consistent with our earlier discussion concerning the meaning of the term

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[224] *See, e.g.*, Letter from Bell Atlantic to William Kennard, General Counsel, FCC 6 (April 15, 1996); Southwestern Bell's February 29, 1996 Submission at 3-4; Ameritech's February 28, 1996 Submission at 3.

[225] *See, e.g.*, Letter on Behalf of AT&T, MCI, LDDS WorldCom, and CompTel to William Kennard, General Counsel, FCC 4 (March 20, 1996).

network element."[326] There we noted that a network element appears to refer to a facility or function, rather than a jurisdictionally distinct service, such as switching for intrastate exchange access. We also note that viewing a network element as a jurisdictionally distinct service might be inconsistent with the pricing standards set forth in section 252(d)(1), which suggest that prices for these elements should be set on the basis of some measure of economic costs, not jurisdictionally separated costs. Moreover, as with section 251(c)(2), allowing interexchange carriers to circumvent Part 69 access charges by subscribing under section 251(c)(3) to network elements solely for the purpose of obtaining exchange access may be viewed as inconsistent with other provisions in section 251, such as sections 251(i) and 251(g), and contrary to Congress' focus in these sections on promoting local competition. Lastly, such a reading of the statute may effect a fundamental jurisdictional shift by placing interstate access charges under the administration of state commissions. We seek comment on these issues.

165. If a carrier that provides interexchange toll services purchases access to unbundled network elements in order to provide such toll services -- either alone if the statute permits it, or in conjunction with local exchange services -- we tentatively conclude that the incumbent LEC may not assess Part 69 access charges in addition to the charges assessed for the network elements determined under sections 251 and 252. Section 252, we note, requires that charges for elements shall be based on cost.[327] Thus, the additional imposition of Part 69 access charges would result in total charges not based on cost and thus would seem inconsistent with the statutory scheme. We seek comment on this conclusion. In commenting, parties may want to discuss the relevance of section 272(e)(3). That section requires BOCs, after entering the in-region interexchange business, to impose on their affiliates -- or impute to themselves -- access charges no lower than what they charge to unaffiliated interexchange carriers. In light of the above discussion and its possible implications for our Part 69 access charge regime, we repeat here our intention of taking up access charge reform in the very near future.

(2) Commercial Mobile Radio Services

166. We next seek comment on whether interconnection arrangements between incumbent LECs and commercial mobile radio service (CMRS) providers fall within the scope of section 251(c)(2). As indicated below in the discussion of section 251(b)(5), we also seek comment on the separate but related question of whether LEC-CMRS transport and termination arrangements fall within the scope of section 251(b)(5).

167. With respect to section 251(c)(2), because the obligations of that section, and of section 251(c) generally, apply only to incumbent LECs, we tentatively conclude that CMRS providers are not obliged to provide interconnection to requesting telecommunications carriers under the provision of section 251(c)(2). CMRS providers are not encompassed by the 1996 Act's definition of "incumbent local exchange carrier" discussed above.

168. LEC-CMRS interconnection arrangements may nonetheless fall within the scope of section 251(c)(2) if CMRS providers are "requesting telecommunications carrier[s]" that seek interconnection for the purpose of providing "telephone exchange service and exchange access." CMRS are within the definition of "telecommunications services" in section 3(46) of the 1934 Act, as amended, because they are offered "for a fee directly to the public." Similarly, CMRS providers are within the definition of "telecommunications carrier[s]" in section 3(44) because they are "provider[s] of telecommunications services." The phrase "telephone exchange service"

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[326] See discussion, supra, II.B.2.c regarding the definition of "network element."

[327] 1996 Act, sec. 101, § 252(d)(1).

is arguably broad enough to encompass at least some CMRS. "[T]elephone exchange service" is defined as either "(A) service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge, or (B) comparable service[s]."[228] We seek comment on which if any CMRS, including voice-grade services, such as cellular, PCS, and SMR, and non-voice-grade services, such as paging, fit this definition. In commenting, parties should address any past Commission statements that bear on the matter.[229]

169. If CMRS providers seeking interconnection from incumbent LECs fall within the purview of section 251(c)(2), or of section 251(b)(5), there arises the question of the relationship between section 251 and another recent addition to the 1934 Act that also addresses interconnection between CMRS providers and other common carriers, section 332(c). Although we seek comment on the relationship of the two provisions in this proceeding, we note that LEC-CMRS interconnection pursuant to section 332(c) is the subject of its own ongoing proceeding in CC Docket No. 95-185, which the Commission initiated prior to the enactment of the 1996 Act. We also note that we sought comment in that proceeding generally on the issue of the interplay of section 251 and section 332(c) and have received extensive comments. We intend that CC Docket No. 95-185 remain open and we do not want to ask interested parties to repeat their arguments on issues they have already addressed in that docket. Therefore, in this proceeding, we ask parties to address any specific issues presented in this *Notice* that are not already addressed in CC Docket No. 95-185. In submitting additional comments, parties may want to address the possibility that, if both sections 251 and 332(c) apply, the requesting carrier would have to choose the provision under which to proceed. Parties may also want to address whether it would be sound policy for the Commission to distinguish between telecommunications carriers on the basis of the technology they use. The Commission retains the prerogative of incorporating by reference comments filed in the section 332(c) proceeding into the record of this proceeding, and of acting on these pending rulemakings in a manner that best serves the interests of reasoned decisionmaking.

(3) Non-Competing Neighboring LECs

170. We turn next to whether interconnection agreements between incumbent LECs and non-competing neighboring LECs are subject to section 251(c)(2).[230] If they are, section 252 would appear to require that such arrangements be made public and the terms and conditions of the agreements made available to other carriers. Whether this is true of *existing* arrangements between incumbent LECs and non-competing neighboring LECs depends on the resolution of the issue, discussed above, of existing agreements generally.

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[228] 47 U.S.C. § 3(47). Section 3(a)(1) of the 1996 Act amended the definition in the 1934 Act by adding part (B) above.

[229] *See, e.g., In re Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Services*, 9 FCC Rcd 5408, 5453 (1994) (quoting *The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services*, Policy Statement on Interconnection of Cellular Systems, 59 Rad. Reg. 2d 1275, Appendix B at 1283-85 (1986)); *Amendment of the Commission's Rules To Permit Flexible Service Offerings in the Commercial Mobile Radio Service*, Notice of Proposed Rulemaking, WT Docket No. 96-6, FCC 96-17, 11 FCC Rcd 2445 (Jan. 25, 1996) at para. 20.

[230] As in the LEC-CMRS context, the separate but related question of whether neighboring LEC transport and termination arrangements fall within the scope of section 251(b)(5) is noted below, in the section dealing with that provision.

171. The language of section 251(c)(2), which encompasses interconnection requested for the purposes of providing "telephone exchange service and exchange access," appears to encompass the services provided by non-competing neighboring LECs. By definition, such LECs provide "telephone exchange service and exchange access." Nevertheless, a reading of section 251(c)(2) in context shows that it is part of a provision designed to promote competition against the incumbent LEC, and on this basis, the requirements set forth therein could arguably be understood to apply only to arrangements between *competing* carriers. We note, however, that in deciding this issue, we do not seek to create any disincentives that might hamper competition between neighboring carriers. We seek comment on which of the above interpretations is correct. To the extent a party advocates the latter interpretation, we also seek comment on the implications, if any, for the CMRS discussion.

3. Resale Obligations of Incumbent LECs

a. Statutory Language

172. Section 251(c)(4) imposes a duty upon incumbent LECs to offer certain services for resale at wholesale rates.[231] Specifically, section 251(c)(4) requires incumbent LECs:

> (A) to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers; and (B) not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service, except that a State commission may, consistent with regulations prescribed by the Commission under this section, prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such service to a different category of subscribers.

173. We seek comment generally on the application of this section, as set forth in some detail below. We will first discuss the services subject to resale and conditions on such resale and then turn to the pricing issues concerning resale. We also seek comment generally on the relationship of this section to section 251(b)(1), which imposes certain resale duties on all LECs.

b. Resale Services and Conditions

174. Section 251(c)(4)(A) provides that incumbent LECs must offer for resale at wholesale rates "any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers." Section 251(b)(1) imposes on all LECs "the duty not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications services."[232] One view of the relationship between section 251(b)(1) and section 251(c)(4) is that all LECs are prohibited from imposing unreasonable restrictions on resale, but that only incumbent LECs that provide retail services to subscribers that are not telecommunications carriers are required to make such services available at wholesale rates to requesting telecommunications carriers. We seek comment on this view.

175. We also seek comment on what limitations, if any, incumbent LECs should be allowed to impose with respect to services offered for resale under section 251(c)(4). Should the incumbent LEC have the burden of proving that a restriction it imposes is reasonable and

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[231] 1996 Act, sec. 101, § 251(c)(4).

[232] 1996 Act, sec. 101, § 251(b)(1).

nondiscriminatory? Given the pro-competitive thrust of the 1996 Act and the belief that restrictions and conditions are likely to be evidence of an exercise of market power, we believe that the range of permissible restrictions should be quite narrow.[233] We seek comment on this view. We also seek comment on whether, and if so how, the resale obligation under section 251(c)(4) extends to an incumbent LEC's discounted and promotional offerings. Did Congress intend for such offerings to be provided at wholesale rates, based on the promotional rate minus avoided costs, or does the obligation to provide for resale at wholesale rates only apply to the incumbent LEC's standard retail offerings? If the obligation extends only to the standard offering, what effect would that have on the use of resale as a means of entering the local market? If the obligation applies to promotional and discounted offerings, must the entrant's customer take service pursuant to the same restrictions that apply to the incumbent LEC's retail customers? Moreover, how would such restrictions be enforced without impeding competition (e.g., through disclosure of competitively sensitive information)? We also seek comment on whether a LEC can avoid making a service available at wholesale rates by withdrawing the service from its retail offerings, or whether it should be required to make a showing that withdrawing the offering is in the public interest or that competitors will continue to have an alternative way of providing service. We also seek comment on whether access to unbundled elements addresses this concern.

176. We seek comment on the meaning of the language that "a State commission may, consistent with regulations prescribed by the Commission under this section, prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such service to a different category of subscribers."[234] The provision suggests that Congress did not intend to allow competing telecommunications carriers to purchase a service that, pursuant to state or federal policy, is offered at subsidized prices to a specified category of subscribers (e.g., residential subscribers), and then resell such service to customers that are not eligible for such subsidized service (e.g., business subscribers). For example, it might be reasonable for a state to restrict the resale of a residential exchange service that is limited to low-income consumers, such as the existing Lifeline program. At the same time, we have generally not allowed carriers to prevent other carriers from purchasing high volume, low price offerings to resell to a broad pool of lower volume customers.[235] We seek comment on this analysis.

177. We note that states have adopted various policies regarding resale of telecommunications services. For example, some states prohibit the resale of flat-rated services and residential service.[236] Other states require or permit the resale of residential services, but place restrictions, or permit the LECs to place restrictions, on the resale of such service. For example, Illinois prohibits the resale of residential services to customers other than residential users, while Washington and Ohio permit carriers to prohibit or to place reasonable restrictions

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[233] ALTS asserts that there should be no prohibitions or restrictions on the resale of the services of dominant carriers, such as the incumbent LECs. ALTS Handbook at 17.

[234] 1996 Act, sec. 101, § 251(c)(4)(B).

[235] *See Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities*, Docket No. 20097, Report and Order, 60 FCC 2d 261, 308-316 (1976) (divisions of full time private line circuits will enable smaller users to make efficient, discrete use of private line offerings, and such advantages will be in terms of cost savings and selectivity rather than technical advantages).

[236] Massachusetts prohibits the resale of flat-rate and residential services. NARUC Handbook at 72. Oregon prohibits the resale of residential service. NARUC Handbook at 107.

on the resale of residential services to business customers.[227] Finally, some states have imposed nondiscrimination requirements similar to those contained in section 251(c)(4). Colorado has enacted rules governing the authorization of local exchange service providers, and has prohibited facilities-based telecommunications providers from imposing unreasonable or discriminatory limitations on the resale of the regulated telecommunications service.[228] Pennsylvania also prohibits a LEC from maintaining or imposing resale or sharing restrictions on any service that the state commission finds to be competitive.[229] We seek comment on whether it would be consistent with the 1996 Act to use any state policies concerning restrictions on resale in our federal policies. We also seek comment on state policies that are inconsistent with the goals of the 1996 Act or that are inadvisable from a policy perspective. Parties are also invited to comment on whether requiring new entrants to cope with resale policies that are inconsistent from one state to another would disadvantage them competitively in a manner inconsistent with the 1996 Act.

c. Pricing of Wholesale Services

(1) Statutory Language

178. The requirement in section 251(c)(4) that incumbent LECs offer services at "wholesale rates" is elaborated in section 252(d)(3), which sets forth the standards that states must use in arbitrating agreements and reviewing rates under BOC statements of generally available terms and conditions. Section 252(d)(3) provides that wholesale rates shall be set "on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier." As previously discussed in Section II.B.2.d.(1), we believe that the Commission is authorized to promulgate rules for the states in applying section 252(d).

(2) Discussion

179. We seek comment generally about the meaning of the term "wholesale rates" in section 251(c)(4). To ensure that incumbent LECs fulfill their duty under section 251(c)(4) regarding resale services, can and should we establish principles for the states to apply in order to determine wholesale prices in an expeditious and consistent manner?

180. We also seek comment on whether we should issue rules for states to apply in determining avoided costs. We could, for example, determine that states are permitted, under the Act, to direct incumbent LECs to quantify their costs for any marketing, billing, collection, and similar activities that are associated with offering retail, but not wholesale services. We seek comment on whether avoided costs should also include a share of general overhead or "mark-up" assigned to such costs.[230] LECs would then reduce retail rates by this amount, offset by any portion of those expenses that they incur in the provision of wholesale services. This approach appears to be consistent with the statute, but would create certain administrative difficulties

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[227] NARUC Handbook at 65-66, 139.

[228] *Id.* at 27.

[229] *Id.* at 113.

[230] *See* Rebuttal Testimony of Jake Jennings before Telecommunications Program Office of Policy and Planning Illinois Commerce Commission, Docket No. 95-0458 (December 21, 1995) at 16-17.

because all of the information regarding such costs is under the control of the incumbent LECs. We seek comment on how this approach could be adopted without creating unnecessary burdens on the LECs.

181. Alternatively, we could establish a uniform set of presumptions that states could adopt and that would apply in the absence of quantifications of such costs by incumbent LECs. For example, the Commission could identify a significant number of expenses that the states would presume to be retail expenses, absent a contrary showing by the incumbent LEC. Such presumptions recognize that it may be difficult to obtain cost data from incumbent LECs. They also appear to be consistent with section 252(b)(4)(B), which provides that, "[i]f any party refuses or fails unreasonably to respond on a timely basis to any reasonable request from the state commission, then the State commission may proceed on the basis of the best information available to it from whatever source derived."[241] In addition, we could identify specific accounts or portions of accounts in the Commission's Uniform System of Accounts (USOA)[242] that the states should include as "avoided costs." Another issue on which we seek comment is whether states should be permitted or required to allocate some common costs to "avoided cost" activities. We seek comment on these options, and invite parties to propose other options. We also seek comment on how any approach would further our goals of clarity and administrative simplicity.

182. We also seek comment on whether we should establish rules that allocate avoided costs across services. Should incumbent LECs be allowed, or required, to vary the percentage wholesale discounts across different services based on the degree the avoided costs relate to those services?[243] The benefit of any such approach is that it is likely to result in wholesale rates which are more cost-based than a uniform allocation across services, and that should facilitate efficient entry. However, the administrative complexity of this approach may outweigh the benefits. We seek comment on this approach and on other options, such as requiring that avoided costs be allocated proportionately across all services so that there would be a uniform discount percentage off of the retail rate of each service.

183. While most states have taken no action in this area, a few states have considered these issues. California recently established interim wholesale rates based on identified costs attributable to retailing functions. Based on the costs, California required Pacific Bell to offer a 17 percent discount below retail business rates and a 10 percent discount below its retail residential rates. It also required GTE to set wholesale rates 12 percent below its retail business rates and 7 percent below its residential rates.[244] In Illinois, Ameritech has filed wholesale tariffs with rates that are approximately 6 percent below undiscounted residential retail rates and 10 percent below undiscounted business retail rates. These tariffs are in effect, but are subject to revision in a tariff proceeding pending before the Illinois Commerce Commission. Illinois commission staff have recommended that wholesale prices be set on the basis of retail rates less a measure of net avoided costs. The measure of avoided costs would include the net total

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[241] 1996 Act, sec. 101, § 252(b)(4)(B).

[242] 47 C.F.R. Part 32.

[243] For example, if incumbent LECs spend more money marketing vertical features than they spend marketing basic local exchange service, the wholesale rate for vertical features could be reduced by a proportionally greater amount from the retail rate than would be the case for basic local exchange service.

[244] *Order Instituting Rulemaking on the Commission's Own Motion Into Competition for Local Exchange Service*, R.95-040043, *Order Instituting Investigation on the Commission's Own Motion into Competition for Local Exchange Service*, I.95-04-044, Decision (Cal. Pub. Util. Comm'n. Mar. 13, 1996).

assigned costs (TSLRIC plus an allocation of joint costs) of the avoided functions and a pro rata share of the contribution in existing retail rates.[245] We seek comment on whether any of these approaches by the states are consistent with the fundamental objectives of the 1996 Act, and which, if any, might be useful in setting a national policy. We also invite comments discussing the effect of any regulations we adopt on agreements that have already been negotiated or decisions that have already been made by the states.

(3) Relationship to Other Pricing Standards

184. We seek comment on the relationship between rates for unbundled network elements and rates for wholesale or retail service offerings. Some states have adopted rules requiring that the sum of the rates for unbundled network elements be no greater than the retail service rate. The Illinois Commerce Commission calls this the "imputation rule."[246] Proponents of an imputation rule argue that it prevents anticompetitive price squeezes by incumbent LECs,[247] which may set unbundled element prices too high in order to discourage new entrants from purchasing unbundled elements instead of purchasing and reselling the bundled service.

185. It may be difficult to comply with an imputation rule, however, if rates for retail services are below cost, due to implicit, non-competitively neutral, intrastate subsidy flows.[248] For example, assume the cost of basic residential local exchange service is $25, including a $20 cost for the loop element and a $5 cost for the "port" element, and the retail rate for such service (including the federal SLC) is $10. In such a case, application of the imputation rule would require either that the incumbent LEC offer unbundled network elements to its competitors at prices less than cost, or that the retail rate be increased to at least $25.

186. Certain states, including the New York Public Service Commission, have not found it necessary to adopt an imputation rule. When the incumbent LEC sells retail services at prices that are less than cost, it may be that it recovers the difference in other state retail service rates and in interexchange access charges. For example, in the example cited above, the customer may pay 12 cents per minute for intrastate toll traffic that costs only 2 cents per minute to provide, and may generate long-distance traffic for which the incumbent LEC receives access charges of 3 cents per minute even though it costs only 1 cent per minute to provide such access. Under these circumstances, it could be argued that no imputation rule is needed to protect new entrants because, as a matter of market economics or legal obligations, new entrants purchasing unbundled elements priced at cost would be providing all of these services, and thus could collect the same relatively overpriced revenues for toll service, interstate access, vertical features, and other offerings to make up for the underpricing of basic residential local exchange service.[249]

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[245] NARUC Handbook at 65-66.

[246] *Illinois Bell Telephone Company Proposed Introduction of a Trial of Ameritech's Customer First Plan in Illinois*, nos. 94-0096, 94-0117, 94-0146, 94-0301 consolidated, Illinois Commerce Commission (Apr. 7, 1995).

[247] A price squeeze occurs when a vertically-integrated service provider increases the price of the inputs it sells to its non-integrated competitors and/or decreases the price of the products in which it competes with the non-integrated competitors. *See, e.g.*, Jean Tirole, *The Theory of Industrial Reorganization* 193-94 (1988); Janusz A. Ordover & Garth Saloner, *Predation, Monopolization, and Antitrust*, in Richard Schmalensee & Robert Willig (eds.), 1 *Handbook of Industrial Organization* 565-66 (1989).

[248] Interstate subsidy flows are to be addressed by the Joint Board pursuant to section 254(a)-(e).

[249] *See* discussion *supra* in sections II.B.2.c.(1) and II.B.2.e.

By contrast, an entrant that merely resells a bundled retail service purchased at wholesale rates, would not receive the access revenues. There are at least two possible additional objections to an imputation rule when it requires that unbundled elements be priced below cost. First, the unbundled elements could be used to provide services that compete with LEC retail services that are the source of the subsidy. Second, if unbundled elements were priced at less than cost, then efficient facility-based entry would be deterred, as new entrants purchase unbundled network elements at below cost rather than constructing their own facilities. We seek comment on whether it would advance the pro-competitive goals of the 1996 Act for all states to follow an imputation rule, and on the potential pitfalls of such a rule.

187. One action a state could take to address any problems created by adopting an imputation rule when retail rates are below cost would be to restructure its retail rates to eliminate non-competitively neutral, implicit subsidy flows. This restructure could involve either making subsidy flows explicit and competitively neutral, reducing the level of such flows, or a combination. For example, the Illinois Commerce Commission, before enacting an imputation rule, divided the state into three access areas with separate rates in each area. It then restructured rates, so that retail rates in each access area are, on average, above TSLRIC. Are such changes required pursuant to section 254(f)?[250] We seek comment on the relative advantages and detriments of this and other alternatives as either federal policies or policies that individual states could adopt.

188. We note that, to the extent federal implicit universal service subsidies contribute to any problems created by adopting an imputation rule when retail rates are below cost, they will be addressed in the federal-state joint board review of universal service requirements being conducted pursuant to section 254. We further note that at least one incumbent LEC has suggested in another proceeding that the Commission consider commencing a proceeding to determine whether it would be appropriate to enter a preemption order requiring that rates for local service exceed the cost of providing that service.[251] We seek comment on these issues. We also invite comment on whether some interim rules might be appropriate to address this problem before the federal-state joint board established pursuant to section 254 acts, which could be up to nine months after we issue an order in this proceeding.[252] We also solicit comment on any other rules that should be adopted concerning the relationship between services or elements that are necessary to promote the goals of the Act.

4. Duty to Provide Public Notice of Technical Changes

189. Section 251(c)(5) of the 1996 Act requires incumbent LECs to "provide reasonable public notice of changes in the information necessary for the transmission and routing of services

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[250] Section 254(f) provides that a state "may adopt regulations not inconsistent with the Commission's rules to preserve and advance universal service" and "may adopt regulations to provide for additional definitions and standards to preserve and advance universal service within that State only to the extent that such regulations adopt additional specific, predictable, and sufficient mechanisms to support such definitions or standards that do not rely on or burden Federal universal service support mechanisms."

[251] Reply Comments of US West, Inc., *In the Matter of Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket No. 95-185, March 25, 1996, p.5. *But cf.* Washington Utilities and Transportation Commission, Fifteenth Supplemental Order, Docket UT-950200 pp. 96-97 (April 1996) (average residential rate of $10.50 per month covers incremental cost of service and provides a reasonable contribution to US West's overhead).

[252] *See* 1996 Act, sec. 101, §§ 251(d)(1) and 254(a)(2).

using that local exchange carrier's facilities or networks, as well as of any other changes that would affect the interoperability of those facilities and networks."[253] We tentatively conclude that (1) "information necessary for transmission and routing" should be defined as any information in the LEC's possession that affects interconnectors' performance or ability to provide services; (2) "services" should include both telecommunications services and information services as defined in sections 3(46) and 3(20), respectively, of the 1934 Act, as amended; and (3) "interoperability" should be defined as the ability of two or more facilities, or networks, to be connected, to exchange information, and to use the information that has been exchanged.[254] We request comment on what changes should trigger the public notice requirement and on the above tentative conclusions.

190. We note that public notice is critical to the uniform implementation of network disclosure, particularly for entities operating networks in numerous locations across a variety of states. We tentatively conclude that incumbent LECs should be required to disclose all information relating to network design and technical standards, and information concerning changes to the network that affect interconnection.[255] We further tentatively conclude that the incumbent LEC, at a minimum, must provide the following specific information: (1) date changes are to occur; (2) location at which changes are to occur; (3) type of changes; and (4) potential impact of changes. We believe that these proposed categories represent the minimum information that a potential competitor would need in order to achieve and maintain efficient interconnection.

191. In addition, we request comment on how public notice should be provided. We tentatively conclude that full disclosure of the required technical information should be provided through industry forums (*e.g.*, the Network Operations Forum (NOF) or Interconnection Carrier Compatibility Forum (ICCF)) or in industry publications. This approach would build on a voluntary practice that now exists in the industry and would result in broad availability of the information. We seek comment on this tentative conclusion. We further seek comment as to whether incumbent LECs should be required to file with the Commission a reference to this technical information and where it can be located (*e.g.*, an Internet address).

192. We also tentatively conclude that incumbent LECs should be required to: (1) publicly disclose the information within a "reasonable" time in advance of implementation; and (2) make the information available within a "reasonable" time if responding to an individual request. We seek comment on what constitutes a reasonable time in each of these situations, and on whether the Commission should adopt a timetable for disclosing technical information comparable to the disclosure timetable that we adopted in the *Computer III* proceeding.[256] In

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[253] 1996 Act, sec. 101, § 251(c)(5).

[254] *See IEEE Standard Dictionary of Electrical and Electronics Terms* 461 (J. Frank ed. 1984).

[255] 1996 Act, sec. 101, § 251(c)(5); *see, e.g.*, 47 C.F.R. § 64.702.

[256] *Amendment of Section 64.702 of the Commission's Rules and Regulations (Computer III), Phase I*, 104 FCC 2d 958 (1986) (*Phase I Order*), *recon.*, 2 FCC Rcd 3035 (1987) (*Phase I Recon. Order*), *further recon.*, 3 FCC Rcd 1135 (1988) (*Phase I Further Recon. Order*), *second further recon.*, 4 FCC Rcd 5927 (1989) (*Phase I Second Further Recon.*), *Phase I Order and Phase I Recon. Order vacated, California v. FCC*, 905 F.2d 1217 (9th Cir. 1990) (California I); *Phase II*, 2 FCC Rcd 3072 (1987) (*Phase II Order*), *recon.*, 3 FCC Rcd 1150 (1988) (*Phase II Recon. Order*), *further recon.*, 4 FCC Rcd 5927 (1989) (*Phase II Further Recon. Order*), *Phase II Order, vacated, California I*, 905 F.2d 1217 (9th Cir. 1990); *Computer III Remand Proceedings*, 5 FCC Rcd 7719 (1990) (*ONA Remand Order*), *recon.*, 7 FCC Rcd 909 (1992), *pets. for review denied.*

Phase II of that proceeding, the Commission required AT&T and the BOCs to disclose information about network changes or new network services that affect the interconnection of enhanced services with the network at two points in time.[257] First, carriers were required to disclose such information at the "make/buy" point -- that is, when the carrier decides to make itself, or to procure from an unaffiliated entity, any product the design of which affects or relies on the network interface.[258] Second, carriers were required to release publicly all technical information at least twelve months prior to the introduction of a new service or network change that would affect enhanced service interconnection with the network.[259] If a carrier is able to introduce a new service between six and twelve months of the make/buy point, public disclosure was permitted at the make/buy point, but in no event could the carrier introduce the service earlier than six months after the public disclosure.[260] We seek comment as to whether the Commission should adopt a comparable timetable for the section 251(c)(5) network disclosure requirements and how the timetable should be implemented in this context.

193. We seek comment on the relationship between sections 273(c)(1) and (c)(4), which detail BOCs' disclosure requirements "to interconnecting carriers . . . on the planned deployment of telecommunications equipment," and section 251(c)(5), which addresses disclosure requirements for all incumbent LECs. In addition, we seek comment on what enforcement mechanism, if any, should be employed to ensure compliance with the section 251(c)(5) public notice requirement and how we might reconcile the related obligations under sections 251(a), 251(c)(5) and 256 to make them simple to administer.

194. We seek comment on the extent to which safeguards may be necessary to ensure that information regarding network security, national security and proprietary interests of LECs, manufacturers and others are not compromised, and what those safeguards should be.

C. Obligations Imposed on "Local Exchange Carriers" by Section 251(b)

195. Section 251(b) imposes certain specified obligations on all "local exchange carriers." "Local exchange carrier" is defined in section 3(26) as "any person that is engaged in the provision of telephone exchange service or exchange access."[261] Section 3(26) excludes from the definition persons "engaged in the provision of a commercial mobile service under section 332(c), except to the extent that the Commission finds that such service should be included in the definition of such term."[262] We seek comment on whether, and to what extent, CMRS providers should be classified as LECs and the criteria, such as wireless local loop competition

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California v. FCC, 4 F.3d 1505 (9th Cir. 1993) (*California II*); *Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards*, 6 FCC Rcd 7571 (1991) (*BOC Safeguards Order*); *BOC Safeguards Order*, vacated in part and remanded, *California v. FCC*, 39 F.3d 919 (9th Cir. 1994) (*California III*), *cert. denied*, 115 S.Ct. 1427 (1995).

[257] *Phase II Recon. Order*, 3 FCC Rcd 1150, 1164, ¶ 116.

[258] *Id.*

[259] *Id.*

[260] *Id.*

[261] 1996 Act, sec. 3, § 153(a)(44).

[262] 1996 Act, sec. 3, § 153(26).

in the LEC's service area by the CMRS provider, that we should use to make such a determination.[263] We seek comment on whether and how a Commission determination that CMRS providers be granted flexibility to provide fixed wireless local loop service should affect the determination of whether CMRS providers should be included in the definition of local exchange carrier. We also seek comment on whether we may classify a CMRS provider as a LEC for certain purposes but not for others. For example, could we treat a CMRS provider as a LEC for purposes of providing resale but not for providing number portability? We also request that commenters discuss whether we may classify some classes of CMRS providers as LECs, but not others, such as those that are not competing with LECs. For example, in considering whether to classify certain CMRS providers as LECs, should we distinguish between CMRS providers that offer cellular service from those that offer only paging services?

1. Resale

196. Section 251(b)(1) imposes a duty on all LECs "not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications services."[264] New carriers can use resale of other LECs' services to provide service in a geographic area and such resale opportunities facilitate beneficial forms of competition.

197. We seek comment on what types of restrictions on resale of telecommunications services would be "unreasonable" under this provision. We believe that few, if any, conditions or limitations should be permitted because such restrictions generally are inconsistent with the pro-competitive thrust of the Act and would likely be evidence of the exercise of market power. We seek comment on this position. We also seek comment on what standards we should adopt, if any, to determine whether a resale restriction should be permitted. Further, we seek comment on whether any restriction on resale should be presumed to be unreasonable absent an affirmative showing that the restriction is reasonable, and if so, how could such a showing be made. Finally, commenters should address whether any of the issues discussed above with respect to resale by incumbent LECs as required under section 251(c)(4) should be applied to other LECs pursuant to section 251(b)(1).

2. Number Portability

198. Section 251(b)(2) imposes a duty on all LECs "to provide, to the extent technically feasible, number portability in accordance with the requirements prescribed by the Commission."[265] This provision reflects Congress's recognition that pro-competitive policies must necessarily address the consumer's preferences and circumstances in the new competitive environment. By requiring that customers be able to switch local service providers without changing their telephone number, Congress seeks to lower barriers to entry and promote competition in the local exchange market.[266] Section 3(30) of the 1996 Act defines number portability as "the ability of users of telecommunications services to retain, at the same location,

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[263] We note that we might have authority under section 332 or other provisions of the Act to impose on CMRS providers obligations comparable to the ones set forth in section 251(b).

[264] 1996 Act, sec. 101, § 252(b)(1).

[265] 1996 Act, sec. 101, § 251(b)(2).

[266] *See, e.g.*, statement of Sen. Robert Kerrey ("Quite simply, telephone customers -- both business and residential -- are not as willing to switch phone companies if they also have to switch phone numbers.") 141 Cong. Rec. S8313 (June 14, 1995).

existing telecommunications numbers without impairment of quality, reliability, or convenience when switching from one telecommunications carrier to another."[267] Section 251(e)(2) of the 1996 Act mandates that the cost of number portability "be borne by all telecommunications carriers on a competitively neutral basis as determined by the Commission."[268] This requirement helps to ensure that no single category of telecommunications carriers will be disadvantaged competitively by bearing all or substantially all of the costs of number portability, and will help enhance fair and efficient local exchange competition.

199. On July 13, 1995, the Commission adopted a Notice of Proposed Rulemaking in CC Docket No. 95-116 seeking comment on a wide variety of technical and policy issues concerning number portability.[269] On March 14, 1996, the Common Carrier Bureau issued a Public Notice in that docket seeking comment on how passage of the 1996 Act may affect the issues raised in the *Number Portability NPRM*.[270] Accordingly, in an effort to adopt number portability rules expeditiously, we will address number portability issues raised by the 1996 Act in our ongoing proceeding on number portability. That proceeding will specifically address, *inter alia*, the deployment schedule that incumbent LECs must follow for providing number portability, the manner in which it can be provided, and the recovery of number portability costs.

200. Since our July NPRM, a number of states have taken significant steps to implement service provider number portability. Washington state completed a number portability trial using the Local Area Number Portability (LANP) method in December, 1995,[271] and New York is currently conducting a number portability trial in Manhattan using the Carrier Portability Code (CPC) method.[272] Several states have established task forces with industry participants to investigate the development and implementation of long-term number portability methods.[273] In addition, the State commissions of Illinois, Colorado, New York, and Georgia have adopted the recommendations of their staffs and task forces to implement AT&T's Location Routing Number (LRN).[274] Other states, such as Indiana, Michigan, Ohio, and Wisconsin, have selected, or are about to select, LRN without first establishing task forces. Switch vendors have indicated that the software required to support LRN generally will be available in the second quarter of 1997. Consequently, Illinois plans to deploy LRN in the Chicago LATA in the third quarter of 1997.

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[267] 1996 Act, sec. 3, § 153(30).

[268] 1996 Act, sec. 101, § 251(e)(2).

[269] *Telephone Number Portability*, CC Docket No. 95-116, 10 FCC Rcd 12350 (1995)(*Number Portability NPRM*).

[270] *Further Comment, Telephone Number Portability*, Public Notice, DA 96-358 (Mar. 14, 1996).

[271] LANP is a database solution whereby each customer is assigned a unique ten-digit customer number address (the dialed number) and a unique ten-digit network node address (the number that identifies the location of the switch to which the customer has forwarded his or her number).

[272] CPC is a database solution in which a three-digit code is assigned to each carrier in a given area.

[273] Those states include Alabama, Arizona, California, Connecticut, Florida, Georgia, Illinois, Kansas, Maryland, New York, Oregon, Texas, and Washington.

[274] LRN is a database solution in which a ten-digit location routing number is used to identify the switch that serves a particular customer or customers.

and Georgia has ordered implementation of LRN as soon as it becomes fully available. Ohio plans to have implemented a database number portability method by October, 1997.

201. We note that while several states have taken action toward implementation of service provider portability, no long-term number portability solutions are in use today, and approximately 27 states have yet to address issues related to long-term number portability. By enacting section 251(b)(2) of the 1996 Act, Congress has stated that consumers should be able to change local telephone companies without changing their phone numbers, and that this capability is critical to the development of local exchange competition. Although there are methods of providing number portability today, these mechanisms generally are considered less efficient and less pro-competitive than the long-term solutions now being developed. For example, existing methods rely on the incumbent LEC network, generally do not support all current vertical services, and are wasteful of numbering resources. Accordingly, we intend to take expeditious action on number portability issues.

3. Dialing Parity

202. Section 251(b)(3) of the 1996 Act requires LECs "to provide dialing parity to competing providers of telephone exchange service and telephone toll service." Under section 3(15) of the 1934 Act, as amended, "dialing parity" means:

> that a person that is not an affiliate of a local exchange carrier is able to provide telecommunications services in such a manner that customers have the ability to route automatically, without the use of any access code, their telecommunications to the telecommunications services provider of the customer's designation from among 2 or more telecommunications services providers (including such local exchange carrier).[275]

This dialing parity requirement will foster local exchange, long distance, and international competition by ensuring that each customer has the freedom to choose among different carriers for different services without the burden of dialing additional access codes or personal identification numbers.

203. It is our understanding that some form of intraLATA toll dialing parity is available or has been ordered in eighteen states.[276] In the thirty-two states where dialing parity has not been required, competition in the intraLATA toll market generally has been permitted only with the use of access codes, which require customers to dial a five- or seven-digit prefix before dialing the called party's telephone number.[277] Under the 1996 Act, LECs are precluded from relying upon access codes as a means of providing dialing parity to competitive telecommunications providers. Thus, when the 1996 Act became law, "dialing parity" did not exist in most states and, where some form of dialing parity had been required, implementation requirements and methodologies varied across the states.

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[275] 1996 Act, sec. 3, § 3(15).

[276] Those states are Alaska, Arizona, Connecticut, Florida, Georgia, Illinois, Indiana, Iowa, Kentucky, Michigan, Minnesota, New Jersey, New York, Ohio, Pennsylvania, Virginia, West Virginia, and Wyoming.

[277] Sometimes referred to as "10XXX" or "101XXXX" dialing, callers may reach a long distance carrier in states where such dialing arrangements are authorized, by dialing a five-digit carrier access code ("10XXX," with "XXX" representing a three-digit carrier identification code) or a seven-digit carrier access code ("101XXXX," with "XXXX" representing a carrier identification code).

204. On April 4, 1994, the Commission adopted a Notice of Proposed Rulemaking that sought comment on a variety of issues related to the administration of the North American Numbering Plan (NANP),[278] including whether to impose dialing parity requirements on LECs for interstate, intraLATA toll traffic.[279] In a subsequent Order, adopted July 13, 1995, the Commission deferred consideration of the dialing parity issue.[280]

205. Comments in response to the *NANP NPRM* as to *whether* LECs should be required to implement dialing parity have become moot in light of the mandatory dialing parity provisions in section 251(b)(3) of the 1996 Act. In addition, because the *NANP NPRM* proposed requiring dialing parity solely for interstate, intraLATA toll traffic,[281] comments received in response to that notice do not address all of the section 251(b)(3) dialing parity requirements that apply to all interstate and intrastate telephone exchange local calling, and telephone toll services. We address the dialing parity issue anew in this Notice in light of the broader dialing parity directives contained in the 1996 Act. We ask parties to file in this docket those portions of any comments filed in response to the *NANP NPRM* that address particular methodologies for implementing intraLATA toll dialing parity and that are relevant to our consideration of the dialing parity requirements in the 1996 Act.

206. Section 251(b)(3) makes no distinction among international, interstate and intrastate traffic for purposes of the dialing parity provisions. Based on the absence of any such distinctions in defining the scope of the dialing parity requirements, we tentatively conclude that section 251(b)(3) creates a duty to provide dialing parity with respect to all telecommunications services that require dialing to route a call, and encompasses international as well as interstate and intrastate, local and toll services. We believe that this interpretation is consistent with the statutory definition of dialing parity and would open the local and long distance markets to the greatest number of competitive telecommunications services providers. We seek comment on this tentative conclusion.

207. The statutory definition of dialing parity provides that the customer must have the ability to choose "from among 2 or more telecommunications services providers (including such local exchange carrier)."[282] LECs are precluded from relying on access codes as a means of

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[278] Administration of the North American Numbering Plan, *Notice of Proposed Rulemaking*, CC Docket No. 92-237, 9 FCC Rcd 2068 (1994) (*NANP NPRM*). The NANP is the basic numbering scheme that permits calls to be placed within the United States, Canada, Bermuda and most of the Caribbean with, at most, 11-digit dialing.

[279] Specifically, that Notice asked whether the Commission should "require local exchange carriers to . . . deliver those [interstate, intraLATA toll] calls to the carrier preselected by the end user unless the preliminary routing numbers indicate otherwise." *NANP NPRM*, para. 58.

[280] Administration of the North American Numbering Plan, *Report and Order*, CC Docket No. 92-237, FCC 95-283 (1995), para. 7 (recon. *pending*) (*NANP Order*).

[281] An "interstate, intraLATA toll call" is a call that (1) crosses a state boundary but does not cross a LATA boundary and (2) is subject to a charge. For this purpose, the term "state" includes the District of Columbia and the territories of the United States. 47 U.S.C. § 153(v). A call from Silver Spring, Maryland to Manassas, Virginia (currently handled by Bell Atlantic) is an example of such a call.

[282] 1996 Act, sec. 3, § 3(15).

providing dialing parity to competitive service providers.[283] The Act, however, does not specify what methods should be used to implement dialing parity. We believe that presubscription represents the most feasible method of achieving dialing parity in long distance markets consistent with the definition of dialing parity in section 3(15) of the 1996 Act.[284] In this context, "presubscription" refers to the process by which a customer preselects a carrier, to which all of a particular category or categories of calls on the customer's line will be routed automatically.

208. Presubscription to a carrier other than the customer's local exchange carrier has not been available for *interstate*, intraLATA toll calls nor has it been available in most states for *intrastate*, intraLATA toll calls. Instead, BOCs automatically carry these calls rather than routing them to a presubscribed carrier of the customer's choice. If the state from which the customer is calling has authorized competition, but has not ordered presubscription in the intraLATA toll market, a customer wishing to route an intraLATA call to an alternative carrier typically must dial the carrier access code of the alternative carrier.

209. We seek comment on specific alternative methods for implementing local and toll dialing parity, including various forms of presubscription, in the interstate and intrastate long distance and international markets, that are consistent with the statutory requirements set forth in the 1996 Act. Specifically, we seek information and comment on the standards, if any, that have been developed to address or define local or toll dialing parity, the consistency of those standards with the statutory definition of dialing parity set forth in the 1996 Act, and the extent to which there is a need for the development of further standards.

210. We note that there is substantial variation in the intraLATA toll dialing parity requirements and implementation methodologies that individual states have adopted. For example, some states have adopted a presubscription methodology that allows a customer to choose between the incumbent LEC and any interexchange carrier that is authorized in that state to carry the customer's intrastate, intraLATA toll calls.[285] Other states have adopted a presubscription methodology that allows the customer a choice only between the incumbent LEC and the same interexchange carrier that the customer is currently presubscribed to for interLATA long-distance calling.[286] A "multi-PIC" or "smart-PIC" presubscription methodology, which

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[283] 1996 Act, sec. 3, § 3(15).

[284] Although we anticipate that presubscription represents the most feasible method for achieving long distance dialing parity (*see* discussion of PIC presubscription methodology below), we note that presubscription does not represent the method by which carriers would accomplish local dialing parity. Rather, the customer's ability to select a telephone exchange service provider and make local telephone calls without dialing extra digits will be accomplished through the unbundling, number portability and interconnection requirements of Section 251.

[285] *See, e.g., Intra-Market Service Area Presubscription and Changes in Dialing Arrangements Related to the Implementation of Such Presubscription*, Interim Order (Ill. Comm. Comm'n Apr. 7, 1995) (adopting "2-PIC" presubscription method based on belief that "2-PIC" method affords customers additional choice and opens market to more participants); *Opinion and Order Concerning Intra-LATA Presubscription, Case 28425*, Opinion No. 94-11 (N.Y. Pub. Serv. Comm'n April 4, 1994) (adopting intraLATA toll presubscription using "2-PIC" method).

[286] *See, e.g.*, In re Cincinnati Bell Telephone Company, Case No. 93-432-TP-ALT Office of Consumers' Counsel v. Cincinnati Bell Telephone Company Case No. 93-551-TP-CSS, 151 P.U.R.4th 487 (Ohio Pub. Util. Comm'n May 5, 1994) (adopting "modified 2-PIC" presubscription methodology).

would enable customers to presubscribe to multiple carriers for various categories of long-distance calling, also is being considered in some states.[287] We seek comment on whether any of the presubscription methods adopted by the states could be implemented in national dialing parity standards consistent with the requirements of the 1996 Act. We also seek comment as to the categories of long distance traffic (*e.g.*, intrastate, interstate, and international traffic) for which a customer should be entitled to choose presubscribed carriers, and whether a uniform, nationwide methodology is necessary. In the absence of uniform, federal rules, we ask commenters, and state commissions in particular, to address the difficulties state commissions might experience in implementing the dialing parity requirements of the 1996 Act. Finally, we seek comment on what Commission action, if any, is necessary to implement dialing parity for international calls

211. We tentatively conclude that, pursuant to section 251(b)(3), a LEC is required to permit telephone exchange service customers within a defined local calling area to dial the same number of digits to make a local telephone call, notwithstanding the identity of a customer's or the called party's local telephone service provider. We believe that this interpretation of the dialing parity requirement as applied to the provision of telephone exchange service would best facilitate the introduction of competition in local markets by ensuring that customers of competitive service providers are not required to dial additional access codes or personal identification numbers in order to make local telephone calls. We seek comment on this tentative conclusion and seek information as to how this local dialing parity requirement should be implemented.

212. For most LECs, the 1996 Act provides no timetable for implementing dialing parity. Section 271(e)(2)(A) requires BOCs, however, to provide intraLATA toll dialing parity in a state "coincident with" its exercise of authority to provide interLATA services in that state, or three years from the date of enactment of the 1996 Act, whichever is earlier.[288] Section 271(e)(2)(B) limits the ability of states to impose dialing parity requirements on a BOC prior to the earlier of those two dates.[289] We seek comment on what implementation schedule should be adopted for dialing parity obligations for all LECs.

213. The 1996 Act does not require that procedures be established to permit consumers to choose among competitive telecommunications providers (*e.g.*, through balloting). We seek comment as to whether the Commission should require LECs to notify consumers about carrier selection procedures or impose any additional consumer education requirements. Finally, we seek comment on an alternative proposal that would make competitive telecommunications providers responsible for notifying customers about carrier choices and selection procedures through their own marketing efforts.

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[287] *See, e.g.*, In re Local Exchange Competition and Other Competitive Issues Case No. 95-845-TP-COI, 164 P.U.R.4th 214 (Ohio Pub. Util. Comm'n Sept. 27, 1995) (staff recommendation to require Smart- or Multi-PIC methodology if it is determined that technology is available, or "Full 2-PIC" methodology if it is determined that Smart-PIC technology is not available).

[288] 1996 Act, sec. 151, § 271(e)(2)(A), § 271(e)(2)(B). Exceptions from this requirement are made for single-LATA states and states that issued an order by December 19, 1995 requiring intraLATA toll dialing parity. The 1996 Act also requires a BOC seeking to provide in-region interLATA services to demonstrate, *inter alia*, that it has implemented intraLATA toll dialing parity. Section 271(c)(2)(B)(xii) states that: "[a]ccess or interconnection provided or generally offered to other telecommunications carriers . . . [must include] . . . [n]ondiscriminatory access to such services or information as are necessary to allow the requesting carrier to implement local dialing parity in accordance with the requirements of section 251(b)(3)."

[289] 1996 Act, sec. 151, § 271(e)(2)(B).

214. In addition to the duty to provide dialing parity, Section 251(b)(3) also imposes the duty on all LECs to provide competing telecommunications services providers with "nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listing, with no unreasonable dialing delays."[290] As a general matter, we tentatively conclude that "nondiscriminatory access" means the same access that the LEC receives with respect to such services. We seek comment on this tentative conclusion. We also seek comment as to how the Commission should implement the nondiscriminatory access provisions that are contained in section 251(b)(3) as is discussed in more detail below.

215. More specifically, we interpret "nondiscriminatory access to telephone numbers" to mean that competing telecommunications providers must be provided access to telephone numbers in the same manner that such numbers are provided to incumbent LECs. Currently, the largest local exchange carrier in each area code serves as the central office (CO) code administrator, the entity that is responsible for the assignment and administration of telephone numbers.[291] In 1995, the Commission ordered that the functions associated with the assignment and administration of local telephone numbers be centralized and transferred from the largest LECs to a newly created NANP Administrator.[292] New section 251(e)(1) directs the Commission to create or designate one or more impartial entities to administer telecommunications numbering and to make such numbers available on an equitable basis.[293] In light of the directives contained in the *NANP Order* and section 251(e)(1), we seek comment as to what, if any, additional Commission action is necessary or desirable to ensure nondiscriminatory access to telephone numbers consistent with the requirements of section 251(b)(3).

216. We interpret "nondiscriminatory access to . . . operator services" by LECs to mean, at least in part, that a telephone service customer, regardless of the identity of his local telephone service provider, must be able to connect to a local operator by dialing "0" or "0" plus the desired telephone number. For purposes of this provision, we tentatively define "operator services" as any automatic or live assistance to a consumer to arrange for billing or completion or both of a telephone call through a method other than: (1) automatic completion with billing to the telephone from which the call originated, or (2) completion through an access code by the consumer, with billing of an account previously established with the telecommunications service provider by the consumer.[294] We seek comment on this proposed definition and on what, if any, Commission action is necessary to implement the nondiscriminatory access requirements for operator services under section 251(b)(3). We ask commenters to address whether the duty imposed on LECs to provide nondiscriminatory access to operator services includes the duty to resell operator services to non-facilities-based competing providers or facilities-based competing providers.

217. We further interpret "nondiscriminatory access to . . . directory assistance and

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[290] 1996 Act, sec. 101, § 251(b)(3).

[291] In the United States, current CO code administrators include Alascom, Ameritech, Bell Atlantic, BellSouth, Cincinnati Bell, GTE, NYNEX, Pacific Bell, Southern New England Telephone, SBC Communications, and US West.

[292] *See NANP Order* at para. 73.

[293] *See* discussion of "Number Administration" below.

[294] This proposed definition is based on the definition of "operator services" that is set forth at 47 U.S.C. § 226(a)(7) and, for purposes of this proceeding, has been modified to address the 1996 Act.

directory listing" by LECs to mean that all telecommunications services providers' customers must be able to access each LEC's directory assistance service and obtain a directory listing in the same manner, notwithstanding (1) the identity of a requesting customer's local telephone service provider, or (2) the identity of the telephone service provider for a customer whose directory listing is requested through directory assistance. We seek comment on this interpretation and on what, if any, Commission action is necessary or desirable to implement nondiscriminatory access to directory assistance and directory listing as required by section 251(b)(3). We also seek comment on whether customers of competing telecommunications providers can access directory assistance by dialing 411 or 555-1212,[395] or whether an alternative dialing arrangement is needed in order to make directory assistance databases accessible to all providers. We ask commenters to address whether the duty imposed on LECs to provide nondiscriminatory access to directory assistance includes the duty to resell 411 or local 555-1212 directory assistance services to non-facilities-based competing providers or to facilities-based competing providers.

218. Section 251(b)(3) prohibits "unreasonable dialing delays." We seek comment on the appropriate definition of the term "dialing delay" and on appropriate methods for measuring and recording that delay. For example, the term "dialing delay" might refer to the period that begins when the caller completes dialing a call and ends when a ringing tone or busy signal is heard on the line. Alternatively, "dialing delay" might refer to the period beginning when the caller completes dialing a call and ending when the call is delivered by the incumbent LEC to a competing service provider. Another relevant measure might include the period beginning when a customer goes off hook and ending when a dialtone is heard on the line. We recognize the confusion that has centered around the context-specific use of the terms post-dial delay, access time, call set-up time, and dialtone delay.[396] Accordingly, we ask interested parties to define clearly the time being measured rather than rely upon a definition of a term that may have been used in particular proceedings. Finally, we ask commenters to identify a specific period that would constitute an "unreasonable" dialing delay.

219. The 1996 Act does not specify how LECs would recover costs associated with providing dialing parity to competing providers. We seek comment on what, if any, standard should be used for arbitration to determine the dialing parity implementation costs that LECs should be permitted to recover, and how those costs should be recovered.

4. Access to Rights-of-Way

220. Section 251(b)(4) imposes upon LECs the "duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224."[397] Section 224, which predates the enactment of the 1996 Act, states that the Commission "shall regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable, and shall adopt procedures necessary and appropriate to hear and resolve

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[395] As used here, 555-1212 refers only to the local directory assistance listing.

[396] *See, e.g., Southwestern Bell Telephone Company Revisions to Tariff F.C.C. No. 6*, Memorandum Opinion and Order, FCC 91-173, 6 FCC Rcd 3760, n.5 (1991); *Policy and Rules Concerning Rates for Dominant Carriers*, Memorandum Opinion and Order, CC Docket No. 87-313, 6 FCC Rcd 2974 (Com. Car. Bur. 1991).

[397] 1996 Act, sec. 101, § 251(b)(4).

complaints concerning such rates, terms, and conditions."[298] Thus, under section 224, if an entity provided access to poles, ducts, conduits, and rights-of-way, it had to do so on rates, terms, and conditions that were just and reasonable, but there was no specific requirement to provide access to poles, ducts, conduits and rights-of-way. Section 251(b)(4) establishes an additional requirement for LECs to provide access to poles, ducts, conduits, and rights-of-way, consistent with the requirements in section 224. Moreover, amendments to section 224(a)(1) state expressly that LECs are subject to the requirements of section 224.[299] Thus, section 251(a)(4), in conjunction with section 224, requires LECs to provide access to poles, ducts, conduits, and rights-of-way on just and reasonable rates, terms, and conditions. This requirement is vital to the development of local competition, because it ensures that competitive providers can obtain access to facilities necessary to offer service.

221. Section 703 of the 1996 Act added and amended several provisions of section 224 of the 1934 Act. Specifically, section 703 amended sections 224(a)(1), (a)(4), (c)(1) and (c)(2)(B), and added sections 224(a)(5), (d)(3), (e), (f), (g), (h) and (i).[300] We will adopt rules implementing several of these provisions in one or more separate proceedings.[301] In this proceeding, however, we believe that we should address issues raised by new sections 224 (f) and (h), to ensure that we have an opportunity to seek comment and establish any rules necessary to implement section 251(b)(4) within the six month period established by the statute.

222. Section 224(f) provides:

> (1) A utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it.
>
> (2) Notwithstanding paragraph (1), a utility providing electric service may deny a cable television system or any telecommunications carrier access to its poles, ducts, conduits, or rights-of-way, on a non-discriminatory basis where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes.[302]

We seek comment as to the meaning of "nondiscriminatory access" with respect to this provision. For example, to what extent must a LEC provide access to poles, ducts, conduits, and rights-of-way on similar terms to all requesting telecommunications carriers? Must those terms be the same as the carrier applies to itself or an affiliate for similar uses? Are there any legitimate bases for distinguishing conditions of access? We seek comment on specific reasons of safety, reliability, and engineering purposes, if any, upon which access could be denied consistent with

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[298] 47 U.S.C. § 224(b)(1).

[299] 1996 Act, sec. 703, § 224(a)(1).

[300] 1996 Act, sec. 703, § 224.

[301] For example, in a separate proceeding within the two-year period specified by section 224(e), we will "prescribe regulations . . . to govern the charges for pole attachments used by telecommunications carriers to provide telecommunications services, when the parties fail to resolve a dispute over such charges." 1996 Act, sec. 703(7), § 224(e)(1).

[302] 1996 Act, sec. 703(7), § 224(f).

sections 224(f)(1) and 251(b)(4).

223. We seek comment on specific standards under section 224(f)(2) for determining when a utility has "insufficient capacity" to permit access. Likewise, we seek comment as to the conditions under which access may be denied for "reasons of safety, reliability and generally applicable engineering purposes." For example, should we establish regulations that require a certain minimum or quantifiable threat to reliability before a utility may deny access under section 224(f)(2)? Should we establish regulations that expressly impose on utilities the burden of proving that they are justified in denying access pursuant to section 224(f)(2)? May we, and should we, establish regulations to ensure that a utility fairly and reasonably allocates capacity?

224. Section 224(h) provides that whenever "the owner of a pole, duct, conduit, or right-of-way intends to modify or alter such pole, duct, conduit, or right-of-way," the owner must provide written notification of such action "to any entity that has obtained an attachment to such conduit or right-of-way so that such entity may have a reasonable opportunity to add to or modify its existing attachment. An entity that adds to or modifies its existing attachment after receiving such notification shall bear a proportionate share of the costs incurred by the owner in making such pole, duct, conduit, or right-of-way accessible."[383]

225. We seek comment on whether we should establish requirements regarding the manner and timing of the notice that must be given under this provision to ensure that the recipient has a "reasonable opportunity" to add to or modify its attachment. In addition, we seek comment on whether to establish rules to determine the "proportionate share" of the costs to be borne by each entity, and if so, how such a determination should be made. We also seek comment on whether any payment of costs should be offset by the potential increase in revenues to the owner. For example, if the owner of a pole modifies the pole so as to permit additional attachments, for which it can collect additional revenues, should such potential revenues offset the costs borne by the entities that already have access to the pole? We also seek comment on whether we should impose any limitations on an owner's right to modify a facility and then collect a proportionate share of the costs of such modification. For example, should we establish rules that limit owners from making unnecessary or unduly burdensome modifications or specifications?

5. Reciprocal Compensation for Transport and Termination of Traffic

a. Statutory Language

226. Section 251(b)(5) provides that each LEC has the duty to "establish reciprocal compensation arrangements for the transport and termination of telecommunications." Section 252(d)(2) states that, for the purpose of an incumbent LEC's compliance with section 251(b)(5), a state commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless such terms and conditions both: (1) provide for the "mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier," and (2) "determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls." That subsection further provides that the foregoing language shall not be construed "to preclude arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as bill-and-keep arrangements)," or to authorize the Commission or any state to "engage in any rate regulation proceeding to establish with particularity the additional costs of transporting or

[383] 1996 Act, sec. 703(7), § 224(h).

terminating calls, or to require carriers to maintain records with respect to the additional costs of such calls." The legislative history notes that "mutual and reciprocal recovery of costs may include a range of compensation schemes, such as in-kind exchange of traffic without cash payment (known as bill-and-keep arrangements)."[104] The statutory duty to establish reciprocal compensation arrangements for transport and termination furthers the pro-competitive goals of the 1996 Act by ensuring that all LECs receive reasonable compensation for transporting and terminating the traffic of competing local networks with which they are interconnected. It also furthers competition by ensuring that incumbent LECs, in particular, do not charge excessive rates for such transport and termination. As previously discussed in Section II.B.2.d.(1), we believe that the Commission is authorized to promulgate rules to guide the states in applying section 252(d).

b. State Activity

227. While most states have not addressed pricing for transport and termination of traffic among local competitors, a number of states have taken such actions to foster reciprocal compensation arrangements between incumbent LECs and wireline and wireless competitors. In the states that allow competition for local exchange services, there are at least three different systems in place to allow for reciprocal compensation between competing local networks, although many of these arrangements are interim pending the establishment of permanent rules. Some states have adopted mutual compensation policies with rates for termination of traffic subject to tariff regulation by the state commission.[105] Other states have required bill and keep arrangements, at least on an interim basis, such as, the Washington Utilities and Transportation Commission.[106] We discuss bill and keep arrangements in more detail below, at section II.C.5.f. Third, a number of states have directed incumbent LECs and prospective competing carriers to negotiate arrangements, but have not imposed detailed regulatory requirements with respect to those arrangements.

228. The Pennsylvania Public Utilities Commission has created an interim escrow arrangement to govern mutual compensation for termination of local calls to allow for the start-up of local exchange competition until a permanent rate can be developed. Each party makes an initial payment and then continuing monthly payments into an escrow account. After the Pennsylvania commission determines the appropriate rates for termination of local traffic, the parties will calculate the amounts owed to each party and the escrow funds will be distributed accordingly. This mechanism allows local competition to commence immediately, and gives all parties incentives to conclude the development of a permanent rate, either through negotiation or by the Pennsylvania commission.[107]

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[104] Joint Explanatory Statement at 120.

[105] For specific examples, *see CMRS Notice* at para. 71.

[106] *See Washington Utilities and Transportation Commission v. U S West*, Docket Nos. UT-941464-65, UT-950146, UT-950265, Fourth Supplemental Order Rejecting Tariff Filings and Ordering Refiling; Granting Complaints, In Part (Wash. Util. & Transp. Comm., Oct. 31, 1995) (adopting the bill and keep method for reciprocal compensation arrangements between incumbent LECs and new entrants as an interim measure, to be replaced later by a capacity-based charge). California (for one year), Connecticut (for eighteen months), and Oregon (for two years) are other states that have adopted a bill and keep arrangement on an interim basis. After these initial periods, the interconnecting firms will be expected to pay incumbent LECs for call termination and vice versa at a cost-based rate.

[107] NARUC Handbook at 109.

229. Illinois, Maryland and New York have established different rates for termination of a competitor's traffic, depending upon whether the traffic is terminated at the incumbent LEC's end office or at a tandem switch.[308] California and Michigan, however, have established only one rate that applies to termination of a competitor's traffic without regard to whether the call is terminated at an end office or at a tandem switch.[309]

c. Definition of Transport and Termination of Telecommunications

230. We seek comment on whether "transport and termination of telecommunications" under section 251(b)(5) is limited to certain types of traffic. The statutory provision appears at least to encompass telecommunications traffic that originates on the network of one LEC and terminates on the network of a competing LEC in the same local service area as well as traffic passing between LECs and CMRS providers. We seek comment on whether it also encompasses telecommunications traffic passing between neighboring LECs that do not compete with one another. While the issues here overlap with those in our discussion, *supra*, of section 251(c)(2), the text of the two sections are different and thus commenters should note that the issues are not necessarily identical.[310]

231. Because section 252(d)(2) is entitled "Charges for Transport and Termination of Traffic," it could be interpreted to permit separate charges for these two components of reciprocal compensation. As discussed in the section on pricing of interconnection and unbundled network elements, economic theory dictates that dedicated facilities should be priced on a flat-rated basis.[311] We seek comment on whether we should require that states price facilities dedicated to an interconnecting carrier, such as the transport links from one carrier's switch to the meet point with an interconnecting carrier, on a flat-rated basis. We invite comment on other possible interpretations of the statutory distinction between "transport" and "termination" of traffic.

d. Rate Levels

232. In considering the pricing policies for transport and termination of traffic, we seek comment on whether the pricing provisions in Section 252(d) should be viewed independently, or whether they should be considered together. This question arises particularly with respect to section 252(d)(1), relating to interconnection and unbundled elements, and section 252(d)(2), relating to the transport and termination of traffic.[312] Because the statute uses different language for interconnection and unbundled elements and transport and termination of traffic, each standard could be interpreted in a different way based on the different language used in each section. This would require that each incumbent LEC offering be identified as falling within one

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[308] *Id.* at 65, 74, and 81.

[309] *Id.* at 4, 77.

[310] As noted in Section II.B.2.a., we ask parties not to repeat arguments on issues they have already addressed in CC Docket No. 95-185. Instead, they should address in this docket any specific issue that is not already addressed in CC Docket No. 95-185.

[311] *See supra* Section II.B.2.d.4. We also raised the question of flat-rate charges for dedicated transport associated with exchange of traffic between carriers in the *CMRS Notice* at paras. 42-48.

[312] *See* discussion, *supra*, of section 251(c)(2) concerning the general relationship between interconnection and transport and termination of traffic.

particular category. For example, if a carrier terminates a call to one of its customers using unbundled facilities purchased from an incumbent LEC, the unbundled standard would apply. If a carrier delivers a call to the incumbent LEC for termination to a customer on the incumbent LEC's network, then the termination standard would apply.

233. In certain instances, however, transport and termination under reciprocal compensation may be difficult or impossible to distinguish from unbundled elements. For example, transport between an incumbent LEC's central office and an interconnector's network could be considered either of the foregoing. In such a case, the use of different pricing rules for the different categories may create inconsistencies in the pricing of similar services. This could create economic inefficiencies. We seek comment on whether the statute permits states to use identical pricing rules for each category and, if different rules are used for each, whether it will be possible to distinguish transport and termination from the other categories of service. We also seek comment on whether, if two different pricing rules could apply to a particular situation, we should require that the new entrant be able to choose between them.

234. We seek comment on whether we should establish a generic pricing methodology or impose a ceiling to guide the states in setting the charge for the transport and termination of traffic, and whether any such generic pricing methodology or ceiling should be established using the same principles that might be used to establish any ceiling for interconnection and unbundled elements. We invite parties to suggest any other rules we might establish to assist states. We also seek comment on whether we should mandate a floor for state pricing of reciprocal compensation. The question of whether any floors should be imposed on the charge for transport and termination of traffic is complicated by the additional questions, discussed below, of whether competing LECs should be required to charge symmetrical rates, and to what extent bill and keep arrangements may or should be used. We seek comment on these issues. We also seek comment on the meaning of section 252(d)(2)(B)(ii), which prohibits "any rate regulation proceeding to establish with particularity the additional costs of transporting or terminating calls" and any requirement that carriers "maintain records with respect to the additional costs of such calls."[313] We seek comment on whether one or more of the state policies for mutual compensation for transport and termination of traffic could serve as a model for national policies. We also seek comment on state policies that the commenter believes are inconsistent with the goals of the 1996 Act or that are inadvisable from a policy perspective. Parties are also invited to comment on the possible consequences of requiring new entrants to negotiate reciprocal compensation arrangements with incumbents under ground rules that may vary widely from state to state. We also seek comment on whether provisions to maintain existing arrangements are necessary under section 251(d)(3).

e. Symmetry

235. Symmetrical compensation arrangements are those in which the rate paid by an incumbent LEC to a competitor for transport and termination of traffic is the same as the rate the incumbent LEC charges the competitor for the same service. We note that incumbent LECs are not likely to need to purchase significant amounts of interconnection or unbundled elements from competitors, except for transport and termination of traffic. We therefore consider symmetrical compensation arrangements as a possible additional requirement only for transport and termination of traffic. We seek comment on whether a rate symmetry requirement is consistent with the statutory requirement that rates set by states for transport and termination of traffic be based on "costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier," and "a reasonable

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[313] 1996 Act, sec. 101, § 252(d)(2)(B)(ii).

approximation of the additional costs of terminating such calls."[314]

236. Symmetrical compensation rates based on the incumbent LEC's rate are administratively easier to derive and manage than asymmetrical rates based on the costs of each of the respective networks. Setting asymmetric, cost-based rates might require evaluating the cost structure of nondominant carriers, which would be complex and intrusive. Symmetrical rates also could satisfy the requirement of section 252(d)(2) that costs be determined "on the basis of a reasonable approximation of the additional costs of terminating such calls," by using the incumbent LEC's costs and rates for transport and termination of traffic as a proxy for the costs incurred by new entrants. Moreover, symmetrical rates could reduce an incumbent LEC's ability to use its bargaining strength to negotiate an excessively high termination charge that competitors would pay the incumbent and an excessively low termination rate that the incumbent would pay competitors. Further complicating this issue is that a competitor may possess a degree of market power over the incumbent LEC that needs to terminate a call on the competitor's network because the decision to place the call lies with the incumbent's customer (who may or may not be aware that the call's intended recipient is on a different network). The competitor, therefore, may have an incentive and the ability to charge high rates to the incumbent for transport and termination of traffic on its network. Finally, symmetrical rates may give carriers a greater incentive to reduce their costs, because the rates they can charge for transport and termination of traffic may not be based directly on their own costs.

237. On the other hand, symmetrical interconnection rates have certain disadvantages. Different networks, even those that use similar technologies, may have different cost characteristics. If interconnection rates were fully cost-based, then instead of setting symmetric rates, one LEC might pay a competitor different interconnection rates for transport and termination than it receives from its competitor. Further, rate symmetry in some circumstances may not resolve existing bargaining power imbalances. For instance, a LEC might be able to use its bargaining power to extract a symmetrical rate higher than relevant costs, or to require that new entrants incur a disproportionate share of the costs of transporting traffic between the two carriers' central offices.

238. In establishing principles to govern state arbitration of rates for transport and termination of traffic, as well as state review of BOC statements of generally available terms and conditions, there are a number of possible options we could follow with regard to rate symmetry. First, we could allow the states to decide whether to require rate symmetry. Second, we could require the states to impose symmetrical rates. Third, we could permit states to allow new entrants to charge termination rates higher than the incumbent LEC in particular circumstances. For example, it might be appropriate to permit a new entrant that offers a premium service with higher costs to charge a higher rate to the LEC of the customer originating the call if the originating LEC can pass on the additional cost to the caller, who could be informed that the call carries an additional charge.[315] We seek comment on these options.

f. Bill and Keep Arrangements

239. Under bill and keep arrangements, broadly construed, neither of the interconnecting networks charges the other network for terminating the traffic that originated on the other network, and hence the terminating marginal compensation rate on a usage basis is zero. Instead, each network recovers from its own end-users the cost of both originating traffic

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[314] 1996 Act, sec. 101, § 252(d)(2).

[315] See *CMRS Notice* at para. 59 n.76.

delivered to the other network and terminating traffic received from the other network. A bill and keep approach does not, however, preclude a positive flat-rated charge for transport of traffic between carriers' networks.

240. As noted earlier, many states have established bill and keep arrangements on an interim basis until a tariffed rate can be established.[116] In other states, such as Maryland, Michigan and New York, bill and keep has not been employed and tariffed rates for the transport and termination of traffic are already in effect.[117] Michigan, however, allows carriers to waive mutual recovery and use bill and keep if traffic from one network to the other is not more than five percent greater than traffic flowing in the opposite direction.[118] In Florida, after negotiations between the incumbent and two new entrants failed, the Florida Public Service Commission determined that, for the termination of local traffic, competing LECs will compensate each other by mutual traffic exchange. Any party that believes that traffic is imbalanced to the point that it is not receiving benefits equivalent to those it is providing through this form of bill and keep arrangement may request that the compensation mechanism be changed.[119] Other states are considering approaches similar to that of Florida.[120] The Texas Public Utilities Commission has proposed a rule that would require competitive LECs to negotiate mutual compensation rates. If negotiations fail, there would be a nine-month bill and keep period to allow the Texas commission time to establish interconnection rates, terms, and conditions.[121] The Public Utilities Commission of Ohio staff has proposed using bill and keep on an interim basis for one year. While that proposal is under consideration, Ameritech and Time Warner are using bill and keep in their interim interconnection arrangement until the end of December 1997.[122]

241. Proponents of bill and keep arrangements argue that such arrangements are advantageous in many circumstances. Because no calculation of costs, nor any metering of usage, is necessary under a bill and keep regime, such arrangements may be more quickly established and easily administered. Further, some networks may lack the ability to measure the volume of exchange traffic, and adding that ability would be very costly if done outside of normal network upgrades.[123] Bill and keep arrangements are efficient if the incremental cost to each network of terminating traffic originated on the other network is zero. When the incremental costs of termination for each carrier are near zero (as may be the case for off-peak usage), bill and keep arrangements yield results similar to those of arrangements in which mutual compensation rates are set based on the incremental costs of shared network facilities. Finally, even if incremental termination costs are not zero, bill and keep may impose a small loss in economic efficiency if the demand for calls is inelastic with respect to termination charges. Demand might be inelastic either because termination charges are not passed through to

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[116] *See* Section II.C.5.b.

[117] NARUC Handbook at 74, 77, 80-81.

[118] *See* City Signal, Inc., 159 P.U.R.4th 532 (Mich. P.S.C. 1995).

[119] NARUC Handbook at 58.

[120] *See, e.g.*, NARUC Handbook at 69.

[121] NARUC Handbook at 118.

[122] *Id.* at 85-86.

[123] ALTS Handbook at 20.

customers, or, as is the case with CMRS, the termination charges are a small part of the cost of service. Bill and keep may be efficient when the efficiency loss is small and the administrative cost of termination charges is large.

242. If at least one carrier has a non-zero incremental termination cost and the elasticity of demand is significant, then bill and keep may create significant efficiency losses by not giving carriers (and their customers) the correct price signals to use network resources efficiently. If there is a positive cost to terminating a call on a competitor's network, but the originating carrier is not charged for sending the call, the originating carrier will have inefficient incentives to compete for customers that initiate large volumes of traffic but receive few calls. Similarly, if there is no charge to the consumer for placing a call that imposes a positive cost on the network of the party called, consumers are likely to initiate an excessive number of calls.

243. As noted earlier, section 252(d)(2)(B)(i) provides that the standards in section 252(d)(2)(A) restricting what may be considered "just and reasonable" terms and conditions for reciprocal compensation "shall not be construed to preclude arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as bill and keep arrangements)." Some parties contend that this section merely authorizes bill and keep arrangements in voluntary negotiated arrangements, but that the Commission and the states are prohibited from imposing bill and keep.[224] The grounds on which a state may reject a negotiated arrangement, however, are limited in Section 252(e)(2) to those that discriminate against a non-party telecommunications carrier or are inconsistent with the public interest, convenience, and necessity. Therefore, the language in 252(d)(2)(B)(i) arguably is not necessary to authorize the states to approve bill and keep in negotiated arrangements, and may be intended to authorize the states to impose bill and keep arrangements in arbitration. We seek comment on whether section 252(d)(2)(B)(i) authorizes states or the Commission to impose bill and keep arrangements. If it does, we also seek comment on whether we must or should limit the circumstances in which states may adopt bill and keep arrangements. For example, one approach would find that section 252(d)(2)(B)(i) allows states to establish bill and keep arrangements only when either of two conditions are met: (1) the transport and termination costs of both carriers are roughly symmetrical and traffic is roughly balanced in each direction during peak periods; or (2) actual transport and termination costs are so low that there is little difference between a cost-based rate and a zero rate (for example, during off-peak periods). When neither of these conditions are met, bill and keep arrangements arguably would not provide for "the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier," which would violate the requirement of section 252(d)(2)(A)(i).[225] Another possible approach would be to permit or require states to adopt a variant of bill and keep, such as that used by Michigan.[226] In addition, we seek comment on the meaning of the statutory description of bill and keep arrangements as "arrangements that waive mutual recovery."[227] We seek comment on the policies that the states have adopted with respect to bill and keep arrangements. We also seek comment on the historical interconnection arrangements between neighboring incumbent LECs, which, in many cases, used a bill and keep

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[224] *See* Letter from Michael K. Kellogg to William F. Caton, February 26, 1996 at 5-6.

[225] 1996 Act, sec. 101, § 252(d)(2)(A)(i).

[226] Michigan allows carriers to waive mutual recovery and use bill and keep if traffic from one network to the other is not more than five percent greater than traffic flowing in the opposite direction.

[227] 1996 Act, sec. 101, § 252(d)(2)(B)(i).

approach with respect to compensation for transport and termination of telecommunications traffic. We also seek comment on whether one or more of these state policies could be incorporated as models for federal policy. We also seek comment on state policies that the commenter believes are inconsistent with the goals of the 1996 Act or that are inadvisable from a policy perspective.

g. Other Possible Standards

244. There are other ways to establish rate levels or ceilings for reciprocal compensation for transport and termination of traffic, including, *inter alia*, basing them on existing arrangements between neighboring incumbent LECs or measured local service rates (which provides a quick method for determining an appropriate ceiling), or establishing a presumptive uniform per-minute interconnection rate. We solicit comment on whether any of these or other alternatives should be used as the principle for pricing transport and termination of traffic between LECs, and how they would be applied.[328] We also seek comment on whether it might be desirable to establish an interim rule (such as bill and keep) to apply during a limited initial period while negotiations or arbitration proceedings are ongoing, and a different rule for states to use if called upon to establish long-term arbitrated rates. This could permit new competitors to enter the market more quickly, equalize bargaining power between new entrants and incumbent LECs, and reduce the incumbent's incentive to stall negotiations.

D. Duties Imposed on "Telecommunications Carriers" by Section 251(a)

245. We first need to identify the entities that qualify as "telecommunications carriers" under section 251. A "telecommunications carrier" is defined in section 3(44) as "any provider of telecommunications services, except that such term does not include aggregators of telecommunications services (as defined in section 226)."[329] Section 3(44) further provides that "[a] telecommunications carrier shall be treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunications services, except that the Commission shall determine whether the provision of fixed and mobile satellite service shall be treated as common carriage."[330]

246. We believe this definition, by itself, generally includes local, interexchange, and international services. We therefore tentatively conclude that, to the extent that a carrier is engaged in providing for a fee local, interexchange, or international basic services, directly to the public or to such classes of users as to be effectively available directly to the public, that carrier falls within the definition of "telecommunications carrier." We seek comment on which carriers are included under this definition, and on whether a provider may qualify as a telecommunications carrier for some purposes but not others.[331] For example, how does the

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[328] *See CMRS Notice* at paras. 58-80.

[329] 1996 Act, sec. 3, § 3(44). The term "telecommunications service" is defined as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." 1996 Act, sec. 3, § 3(46).

[330] 1996 Act, sec. 3, § 3(44).

[331] We note that our decision regarding which service providers are deemed "telecommunications carriers" may determine whether that provider is obligated to contribute to universal service support mechanisms, in accordance with section 254. *See Universal Service Notice of Proposed Rulemaking*, para. 119 (seeking comment on which service providers are "telecommunications carriers").

provision of an information service, as defined by section 3(a)(41),[332] in addition to an unrelated telecommunications service, affect the status of a carrier as a "telecommunications carrier" for purposes of section 251?[333]

247. With respect to the regulatory classification of the provision of fixed or mobile satellite service, we already have determined that earth station and space station licensees providing domestic and international fixed-satellite telecommunications services may offer service on a non-common carrier basis, if they choose. We have determined that earth station operators could elect whether to operate as common carriers or private carriers.[334] More recently, we extended this policy to domestic fixed-satellite (domsat) space station licensees. Previously, we required domsat licensees to operate as common carriers unless the licensee applied for, and was granted, authority to sell transponders on a non-common carrier basis.[335] In amending this policy, we noted that no transponder sales request has been opposed in the last decade. We also noted that despite the routine approval of these sales requests, several operators have chosen to continue to offer space segment capacity on a common carrier basis. This suggests that market forces are sufficient to provide enough common carrier capacity for domestic satellite telecommunications services. We also stated that separate satellite systems providing international fixed-satellite services were established to operate on a non-common carrier basis, and, thus, were never regulated as common carriers.[336] This policy gives fixed-satellite service operators flexibility to meet their customers' changing needs without unnecessary regulatory delay and allows them to remain competitive in the marketplace. With respect to fixed-satellite capacity offered to CMRS providers, we stated that we will examine an array of public interest factors in deciding whether such an offering should be treated as common carriage consistent with section 332(c)(5).[337] With respect to the mobile-satellite service, we already have determined that we would allow space station licensees operating in certain services to choose

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[332] The statute defines information service as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, [which] includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service." 1996 Act, sec. 3, § 3(20).

[333] We note that under the *Computer III* and *Open Network Architecture* proceedings, the Commission imposed a regulatory structure on the BOCs, GTE, and AT&T for their provision of enhanced services that requires unbundling of basic service features, comparably efficient interconnection, and other nonstructural safeguards. *See, e.g., Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards*, 6 FCC Rcd 7571 (1991), *BOC Safeguards Order vacated in part and remanded, California v. FCC*, 39 F.3d 919 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 1427 (1995), *Filing and Review of Open Network Architecture Plans*, 4 FCC Rcd 1 (1988), *recon.*, 5 FCC Rcd 3084 (1990); 5 FCC Rcd 3103 (1990), *erratum*, 5 FCC Rcd 4045, *pets. for review denied, California v. FCC*, 4 F.3d 1505 (9th Cir. 1993), *recon.*, 8 FCC Rcd 97 (1993); 6 FCC Rcd 7646 (1991); 8 FCC Rcd 2606 (1993), *pet. for review denied, California v. FCC*, 4 F.3d 1505 (9th Cir. 1993).

[334] *See* FCC Form 493 (Application for Earth Station Authorization).

[335] *Domestic Fixed-Satellite Transponder Sales*, 90 F.C.C.2d 1238 (1982), *aff'd sub nom. World Communications, Inc. v. FCC*, 735 F.2d 1465 (D.C. Cir. 1984).

[336] *Separate Satellite Systems*, 101 F.C.C.2d 1046, 1103 (1985).

[337] *CMRS Second Report and Order*, paras. 106-108.

whether to offer space segment capacity on a common carrier or non-common carrier basis.[238] We tentatively conclude that we should continue to determine whether the provision of mobile satellite services is CMRS (and therefore common carriage) or Private Mobile Radio Service based on the factors set forth in the *CMRS Second Report and Order*.[239] We also seek comment on whether, and in what respects, this definition of "telecommunications carrier" differs from the definition of "common carrier."[240]

248. Section 251(a)(1) imposes a duty to "interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers."[241] We seek comment on the meaning of "directly or indirectly" in the context of section 251(a)(1), as well as any other issues raised by this subsection. In this context, we ask commenters to address whether section 251(a) is correctly interpreted to allow non-incumbent LECs receiving an interconnection request from another carrier to connect directly or indirectly at its discretion. Section 251(a)(2) of the 1996 Act imposes a duty on each telecommunications carrier "not to install network features, functions or capabilities that do not comply with the guidelines or standards established pursuant to section 255 or 256."[242] We ask commenters to address how this provision should be applied to incumbent and non-incumbent LECs.

249. Section 255 requires the development of guidelines to ensure that telecommunications equipment and customer premises equipment is accessible by persons with disabilities. Section 256 requires the Commission to coordinate "network planning among telecommunications carriers and other providers of telecommunications services for the efficient interconnection of public telecommunications networks."[243] While the specific guidelines or standards to be adopted pursuant to section 255 and 256 will be addressed in one or more separate proceedings, we request comment here on what action, if any, the Commission should

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[238] *See Amendment of the Commission's Rules to Establish Rules and Policies Pertaining to a Mobile Satellite Service in the 1610-1626.5/2483.5-2500 MHz Frequency Bands*, Report and Order, 9 FCC Rcd 5936 (1994) (*Big LEO Order*).

[239] *CMRS Second Report and Order*, para. 108

[240] 1996 Act, sec. 3, § 3(10).

[241] 1996 Act, sec. 101, § 251(a)(1).

[242] 1996 Act, sec. 101, § 251(a)(2). Subsections 255(b) and (c) require all manufacturers of telecommunications equipment and customer premises equipment (CPE), and all providers of telecommunications services, to ensure that their "equipment, CPE and services are accessible to and usable by individuals with disabilities, if readily achievable." Section 255(d) provides that, if the requirements of subsections (b) or (c) are not readily achievable, the manufacturer or provider must "ensure that the equipment or service is compatible with existing peripheral devices or specialized customer premises equipment commonly used by individuals with disabilities to achieve access, if readily achievable." Section 255(e) provides that, within eighteen months after the date of enactment, the Architectural and Transportation Barriers Compliance Board shall develop guidelines for accessibility of telecommunications equipment and CPE, in conjunction with the Commission, and that the Board shall review and update the guidelines periodically. Finally, Section 256 requires "coordinated network planning" to ensure "public telecommunications network interconnectivity, and interconnectivity of devices with such networks used to provide telecommunications service." 1996 Act, sec. 101, § 256(a)(1)(A)-(B). Section 256 also authorizes the Commission to participate in the development of network interconnectivity standards "that promote access to . . . network capabilities and services by individuals with disabilities." 1996 Act, sec. 101, § 256(b)(2)(B).

[243] 1996 Act, sec. 101, § 256(b)(1).

take to ensure compliance with the obligations established in section 251(a)(2), which directs telecommunications carriers "not to install network features, functions, or capabilities that do not comply with the guidelines or standards established pursuant to section 255 or 256." What steps, if any, should the Commission take to make carriers aware of the standards adopted pursuant to sections 255 and 256, and of the periodic revisions to these standards?[344] How should the phrase "network features, functions or capabilities" be defined, and what is meant by "installing" such network features?

E. Number Administration

1. Selection of a neutral number administrator

250. Section 251(e)(1) of the Act requires the Commission to "create or designate one or more impartial entities to administer telecommunications numbering and to make such numbers available on an equitable basis."[345] It further gives the Commission "exclusive jurisdiction over those portions of the North American Numbering Plan that pertain to the United States," but states that "[n]othing in this paragraph shall preclude the Commission from delegating to state commissions or other entities all or any portion of such jurisdiction."[346]

251. Additionally, pursuant to the competitive checklist contained in section 271(c)(2)(B), BOCs desiring to provide in-region interLATA telecommunications services must afford, "[u]ntil the date by which telecommunications numbering administration guidelines, plans or rules are established, non-discriminatory access to telephone numbers for assignment to the other carrier's telephone exchange service customers . . . [and] [a]fter that date, [must] compl[y] with such guidelines, plan or rules."[347] These measures foster competition by ensuring telecommunications numbering resources are administered in a fair, efficient, and orderly manner.

252. The Commission has already taken action to designate an impartial number administrator in its North American Numbering Plan (NANP) decision.[348] In the *NANP Order*, the Commission concluded that the functions associated with NANP administration would be transferred to a new administrator of the NANP, unaligned with any particular segment of the telecommunications industry.[349] We tentatively conclude that the *NANP Order* satisfies the requirement of section 251(e)(1) that the Commission designate an impartial number administrator. We seek comment on this tentative conclusion.

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[344] 1996 Act, sec. 101, § 255(e).

[345] 1996 Act, sec. 101, § 251(e)(1).

[346] 1996 Act, sec. 101, § 251(e)(1).

[347] 1996 Act, sec. 151, § 271(c)(2)(B)(ix).

[348] *See Administration of the North American Numbering Plan*, CC Docket No. 92-237, Report and Order, FCC 95-283 (rel. July 13, 1995) (*NANP Order*) (*recon. pending*). The *NANP Order* was initiated in response to Bellcore's stated desire to relinquish its role as NANP administrator. *See* Letter from G. Heilmeier, President and CEO, Bellcore to the Commission (Aug. 19, 1993). Bellcore, however, will continue performing its NANP Administration functions until those functions are transferred to a new NANP administrator pursuant to the *NANP Order*.

[349] *Id.*, para. 57.

253. Toll free telephone numbers are not administered by the North American Numbering Plan administrator. Database Service Management, Inc. (DSMI), which is a subsidiary of Bellcore, administers toll free numbers.[350] In its proceeding addressing toll free telephone numbers, the Commission sought comment on whether DSMI should continue to administer toll free numbers, or whether the NANP administrator or another neutral entity should administer toll free numbers.[351] We will address the issue of toll free number administration in the Commission's *Toll Free* proceeding.

2. State role in numbering administration

254. Section 251(e)(1) allows the Commission to delegate any portion of its jurisdiction over numbering administration to the states. We tentatively conclude that the Commission should retain its authority to set policy with respect to all facets of numbering administration, including area code relief issues in order to ensure the creation of a nationwide, uniform system of numbering that is essential to the efficient delivery of interstate and international telecommunications services and to the development of the robustly competitive telecommunications services market. Prior to the enactment of the Act, state commissions implemented new area codes by adopting area code relief plans, subject to the guidelines enumerated by the Commission in its *Ameritech Order*.[352]

255. Area code relief traditionally has come in the form of an area code split,[353] but can also take the form of an area code overlay.[354] In the *Ameritech Order*, the Commission concluded that Ameritech's proposed wireless-only overlay plan would be unreasonably discriminatory and anticompetitive and that administration of numbers: (1) must seek to facilitate entry into the communications marketplace by making numbering resources available on an efficient, timely basis to communications services providers; (2) should not unduly favor or disadvantage any particular industry segment or group of consumers; and (3) should not unduly favor one technology over another.[355]

256. In that decision, the Commission also sought to clarify the authority of the Commission and the states respectively with respect to numbering administration. While the Commission held that it had broad authority over telephone numbering issues, the Commission overturned as *dicta* prior statements it had made suggesting that we retained

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[350] DSMI subcontracts functions requiring access to proprietary information to a neutral third party, Lockheed IMS.

[351] *See Toll Free Service Access Codes*, CC Docket 95-155, Notice of Proposed Rulemaking, FCC 95-419 (rel. Oct. 5, 1995) (*Toll-Free NPRM*), para. 49.

[352] *See Proposed 708 Relief Plan and 630 Numbering Plan Area Code by Ameritech - Illinois*, Declaratory Ruling and Order, 10 FCC Rcd 4596 (1995) (*Ameritech Order*) (*recon. pending*).

[353] An area code split occurs when an existing geographic area code is split into two parts and roughly half of the telephone customers continue to be served through the existing area code and half receive a new area code.

[354] An overlay area code covers the same geographic area as an existing area code or area codes, and allows telephone customers in that area to be served through either code.

[355] *Ameritech Order* at 4604.

plenary jurisdiction over numbering issues.[156] The Commission acknowledged that state commissions have legitimate interests in the administration of numbering; it also noted that the state commissions are uniquely positioned to understand, judge and determine how new area codes can best be implemented in view of local circumstances.[157] We believe this continues to be the case. We thus tentatively conclude that the Commission should delegate matters involving the implementation of new area codes, such as the determination of area code boundaries, to the state commissions so long as they act consistently with our numbering administration guidelines. We also tentatively conclude that the *Ameritech Order* should continue to provide guidance to the states regarding how new area codes can be lawfully implemented. We seek comment on these tentative conclusions.

257. Nevertheless, we emphasize that any uncertainty about the Commission's and the states' jurisdiction over numbering administration that may have existed prior to the enactment of the 1996 Act has now been eliminated. Section 251(e)(1) of the Act vests in the Commission exclusive jurisdiction over numbering matters in the United States and authorizes the Commission to delegate some or all of that power to state commissions. As indicated above, we propose leaving to the states decisions related to the implementation of new area codes subject to the guidelines enumerated in the *Ameritech Order*. We are concerned, however, that situations may arise where a state commission, in implementing area code relief, appears to be acting in violation of those guidelines.[158] We therefore seek comment on whether the Commission should, in light of this concern and the enactment of section 251(e)(1), reassess the jurisdictional balance between the Commission and the states that was crafted in the *Ameritech Order*. We also seek comment on what action this Commission should take when a state appears to be acting inconsistently with our numbering administration guidelines. In this regard, we note that issues related to area code relief plans often require prompt resolution due to the imminent exhaustion of central office codes in the area code at issue.

258. Prior to enactment of the 1996 Act, Bellcore, as the NANP Administrator, the LECs, as central office code administrators, and the states performed the majority of functions related to the administration of numbers.[159] We tentatively conclude that the Commission should delegate to Bellcore, the LECs, and the states the authority to continue performing each of their functions related to the administration of numbers as they existed prior to enactment of the 1996 Act until such functions are transferred to the new NANP administrator pursuant to the *NANP Order*. We seek comment on this tentative conclusion. We also seek comment on whether the Commission should delegate any additional number administration functions to the states or to other entities.

3. Cost related to number administration

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[156] *Id.* at 4600, fn. 18.

[157] *Id.* at 4601.

[158] *See, e.g.* Letter from Geraldine A. Matisa, Chief, Network Services Division, Common Carrier Bureau, FCC to Ronald R. Conners, Director, North American Numbering Plan Administration (April 11, 1996). The Texas Public Utilities Commission had directed Southwestern Bell Telephone to request area code assignments from the North American Numbering Plan Administration (NANPA) for use as wireless-only area code overlays in Dallas and Houston. In its letter to NANPA, the Commission agreed with NANPA's decision not to make these area code assignments.

[159] For a discussion of NANP administration functions, see *NANP Order* at paras. 11-12.

259. In section 251(e)(2) of the 1996 Act, Congress mandates that "[t]he cost of establishing telecommunications numbering administration arrangements and number portability shall be borne by all telecommunications carriers on a competitively neutral basis as determined by the Commission."[360] In the *NANP Order*, the Commission: (1) directed that the costs of the new impartial numbering administrator be recovered through contributions by all communications providers; (2) concluded that the gross revenues of each communications provider will be used to compute each provider's contribution to the new numbering administrator; and (3) concluded that the NANC will address the details concerning recovery of the NANP administrator costs.[361] We find that we need take no further action in this NPRM because the Commission has already determined that cost recovery for numbering administration arrangements must be borne by all telecommunications carriers on a competitively neutral basis.

F. Exemptions, Suspensions, and Modifications

260. Section 251(f)(1)(A) provides that the obligations imposed on incumbent LECs pursuant to section 251(c) "shall not apply to a rural telephone company until (i) such company has received a bona fide request for interconnection, services, or network elements, and (ii) the State commission determines (under subparagraph (B)) that such request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 (other than subsections (b)(7) and (c)(1)(D) thereof)."[362] Section 251(f)(1)(B) sets forth procedures for the state commission to terminate the rural telephone company exemption.[363] Section 251(f)(2) provides that a LEC "with fewer than 2 percent of the Nation's subscriber lines installed in the aggregate nationwide may petition a State commission for a suspension or modification of the application of a requirement or requirements of subsection (b) or (c) to telephone exchange service facilities specified in such petition."[364] The state must grant the petition to the extent that, and for such duration as, the state commission determines that such suspension or modification is necessary and is consistent with the public interest, convenience and necessity.[365] Section 251(f)(2) provides for relief from the requirements of both Section 251(b) and (c), whereas section 251(f)(1)(A) provides for relief only from the requirements of section 251(c).[366]

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[360] 1996 Act, sec. 101, § 251(e)(2).

[361] *NANP Order*, paras. 94 & 99.

[362] 1996 Act, sec. 101, § 251(f)(1)(A). This exemption does not apply with respect to a request under Section 252(c) from a cable company seeking to provide telephone service in an area in which the rural telephone company provides video service, unless the rural telephone company was providing video service as of the date of enactment of the 1996 Act. 1996 Act, sec. 101, § 251(f)(1)(C).

[363] 1996 Act, sec. 101, § 251(f)(1)(B).

[364] 1996 Act, sec. 101, §251(f)(2).

[365] 1996 Act, sec. 101, § 251(f)(2). The state must determine that such modification or suspension is necessary to avoid (1) a significant adverse economic impact on users of telecommunications services generally; (2) imposing a burden that is unduly economically burdensome; or (3) imposing a requirement that is technically infeasible.

[366] As discussed above, section 251(b) sets forth obligations for all LECs, and section 251(c) sets forth obligations for incumbent LECs.

261. We seek comment on whether the Commission can and should establish some standards that would assist the states in satisfying their obligations under this section. For example, should the Commission establish standards regarding what would constitute a "bona fide" request? We tentatively conclude that the states alone have authority to make determinations under section 271(f).

G. Continued Enforcement of Exchange Access and Interconnection Regulations

262. Section 251(g) provides that each LEC, "to the extent that it provides wireline services, shall provide exchange access, information access, and exchange services for such access . . . in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation)" that applied to such carrier immediately preceding the date of enactment of the 1996 Act, "until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission . . . ."[347] Those obligations and restrictions are enforceable until they are superseded. Section 251(i) states that nothing in section 251 "shall be construed to limit or otherwise affect the Commission's authority under section 201."[348] We seek comment on any issues that these provisions may create. In particular, we seek comment on any aspect of this Notice that may affect existing "equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation)."[349]

H. Advanced Telecommunications Capabilities

263. Finally, we note that pursuant to subsection 706(a) of the 1996 Act the Commission "shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures to promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment." We sought comment on subsection 706(a) in our section 254 Universal Service NPRM, in our Open Video Systems NPRM, and in our Cable Reform NPRM. Because section 251 and this NPRM comprehensively address "measures to promote competition in the local telecommunications market," we believe it relevant to also seek comment herein on how we can advance Congress's subsection 706(a) goal within the context of our implementation of sections 251 and 252 of the 1996 Act.

III. PROVISIONS OF SECTION 252

A. Arbitration Process

264. Section 252(a) states that, "[u]pon receiving a request for interconnection, services, or network elements pursuant to section 251, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of

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[347] 1996 Act, sec. 101, § 251(g).

[348] 1996 Act, sec. 101, § 251(i).

[349] 1996 Act, sec. 101, § 251(g).

section 251."[370] Any party negotiating an agreement under section 252(a) "may, at any point in the negotiation, ask a State commission to participate in the negotiation and to mediate any differences arising in the course of the negotiation."[371] Section 252(b) states that, "[d]uring the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition the State commission to arbitrate any open issues."[372] In addition, under section 252(e), the parties must submit for approval any negotiated or arbitrated agreement to the state commission.[373]

265. Section 252(e)(5) directs the Commission to assume responsibility for any proceeding or matter in which the state commission "fails to act to carry out its responsibility" under that section.[374] We note that, unlike section 251(d)(1), there is no specified time within which the Commission must establish regulations pursuant to section 252(e)(5). Thus, we seek comment on whether in this proceeding we should establish regulations necessary and appropriate to carry out our obligations under section 252(e)(5). We also seek comment on what constitutes notice of failure to act, and what procedures, if any, we should establish for interested parties to notify the FCC that a state commission has failed to act.

266. We seek comment on the circumstances under which a state commission should be deemed to have "fail[ed] to act" under section 252(e)(5). We note that section 252(e)(4) states that if the state commission does not approve or reject (1) a negotiated agreement within 90 days, or (2) an arbitrated agreement within 30 days, from the time the agreement is submitted by the parties, the agreement shall be "deemed approved."[375] We seek comment on the relationship between this provision and our obligation to assume responsibility under section 252(e)(5). Other questions raised by section 252(e)(5) include: (1) if the Commission assumes the responsibility of the state commission, is the Commission bound by all of the laws and standards that would have applied to the state commission; and (2) is the Commission authorized to determine whether an agreement is consistent with applicable state law as the state commission would have been under section 252(e)(3)? One possible interpretation is that, if an agreement is deemed approved pursuant to section 252(e)(4), it will be deemed to comply with state law, and the Commission will have no authority to review that determination.

267. Once the Commission assumes such responsibility under section 252(e)(5), there is no specific provision by which authority reverts back to the state commission. For example, if the Commission arbitrates an agreement pursuant to section 252(e)(5), the 1996 Act does not provide that the arbitrated agreement is referred back to the state commission for any further purpose. We seek comment on whether, once the Commission assumes responsibility under section 252(e)(5), it retains jurisdiction over that matter or proceeding.

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[370] 1996 Act, sec. 101, § 252(a).

[371] 1996 Act, sec. 101, § 252(a)(2).

[372] 1996 Act, sec. 101, § 252(b).

[373] 1996 Act, sec. 101, § 252(e)(1).

[374] 1996 Act, sec. 101, § 252(e)(5). Before doing so, section 252(e)(5) requires the Commission to issue an order preempting the state's jurisdiction of that proceeding or matter.

[375] 1996 Act, sec. 101, § 252(e)(4).

268. We also seek comment on whether we should adopt in this proceeding some standards or methods for arbitrating disputes in the event we must conduct an arbitration under section 252(e)(5). One method we could adopt is "final offer" arbitration, whereby each party to the negotiation proposes its best and final offer, and the arbitrator determines which of the two proposals becomes binding. Under final offer arbitration, each party has incentives to propose an arrangement that the arbitrator could determine to be fair and equitable. In addition, parties are more likely to present terms and conditions that approximate the economically efficient outcome, because proposing extreme terms and conditions may result in an unfavorable finding by the arbitrator. While final offer arbitration is a simple and speedy option, it is possible that the proposals submitted by the parties may not be consistent with the public interest and policies of sections 251 and 252. Alternatively, we could adopt an open-ended arbitration method, which would culminate in a final decision that would be consistent with the public interest and policies of sections 251 and 252. Open-ended arbitration, however, is more administratively difficult and likely to be slower than final offer arbitration.

B. Section 252(i)

269. Section 251 requires that interconnection, unbundled element, and collocation rates be "nondiscriminatory" and prohibits the imposition of "discriminatory conditions" on the resale of telecommunications services.[376] Section 252(i) appears to be a primary tool of the 1996 Act for preventing discrimination under section 251. Section 252(i) of the 1996 Act provides that a "local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under [section 252] to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement."[377] We note that in its March 23, 1995 Report on S.652, the Senate Committee on Commerce, Science and Transportation discusses an earlier version of section 252(i) and states that the Committee "intends this requirement to help prevent discrimination among carriers."[378]

270. We seek comment on whether in this proceeding we should adopt standards for resolving disputes under section 252(i) in the event that we must assume the state's responsibilities pursuant to section 252(e)(5). Because the Commission may need to interpret section 252(i) if it assumes the state commission's responsibilities, we seek comment on the meaning of that provision. Must interconnection, services, or network elements provided under a state-approved section 252 agreement be made available to any requesting telecommunications carrier, or would it be consistent with the language and intent of the law to limit this requirement to similarly situated carriers? If the obligation were construed to

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[376] 1996 Act, sec. 101, § 251(c)(2)(D) (interconnection rates, terms, and conditions); 251(c)(3) (unbundled network elements rates, terms, and conditions); 251(c)(6) (collocation rates, terms, and conditions); and 251(c)(4)(B) (resale). Section 252(d)(1) also requires nondiscriminatory interconnection and network element charges. 1996 Act, sec. 101, § 252(d)(1).

[377] 1996 Act, sec. 101, § 252(i).

[378] *See* S. Rep. No. 104-23, 104th Cong., 1st Sess. 21-22 (1995) (1995 Senate Report). The Senate originally drafted the section entitled "Availability to Other Telecommunications Carriers," which was to become section 252(i), to read: "A local exchange carrier shall make available any service, facility, or function provided under an interconnection agreement to which it is a party to any other telecommunications carrier that requests such interconnection upon the same terms and conditions as those provided in the agreement." *See* S. 652, 104th Cong., 1st Sess. § 251(g) (1995).

extend only to similarly situated carriers, how should similarly situated carriers be defined? For example, does the section require that the same rates for interconnection must be offered to all requesting carriers regardless of the cost of serving that carrier, or would it be consistent with the statute to permit different rates if the costs of serving carriers are different? In addition, can section 252(i) be interpreted to allow LECs to make available interconnection, services, or network elements only to requesting carriers serving a comparable class of subscribers or providing the same service (*i.e.*, local, access, or interexchange) as the original party to the agreement? We tentatively conclude that the language of the statute appears to preclude such differential treatment among carriers. We seek comment on this tentative conclusion.

271. We note that negotiated agreements under section 252(a) are the product of compromise between incumbent LECs and requesting carriers, and may therefore contain provisions to which a party agreed as specific consideration for some other provision. We seek comment on whether section 252(i) requires requesting carriers to take service subject to all of the same terms and conditions contained in the entire state-approved agreement.[179] Alternatively, does section 252(i) permit the separation of section 251(b) and (c) agreements down to the level of the individual provisions of subsections (b) and (c) and the individual paragraphs of section 251?[180] We recognize that allowing requesting carriers to unbundle too extensively the provisions of a voluntarily negotiated agreement might affect the negotiation process by intensifying the importance each individual term of the agreement. We note that in its March 23 1995 Report on S. 652, the Senate Committee on Commerce, Science, and Transportation stated that it intended the requirement codified in section 252(i) to "make interconnection more efficient by making available to other carriers the individual elements of agreements that have been previously negotiated."[181] and seek comment on its meaning.

272. Section 252(i) requires that incumbent LECs must make available the interconnection, service, or network element provided under the agreement after state approval of the agreement. The statute is silent, however, as to how long such an agreement must be made available. We seek comment on whether the agreement should be made available for an unlimited period, or whether the statute would permit the terms of the agreement to be available for a limited period of time. In particular, we ask commenters to cite any statutory language that would require the resubmission of these pre-existing interconnection agreements to state agencies.

IV. PROCEDURAL ISSUES

A. *Ex Parte* Presentations

273. This is a non-restricted notice-and-comment rulemaking proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided that they are

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[179] Ameritech suggests that LECs should only be obligated to make available such interconnection, service, or network element provided under a state-approved agreement subject to all applicable terms and conditions contained in the entire agreement. Ameritech "Proposed Interpretation of Section 252 Pricing Standards" (submitted with its March 25, 1996 letter to Regina M. Keeney, Chief, Common Carrier Bureau, Federal Communications Commission) at 13-14.

[180] This view has been proposed by the Association for Local Telecommunications Services. *See* ALTS Handbook at 23-24.

[181] 1995 Senate Report at 21-22.

disclosed as provided in the Commission's rules. *See generally* 47 C.F.R. §§ 1.1202, 1.1203, 1.1206. Written submissions, however, will be limited as discussed below.[182]

B. Regulatory Flexibility Analysis

274. Section 251 of the Communications Act establishes a variety of interconnection obligations. Some of these requirements apply to all telecommunications carriers (which include incumbent LECs, new LEC entrants, and interexchange carriers).[183] Other requirements apply to LECs -- both incumbents and new entrants.[184] Section 252 also places certain obligations on state regulatory commissions.

275. We believe that the Regulatory Flexibility Act applies differently to these groups. In particular, we believe that the Regulatory Flexibility Act is inapplicable to this proceeding insofar as it pertains to incumbent LECs. The proposal in this proceeding, however, may have a significant economic impact on a substantial number of small businesses as defined by section 601(3) of the Regulatory Flexibility Act insofar as they apply to telecommunications carriers other than incumbent LECs.

276. Accordingly, we certify that the Regulatory Flexibility Act of 1980 does not apply to this rulemaking proceeding insofar as it pertains to incumbent LECs and state utility commissions because the relevant proposals, if promulgated, would not have a significant economic impact on a substantial number of small entities, as defined by section 601(3) of the Regulatory Flexibility Act. Incumbent LECs directly subject to the proposed rule amendments do not qualify as small businesses since they are dominant in their field of operation. The Commission will, however, take appropriate steps to ensure that the special circumstances of the smaller incumbent LECs are carefully considered in resolving those issues. To the extent that this Notice may apply to state utility commissions, they do not qualify as small entities under section 601 of the Regulatory Flexibility Act.

277. Insofar as the proposals in this Notice apply to telecommunications carriers other than incumbent LECs (generally interexchange carriers and new LEC entrants), they may have a significant economic effect on a substantial number of small entities. Accordingly, we are preparing an Initial Regulatory Flexibility analysis with respect to the provisions applicable to telecommunications carriers other than incumbent LECs. Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. §§ 601-612, the Commission's Initial Regulatory Flexibility Analysis with respect to the Notice of Proposed Rulemaking is as follows:

278. *Reason for Action*: The Commission is issuing this Notice of Proposed Rulemaking to implement the local exchange competition provisions of the 1996 Act discussed above, most importantly section 251.

279. *Objectives*: The objective of the Notice of Proposed Rulemaking is to provide an opportunity for public comment and to provide a record for a Commission decision on the issues addressed in the Notice.

280. *Legal basis*: The Notice of Proposed Rulemaking is adopted pursuant to

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[182] *See infra* ¶ 291.

[183] 1996 Act, sec. 101, § 251(a); 1996 Act, sec. 3, § 3(44).

[184] 1996 Act, sec. 101, § 251(b); 1996 Act, sec. 3, § 3(26).

Sections
1, 4, 201-205, 222, 224, 225, 251, 252, 253, 254, 255, 256, 271, and 273 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 153, 154, 201-205, 222, 224, 251, 252, 253, 254, 255, 256, 271, and 273.

281. *Description of small entities affected*: Certain of the proposals in this Notice would apply to telecommunications carriers, other than incumbent LECs. These carriers would include small interexchange carriers and small, new LEC entrants. Some of these carriers clearly qualify as small business entities.

282. *Potential Impact*: Some of the proposals in this Notice may impose requirements that will have a significant economic effect on certain small business entities. After evaluating the comments in this proceeding, the Commission will further examine the impact of any rule changes on small entities and set forth findings in the Final Regulatory Flexibility Analysis.

283. *Reporting, recordkeeping and other compliance requirement*: The proposed rules, adopted pursuant to the Telecommunications Act of 1996, would require dominant incumbent local exchange carriers, in certain cases, to submit documentation requested by state commissions for arbitration concerning the rates, terms, and conditions for interconnection and network element unbundling.

284. *Federal rules that may overlap, duplicate or conflict with the Commission's proposal*: Our existing Expanded Interconnection rules may overlap with the requirements of section 251 addressed in this Notice. We have also sought comment on the relationship between our Part 69 Access Charge rules and the requirements of sections 251 and 252 of the 1996 Act.[183]

285. *Any significant alternatives minimizing impact on small entities and consistent with stated objectives*: The Notice of Proposed Rulemaking solicits comments on alternatives.

286. *Comments are solicited*: Written comments are requested on this Initial Regulatory Flexibility Analysis. These comments must be filed in accordance with the same filing deadlines set for comments on the other issues in this Notice of Proposed Rulemaking but they must have a separate and distinct heading designating them as responses to the Regulatory Flexibility Analysis.

287. The Secretary shall send a copy of this *Notice of Proposed Rulemaking*, including the certification set out above, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. § 601, *et. seq.* (1981).

C. Initial Paperwork Reduction Act of 1995 Analysis

288. This NPRM contains either a proposed or modified information collection. As part of its continuing effort to reduce paperwork burdens, we invite the general public and the Office of Management and Budget (OMB) to take this opportunity to comment on the information collections contained in this NPRM, as required by the Paperwork Reduction Act of 1995, Pub. L. No. 104-13. Public and agency comments are due at the same time as other

[183] See paras. 159-165.

comments on this NPRM: OMB comments are due 60 days from the date of publication of this NPRM in the Federal Register. Comments should address: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

D. Comment Filing Procedures

289. *General.* Pursuant to applicable procedures set forth in sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file comments on or before 25 days after public release of the item, and reply comments on or before 14 days after the comment due date. To file formally in this proceeding, you must file an original and twelve copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original and 16 copies. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, 1919 M Street, N.W., Room 222, Washington, D.C. 20554, with a copy to Janice Myles of the Common Carrier Bureau, 1919 M Street, N.W., Room 544, Washington, D.C. 20554. Parties should also file one copy of any documents filed in this docket with the Commission's copy contractor, International Transcription Services, Inc., 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, 1919 M Street, N.W., Room 239, Washington, D.C. 20554.

290. *Separate Comment Filing Procedures for Dialing Parity, Number Administration, Public Notice of Technical Changes, and Access to Rights of Way.* Interested parties are instructed to file separate comments with respect to (1) dialing parity, (2) access to rights-of-way, (3) number administration, and (4) public notice of technical changes requirements and regulatory changes proposed or discussed above. Comments on these issues are to be filed on or before 27 days after public release of the item; and reply comments on, or before, 14 days after the comment due date for these four sections. These filings will not be considered in applying the page limits for filings in this proceeding. To file formal comments addressing these issues, parties are required to comply with all of the remaining comment filing procedures contained in part VI(D) of this Notice. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, 1919 M Street, N.W., Room 222, Washington, D.C. 20554, with 3 copies to Gloria Shambley of the Network Services Division, Common Carrier Bureau, 2000 M Street, N.W., Suite 210, Washington, D.C. 20554.

291. *Other requirements.* In order to facilitate review of comments and reply comments, both by parties and by Commission staff, we require that comments be no longer than seventy-five (75) pages and reply comments be no longer than thirty-five (35) pages, including exhibits, appendices, and affidavits of expert witnesses. Empirical economic studies and copies of relevant state orders will not be counted against these page limits. These page limits will not be waived and will be strictly enforced. Comments and reply comments must include a short and concise summary of the substantive arguments raised in the pleading. Comments and reply comments must also comply with Section 1.49 and all other applicable

sections of the Commissions rules.[186] We also direct all interested parties to include the name of the filing party and the date of the filing on each page of their comments and reply comments. Comments and reply comments also must clearly identify the specific portion of this Notice of Proposed Rulemaking to which a particular comment or set of comments is responsive. If a portion of a party's comments does not fall under a particular topic listed in the outline of this Notice, such comments must be included in a clearly labelled section at the beginning or end of the filing. Parties may not file more than a total of ten (10) pages of *ex parte* submissions, excluding cover letters. This 10 page limit does not include: (1) written *ex parte* filings made solely to disclose an oral *ex parte* contact; (2) written material submitted at the time of an oral presentation to Commission staff that provides a brief outline of the presentation; or (3) written material filed in response to direct requests from Commission staff. *Ex parte* filings in excess of this limit will not be considered as part of the record in this proceeding.

292. Parties are also asked to submit comments and reply comments on diskette. Such diskette submissions would be in addition to and not a substitute for the formal filing requirements addressed above. Parties submitting diskettes should submit them to Janice Myles of the Common Carrier Bureau, 1919 M Street, N.W., Room 544, Washington, D.C. 20554. Such a submission should be on a 3.5 inch diskette formatted in an IBM compatible form using MS DOS 5.0 and WordPerfect 5.1 software. The diskette should be submitted in "read only" mode. The diskette should be clearly labelled with the party's name, proceeding, type of pleading (comment or reply comments) and date of submission. The diskette should be accompanied by a cover letter.

293. Written comments by the public on the proposed and/or modified information collections are due 25 days after public release of this NPRM, and reply comments must be submitted not later than 14 days after the comments. Written comments must be submitted by the Office of Management and Budget (OMB) on the proposed and/or modified information collections on or before 60 days after date of publication in the Federal Register. In addition to filing comments with the Secretary, a copy of any comments on the information collections contained herein should be submitted to Dorothy Conway, Federal Communications Commission, Room 234, 1919 M Street, N.W., Washington, D.C. 20554, or via the Internet to dconway@fcc.gov and to Timothy Fain, OMB Desk Officer, 10236 NEOB, 725 - 17th Street, N.W., Washington, D.C. 20503 or via the Internet to fain_t@al.eop.gov.

E. Ordering Clauses

294. Accordingly, IT IS ORDERED that pursuant to Sections 1, 4, 201-205, 222, 224, 225, 251, 252, 254, 255, 256, 271 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 153, 154, 201-205, 222, 224, 251, 252, 254, 255, 256, and 271, a NOTICE OF PROPOSED RULEMAKING is hereby ADOPTED.

295. IT IS FURTHER ORDERED that, the Secretary shall send a copy of this NOTICE OF PROPOSED RULEMAKING, including the regulatory flexibility certification, to the Chief Counsel for Advocacy of the Small Business Administration, in accordance with paragraph 603(a) of the Regulatory Flexibility Act, 5 U.S.C. §§ 601 *et seq.*, (1981).

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[186] *See* 47 C.F.R. § 1.49. However, we require here that a summary be included with all comments and reply comments, although a summary that does not exceed three pages will not count towards the 75 page limit for comments or the 35 page limit for reply comments. The summary may be paginated separately from the rest of the pleading (*e.g.*, as "i, ii"). *See* 47 C.F.R. § 1.49.

296. The *Administration of the North American Numbering Plan*, Notice of Proposed Rulemaking, CC Docket No. 92-237, 9 FCC Rcd 2068 (1994), to the extent that it addressed the issue of dialing parity, is hereby dismissed as moot solely with respect to that issue.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

FCC 96-325

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
	)	
Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers	)	CC Docket No. 95-185
	)	
	)	

FIRST REPORT AND ORDER

Adopted: August 1, 1996 Released: August 8, 1996

By the Commission: Chairman Hundt and Commissioners Quello, Ness, and Chong issuing separate statements.

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I. INTRODUCTION, OVERVIEW, AND EXECUTIVE SUMMARY

A. The Telecommunications Act of 1996 - A New Direction

1. The Telecommunications Act of 1996[1] fundamentally changes telecommunications regulation. In the old regulatory regime government encouraged monopolies. In the new regulatory regime, we and the states remove the outdated barriers that protect monopolies from competition and affirmatively promote efficient competition using tools forged by Congress. Historically, regulation of this industry has been premised on the belief that service could be provided at the lowest cost to the maximum number of consumers through a regulated monopoly network. State and federal regulators devoted their efforts over many decades to regulating the prices and practices of these monopolies and protecting them against competitive entry. The 1996 Act adopts precisely the opposite approach. Rather than shielding telephone companies from competition, the 1996 Act requires telephone companies to open their networks to competition.

2. The 1996 Act also recasts the relationship between the FCC and state commissions responsible for regulating telecommunications services. Until now, we and our state counterparts generally have regulated the jurisdictional segments of this industry assigned to each of us by the Communications Act of 1934. The 1996 Act forges a new partnership between state and federal regulators. This arrangement is far better suited to the coming world of competition in which historical regulatory distinctions are supplanted by competitive forces. As this Order demonstrates, we have benefitted enormously from the expertise and experience that the state commissioners and their staffs have contributed to these discussions. We look forward to the continuation of that cooperative working relationship in the coming months as each of us carries out the role assigned by the 1996 Act.

3. Three principal goals established by the telephony provisions of the 1996 Act are: (1) opening the local exchange and exchange access markets to competitive entry; (2) promoting increased competition in telecommunications markets that are already open to competition, including the long distance services market; and (3) reforming our system of universal service so that universal service is preserved and advanced as the local exchange and exchange access markets move from monopoly to competition. In this rulemaking and related proceedings, we are taking the steps that will achieve the pro-competitive, deregulatory goals of the 1996 Act. The Act directs us and our state colleagues to remove not only statutory and regulatory impediments to competition, but economic and operational impediments as well. We are directed to remove these impediments to competition in all

[1] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, *to be codified at* 47 U.S.C. §§ 151 *et. seq.* Hereinafter, all citations to the 1996 Act will be to the 1996 Act as codified in the United States Code unless otherwise indicated.

telecommunications markets, while also preserving and advancing universal service in a manner fully consistent with competition.

4. These three goals are integrally related. Indeed, the relationship between fostering competition in local telecommunications markets and promoting greater competition in the long distance market is fundamental to the 1996 Act. Competition in local exchange and exchange access markets is desirable, not only because of the social and economic benefits competition will bring to consumers of *local* services, but also because competition eventually will eliminate the ability of an incumbent local exchange carrier to use its control of bottleneck local facilities to impede free market competition. Under section 251, incumbent local exchange carriers (LECs), including the Bell Operating Companies (BOCs), are mandated to take several steps to open their networks to competition, including providing interconnection, offering access to unbundled elements of their networks, and making their retail services available at wholesale rates so that they can be resold. Under section 271, once the BOCs have taken the necessary steps, they are allowed to offer long distance service in areas where they provide local telephone service, if we find that entry meets the specific statutory requirements and is consistent with the public interest. Thus, under the 1996 Act, the opening of one of the last monopoly bottleneck strongholds in telecommunications -- the local exchange and exchange access markets -- to competition is intended to pave the way for enhanced competition in *all* telecommunications markets, by allowing all providers to enter all markets. The opening of all telecommunications markets to all providers will blur traditional industry distinctions and bring new packages of services, lower prices and increased innovation to American consumers. The world envisioned by the 1996 Act is one in which all providers will have new competitive opportunities as well as new competitive challenges.

5. The Act also recognizes, however, that universal service cannot be maintained without reform of the current subsidy system. The current universal service system is a patchwork quilt of implicit and explicit subsidies. These subsidies are intended to promote telephone subscribership, yet they do so at the expense of deterring or distorting competition. Some policies that traditionally have been justified on universal service considerations place competitors at a disadvantage. Other universal service policies place the incumbent LECs at a competitive disadvantage. For example, LECs are required to charge interexchange carriers a Carrier Common Line charge for every minute of interstate traffic that any of their customers send or receive. This exposes LECs to competition from competitive access providers, which are not subject to this cost burden. Hence, section 254 of the Act requires the Commission, working with the states and consumer advocates through a Federal/State Joint Board, to revamp the methods by which universal service payments are collected and disbursed.[2] The present universal service system is incompatible with the statutory mandate to introduce efficient competition into local markets, because the current system distorts competition in

[2] *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Notice of Proposed Rulemaking *and Order Establishing Joint Board*, FCC 96-93 (rel. Mar. 8, 1996) (*Universal Service NPRM*).

those markets. For example, without universal service reform, facilities-based entrants would be forced to compete against monopoly providers that enjoy not only the technical, economic, and marketing advantages of incumbency, but also subsidies that are provided only to the incumbents.

B. The Competition Trilogy: Section 251, Universal Service Reform and Access Charge Reform

6. The rules that we adopt to implement the local competition provisions of the 1996 Act represent only one part of a trilogy. In this Report and Order, we adopt initial rules designed to accomplish the first of the goals outlined above -- opening the local exchange and exchange access markets to competition. The steps we take today are the initial measures that will enable the states and the Commission to begin to implement sections 251 and 252. Given the dynamic nature of telecommunications technology and markets, it will be necessary over time to review proactively and adjust these rules to ensure both that the statute's mandate of competition is effectuated and enforced, and that regulatory burdens are lifted as soon as competition eliminates the need for them. Efforts to review and revise these rules will be guided by the experience of states in their initial implementation efforts.

7. The second part of the trilogy is universal service reform. In early November, the Federal/State Universal Service Joint Board, including three members of this Commission, will make its recommendations to the Commission. These recommendations will serve as the cornerstone of universal service reform. The Commission will act on the Joint Board's recommendations and adopt universal service rules not later than May 8, 1997, and, we hope, even earlier. Our universal service reform order, consistent with section 254, will rework the subsidy system to guarantee affordable service to all Americans in an era in which competition will be the driving force in telecommunications. By reforming the collection and distribution of universal service funds, the states and the Commission will also ensure that the goals of affordable service and access to advanced services are met by means that enhance, rather than distort, competition. Universal service reform is vitally connected to the local competition rules we adopt today.

8. The third part of the trilogy is access charge reform. It is widely recognized that, because a competitive market drives prices to cost, a system of charges which includes non-cost based components is inherently unstable and unsustainable. It also well-recognized that access charge reform is intensely interrelated with the local competition rules of section 251 and the reform of universal service. We will complete access reform before or concurrently with a final order on universal service.

9. Only when all parts of the trilogy are complete will the task of adjusting the regulatory framework to fully competitive markets be finished. Only when our counterparts at the state level complete implementing and supplementing these rules will the complete

blueprint for competition be in place. Completion of the trilogy, coupled with the reduction in burdensome and inefficient regulation we have undertaken pursuant to other provisions of the 1996 Act, will unleash marketplace forces that will fuel economic growth. Until then, incumbents and new entrants must undergo a transition process toward fully competitive markets. We will, however, act quickly to complete the three essential rulemakings. We intend to issue a notice of proposed rulemaking in 1996 and to complete the access charge reform proceeding concurrently with the statutory deadline established for the section 254 rulemaking. This timetable will ensure that actions taken by the Joint Board in November and this Commission by not later than May 1997 in the universal service reform proceeding will be coordinated with the access reform docket.

C. Economic Barriers

10. As we pointed out in our Notice of Proposed Rulemaking in this docket[3], the removal of statutory and regulatory barriers to entry into the local exchange and exchange access markets, while a necessary precondition to competition [illegible]ot sufficient to ensure that competition will supplant monopolies. An incumbent LEC's existing infrastructure enables it to serve new customers at a much lower incremental cost than a facilities-based entrant that must install its own switches, trunking and loops to serve its customers.[4] Furthermore, absent interconnection between the incumbent LEC and the entrant, the customer of the entrant would be unable to complete calls to subscribers served by the incumbent LEC's network. Because an incumbent LEC currently serves virtually all subscribers in its local serving area,[5] an incumbent LEC has little economic incentive to assist new entrants in their efforts to secure a greater share of that market. An incumbent LEC also has the ability to act on its incentive to discourage entry and robust competition by not interconnecting its network with the new entrant's network or by insisting on supracompetitive prices or other unreasonable conditions for terminating calls from the entrant's customers to the incumbent LEC's subscribers.

11. Congress addressed these problems in the 1996 Act by mandating that the most significant economic impediments to efficient entry into the monopolized local market must be removed. The incumbent LECs have economies of density, connectivity, and scale; traditionally, these have been viewed as creating a natural monopoly. As we pointed out in our NPRM, the local competition provisions of the Act require that these economies be shared

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[3] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Notice of Proposed Rulemaking, FCC 96-182 (rel. Apr. 19, 1996), 61 Fed. Reg. 18311 (Apr. 25, 1996) (NPRM).

[4] *See* NPRM at para. 6.

[5] *See* NPRM at n.13.

with entrants. We believe they should be shared in a way that permits the incumbent LECs to maintain operating efficiency to further fair competition, and to enable the entrants to share the economic benefits of that efficiency in the form of cost-based prices.[6] Congress also recognized that the transition to competition presents special considerations in markets served by smaller telephone companies, especially in rural areas.[7] We are mindful of these considerations, and know that they will be taken into account by state commissions as well.

12. The Act contemplates three paths of entry into the local market -- the construction of new networks, the use of unbundled elements of the incumbent's network, and resale. The 1996 Act requires us to implement rules that eliminate statutory and regulatory barriers and remove economic impediments to each. We anticipate that some new entrants will follow multiple paths of entry as market conditions and access to capital permit. Some may enter by relying at first entirely on resale of the incumbent's services and then gradually deploying their own facilities. This strategy was employed successfully by MCI and Sprint in the interexchange market during the 1970's and 1980's. Others may use a combination of entry strategies simultaneously -- whether in the same geographic market or in different ones. Some competitors may use unbundled network elements in combination with their own facilities to serve densely populated sections of an incumbent LEC's service territory, while using resold services to reach customers in less densely populated areas. Still other new entrants may pursue a single entry strategy that does not vary by geographic region or over time. Section 251 neither explicitly nor implicitly expresses a preference for one particular entry strategy. Moreover, given the likelihood that entrants will combine or alter entry strategies over time, an attempt to indicate such a preference in our section 251 rules may have unintended and undesirable results. Rather, our obligation in this proceeding is to establish rules that will ensure that all pro-competitive entry strategies may be explored. As to success or failure, we look to the market, not to regulation, for the answer.

13. We note that an entrant, such as a cable company, that constructs its own network will not necessarily need the services or facilities of an incumbent LEC to enable its own subscribers to communicate with each other. A firm adopting this entry strategy, however, still will need an agreement with the incumbent LEC to enable the entrant's customers to place calls to and receive calls from the incumbent LEC's subscribers.[8] Sections 251(b)(5) and (c)(2) require incumbent LECs to enter into such agreements on just, reasonable, and nondiscriminatory terms and to transport and terminate traffic originating on another carrier's network under reciprocal compensation arrangements. In this item, we adopt rules for states

[6] *See* NPRM at paras. 10-12.

[7] 47 U.S.C. § 251(f).

[8] *See infra*, Section IV.A.

to apply in implementing these mandates of section 251 in their arbitration of interconnection disputes, as well as their review of such arbitrated arrangements, or a BOC's statement of generally available terms. We believe that our rules will assist the states in carrying out their responsibilities under the 1996 Act, thereby furthering the Act's goals of fostering prompt, efficient, competitive entry.

14. We also note that many new entrants will not have fully constructed their local networks when they begin to offer service.[9] Although they may provide some of their own facilities, these new entrants will be unable to reach all of their customers without depending on the incumbent's facilities. Hence, in addition to an arrangement for terminating traffic on the incumbent LEC's network, entrants will likely need agreements that enable them to obtain wholesale prices for services they wish to sell at retail and to use at least some portions of the incumbents' facilities, such as local loops and end office switching facilities.

15. Congress recognized that, because of the incumbent LEC's incentives and superior bargaining power, its negotiations with new entrants over the terms of such agreements would be quite different from typical commercial negotiations. As distinct from bilateral commercial negotiation, the new entrant comes to the table with little or nothing the incumbent LEC needs or wants. The statute addresses this problem by creating an arbitration proceeding in which the new entrant may assert certain rights, including that the incumbent's prices for unbundled network elements must be "just, reasonable and nondiscriminatory."[10] We adopt rules herein to implement these requirements of section 251(c)(3).

D. Operational Barriers

16. The statute also directs us to remove the existing operational barriers to entering the local market. Vigorous competition would be impeded by technical disadvantages and other handicaps that prevent a new entrant from offering services that consumers perceive to be equal in quality to the offerings of incumbent LECs. Our recently-issued number portability Report and Order addressed one of the most significant operational barriers to

[9] Joint Managers' Statement, S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 113 (1996) ("Joint Explanatory Statement") at 121.

[10] *See* 47 U.S.C.§ 251(c)(3)

competition by permitting customers to retain their phone numbers when they change local carriers.[11]

17. Closely related to number portability is dialing parity, which we address in a companion order.[12] Dialing parity enables a customer of a new entrant to dial others with the convenience an incumbent provides, regardless of which carrier the customer has chosen as the local service provider. The history of competition in the interexchange market illustrates the critical importance of dialing parity to the successful introduction of competition in telecommunications markets. Equal access enabled customers of non-AT&T providers to enjoy the same convenience of dialing "1" plus the called party's number that AT&T customers had. Prior to equal access, subscribers to interexchange carriers (IXCs) other than AT&T often were required to dial more than 20 digits to place an interstate long-distance call. Industry data show that, after equal access was deployed throughout the country, the number of customers using MCI and other long-distance carriers increased significantly.[13] Thus, we believe that equal access had a substantial pro-competitive impact. Dialing parity should have the same effect.

18. This Order addresses other operational barriers to competition, such as access to rights of way, collocation, and the expeditious provisioning of resale and unbundled elements to new entrants. The elimination of these obstacles is essential if there is to be a fair opportunity to compete in the local exchange and exchange access markets. As an example, customers can voluntarily switch from one interexchange carrier to another extremely rapidly, through automated systems. This has been a boon to competition in the interexchange market. We expect that moving customers from one local carrier to another rapidly will be essential to fair local competition.

19. As competition in the local exchange market emerges, operational issues may be among the most difficult for the parties to resolve. Thus, we recognize that, along with the state commissions and the courts, we will be called upon to enforce provisions of arbitrated agreements and our rules relating to these operational barriers to entry. Because of the critical importance of eliminating these barriers to the accomplishment of the Act's pro-competitive

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[11] *Telephone Number Portability*, CC Docket No. 95-116, First Report and Order and Further Notice of Proposed Rulemaking, FCC 96-286 (rel. July 2, 1996) (*Number Portability Order*). Consistent with the 1996 Act, 47 U.S.C. §251(b)(2), we required LECs to implement interim and long-term measures to ensure that customers can change their local service providers without having to change their phone number. Number portability promotes competition by making it less expensive and less disruptive for a customer to switch providers, thus freeing the customer to choose the local provider that offers the best value.

[12] NPRM paras. 202-219.

[13] Federal Communications Commission, STATISTICS OF COMMUNICATIONS COMMON CARRIERS 1994-95, at 344, Table 8.8; Federal Communications Commission, REPORT ON LONG DISTANCE MARKET SHARE, Second Quarter 1995, at 14, table 6 (Oct. 1995).

objectives, we intend to enforce our rules in a manner that is swift, sure, and effective. To this end we will review, with the states, our enforcement techniques during the fourth quarter of 1996.

20. We recognize that during the transition from monopoly to competition it is vital that we and the states vigilantly and vigorously enforce the rules that we adopt today and that will be adopted in the future to open local markets to competition. If we fail to meet that responsibility, the actions that we take today to accomplish the 1996 Act's pro-competitive, deregulatory objectives may prove to be ineffective.

E. Transition

21. We consider it vitally important to establish a "pro-competitive, deregulatory national policy framework"[14] for local telephony competition, but we are acutely mindful of existing common carrier arrangements, relationships, and expectations, particularly those that affect incumbent LECs. In light of the timing issues described above, we think it wise to provide some appropriate transitions.

22. In this regard, this Order sets minimum, uniform, national rules, but also relies heavily on states to apply these rules and to exercise their own discretion in implementing a pro-competitive regime in their local telephone markets. On those issues where the need to create a factual record distinct to a state or to balance unique local considerations is material, we ask the states to develop their own rules that are consistent with general guidance contained herein. The states will do so in rulemakings and in arbitrating interconnection arrangements. On other issues, particularly those related to pricing, we facilitate the ability of states to adopt immediate, temporary decisions by permitting the states to set proxy prices within a defined range or subject to a ceiling. We believe that some states will find these alternatives useful in light of the strict deadlines of the law. For example, section 252(b)(4)(C) requires a state commission to complete the arbitration of issues that have been referred to it, pursuant to section 252(b)(1), within nine months after the incumbent local exchange carrier received the request for negotiation. Selection of the actual prices within the range or subject to the ceiling will be for the state commission to determine. Some states may use proxies temporarily because they lack the resources necessary to review cost studies in rulemakings or arbitrations. Other states may lack adequate resources to complete such tasks before the expiration of the arbitration deadline. However, we encourage all states to complete the necessary work within the statutory deadline. Our expectation is that the bulk of interconnection arrangements will be concluded through arbitration or agreement, by the beginning of 1997. Not until then will we be able to determine more precisely the impact of this Order on promoting competition. Between now and then, we are eager to continue our work with the states. In this period, as set forth earlier, we should be able to take major steps

[14] Joint Explanatory Statement at 1.

toward implementing a new universal service system and far-reaching reform of interstate access. These reforms will reflect intensive dialogue between us and the states.

23. Similarly, as states implement the rules that we adopt in this order as well as their own decisions, they may find it useful to consult with us, either formally or informally, regarding particular aspects of these rules. We encourage and invite such inquiries because we believe that such consultations are likely to provide greater certainty to the states as they apply our rules to specific arbitration issues and possibly to reduce the burden of expensive judicial proceedings on states. A variety of formal and informal procedures exist under our rules for such consultations, and we may find it helpful to fashion others as we gain additional experience under the 1996 Act.

F. Executive Summary

1. Scope of Authority of the FCC and State Commissions

24. The Commission concludes that sections 251 and 252 address both interstate and intrastate aspects of interconnection, resale services, and access to unbundled elements. The 1996 Act moves beyond the distinction between interstate and intrastate matters that was established in the 1934 Act, and instead expands the applicability of national rules to historically intrastate issues, and state rules to historically interstate issues. In the Report and Order, the Commission concludes that the states and the FCC can craft a partnership that is built on mutual commitment to local telephone competition throughout the country, and that under this partnership, the FCC establishes uniform national rules for some issues, the states, and in some instances the FCC, administer these rules, and the states adopt additional rules that are critical to promoting local telephone competition. The rules that the FCC establishes in this Report and Order are minimum requirements upon which the states may build. The Commission also intends to review and amend the rules it adopts in this Report and Order to take into account competitive developments, states' experiences, and technological changes.

2. Duty to Negotiate in Good Faith

25. In the Report and Order, the Commission establishes some national rules regarding the duty to negotiate in good faith, but concludes that it would be futile to try to determine in advance every possible action that might be inconsistent with the duty to negotiate in good faith. The Commission also concludes that, in many instances, whether a party has negotiated in good faith will need to be decided on a case-by-case basis, in light of the particular circumstances. The Commission notes that the arbitration process set forth in section 252 provides one remedy for failing to negotiate in good faith. The Commission also concludes that agreements that were negotiated before the 1996 Act was enacted, including agreements between neighboring LECs, must be filed for review by the state commission pursuant to section 252(a). If the state commission approves such agreements, the terms of

those agreements must be made available to requesting telecommunications carriers in accordance with section 252(i).

3. Interconnection

26. Section 251(c)(2) requires incumbent LECs to provide interconnection to any requesting telecommunications carrier at any technically feasible point. The interconnection must be at least equal in quality to that provided by the incumbent LEC to itself or its affiliates, and must be provided on rates, terms, and conditions that are just, reasonable, and nondiscriminatory. The Commission concludes that the term "interconnection" under section 251(c)(2) refers only to the physical linking of two networks for the mutual exchange of traffic. The Commission identifies a minimum set of five "technically feasible" points at which incumbent LECs must provide interconnection: (1) the line side of a local switch (for example, at the main distribution frame); (2) the trunk side of a local switch; (3) the trunk interconnection points for a tandem switch; (4) central office cross-connect points; and (5) out-of-band signalling facilities, such as signalling transfer points, necessary to exchange traffic and access call-related databases. In addition, the points of access to unbundled elements (discussed below) are also technically feasible points of interconnection. The Commission finds that telecommunications carriers may request interconnection under section 251(c)(2) to provide telephone exchange or exchange access service, or both. If the request is for such purpose, the incumbent LEC must provide interconnection in accordance with section 251(c)(2) and the Commission's rules thereunder to any telecommunications carrier, including interexchange carriers and commercial mobile radio service (CMRS) providers.

4. Access to Unbundled Elements

27. Section 251(c)(3) requires incumbent LECs to provide requesting telecommunications carriers nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory. In the Report and Order, the Commission identifies a minimum set of network elements that incumbent LECs must provide under this section. States may require incumbent LECs to provide additional network elements on an unbundled basis. The minimum set of network elements the Commission identifies are: local loops, local and tandem switches (including all vertical switching features provided by such switches), interoffice transmission facilities, network interface devices, signalling and call-related database facilities, operations support systems functions, and operator and directory assistance facilities. The Commission concludes that incumbent LECs must provide nondiscriminatory access to operations support systems functions by January 1, 1997. The Commission concludes that access to such operations support systems is critical to affording new entrants a meaningful opportunity to compete with incumbent LECs. The Commission also concludes that incumbent LECs are required to provide access to network elements in a manner that allows requesting carriers to combine such elements as they choose, and that incumbent LECs

may not impose restrictions upon the uses to which requesting carriers put such network elements.

5. Methods of Obtaining Interconnection and Access to Unbundled Elements

28. Section 251(c)(6) requires incumbent LECs to provide physical collocation of equipment necessary for interconnection or access to unbundled network elements at the incumbent LEC's premises, except that the incumbent LEC may provide virtual collocation if it demonstrates to the state commission that physical collocation is not practical for technical reasons or because of space limitations. The Commission concludes that incumbent LECs are required to provide for any technically feasible method of interconnection or access requested by a telecommunications carrier, including physical collocation, virtual collocation, and interconnection at meet points. The Commission adopts, with certain modifications, some of the physical and virtual collocation requirements it adopted earlier in the *Expanded Interconnection* proceeding. The Commission also establishes rules interpreting the requirements of section 251(c)(6).

6. Pricing Methodologies

29. The 1996 Act requires the states to set prices for interconnection and unbundled elements that are cost-based, nondiscriminatory, and may include a reasonable profit. To help the states accomplish this, the Commission concludes that the state commissions should set arbitrated rates for interconnection and access to unbundled elements pursuant a forward-looking economic cost pricing methodology. The Commission concludes that the prices that new entrants pay for interconnection and unbundled elements should be based on the local telephone companies Total Service Long Run Incremental Cost of a particular network element, which the Commission calls "Total Element Long-Run Incremental Cost" (TELRIC), plus a reasonable share of forward-looking joint and common costs. States will determine, among other things, the appropriate risk-adjusted cost of capital and depreciation rates. For states that are unable to conduct a cost study and apply an economic costing methodology within the statutory time frame for arbitrating interconnection disputes, the Commission establishes default ceilings and ranges for the states to apply, on an interim basis, to interconnection arrangements. The Commission establishes a default range of 0.2-0.4 cents per minute for switching. For tandem switching, the Commission establishes a default ceiling of 0.15 cents per minute. The Order also establishes default ceilings for the other unbundled network elements.

7. Access Charges for Unbundled Switching

30. Nothing in this Report and Order alters the collection of access charges paid by an interexchange carrier under Part 69 of the Commission's rules, when the incumbent LEC provides exchange access service to an interexchange carrier, either directly or through service

resale. Because access charges are not included in the cost-based prices for unbundled network elements, and because certain portions of access charges currently support the provision of universal service, until the access charge reform and universal service proceedings have been completed, the Commission continues to provide for a certain portion of access charge recovery with respect to use of an incumbent LEC's unbundled switching element, for a defined period of time. This will minimize the possibility that the incumbent LEC will be able to "double recover," through access charges, the facility costs that new entrants have already paid to purchase unbundled elements, while preserving the status quo with respect to subsidy payments. Incumbent LECs will recover from interconnecting carriers the carrier common line charge and a charge equal to 75% of the transport interconnection charge for all interstate minutes traversing the incumbent LECs local switches for which the interconnecting carriers pay unbundled network element charges. This aspect of the Order expires at the earliest of: 1) June 30, 1997; 2) the effective date of final decisions by the Commission in the universal service and access reform proceedings; or 3) if the incumbent LEC is a Bell Operating Company (BOC), the date on which that BOC is authorized under section 271 of the Act to provide in-region interLATA service, for any given state.

31. For a similar limited period, incumbent LECs may charge the same portions of any intrastate access charges comparable to the carrier common line charge (CCLC) and the transport interconnection charge (TIC), as well as any existing explicit universal service support mechanisms based on intrastate access charges. During this period, incumbent LECs may continue to recover such revenues from purchasers of unbundled local switching elements that use those elements to originate or terminate intrastate toll calls for end user customers they win from incumbent LECs. These state mechanisms must end on the earlier of: (1) June 30, 1997; (2) the effective date of a state commission decision that an incumbent LEC may not assess such charges; and (3) if the incumbent LEC that receives the access charge revenues is a BOC, the date on which that BOC is authorized under section 271 of the 1996 Act to offer in-region interLATA service. The last end date will apply only to the recovery of charges in those states in which the BOC is authorized to offer interLATA service.

8. Resale

32. The 1996 Act requires all incumbent LECs to offer for resale any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers. Resale will be an important entry strategy both in the short term for many new entrants as they build out their own facilities and for small businesses that cannot afford to compete in the local exchange market by purchasing unbundled elements or by building their own networks. State commissions must identify marketing, billing, collection, and other costs that will be avoided or that are avoidable by incumbent LECs when they provide services wholesale, and calculate the portion of the retail rates for those services that is attributable to the avoided and avoidable costs. The Commission identifies certain avoided costs, and the application of this definition is left to the states. If a state elects not to

implement the methodology, it may elect, on an interim basis, a discount rate from within a default range of discount rates established by the Commission. The Commission establishes a default discount range of 17-25% off retail prices, leaving the states to set the specific rate within that range, in the exercise of their discretion.

9. Requesting Telecommunications Carriers

33. The Commission concludes that, to the extent that a carrier is engaged in providing for a fee local, interexchange, or international basic services directly to the public or to such classes of users as to be effectively available directly to the public, the carrier is a "telecommunications carrier," and is thus subject to the requirements of section 251(a) and the benefits of section 251(c). The Commission concludes that CMRS providers are telecommunications carriers, and that private mobile radio service (PMRS) providers generally are not telecommunications carriers, except to the extent that a PMRS provider uses excess capacity to provide local, interexchange, or international services for a fee directly to the public. The Commission also concludes that, if a company provides both telecommunications services and information services, it must be classified as a telecommunications carrier.

10. Commercial Mobile Radio Service

34. The Commission concludes that LECs are obligated, pursuant to section 251(b)(5) and the corresponding pricing standards of section 252(d)(2) to to enter into reciprocal compensation arrangements with CMRS providers, including paging providers, for the transport and termination of traffic on each other's networks. The Commission concludes that many CMRS providers (specifically cellular, broadband PCS and covered specialized mobile radio (SMR) providers) offer telephone exchange service and exchange access, and that incumbent LECs therefore must make interconnection available to these CMRS providers in conformity with sections 251(c) and 252. The Commission concludes that CMRS providers should not be classified as LECs at this time. The Commission also concludes that it may apply section 251 and 252 to LEC-CMRS interconnection. By opting to proceed under sections 251 and 252, the Commission is not finding that section 332 jurisdiction over interconnection has been repealed by implication, and the Commission acknowledges that section 332, in tandem with section 201, is a basis for jurisdiction over LEC-CMRS interconnection.

11. Transport and Termination

35. The 1996 Act requires that charges for transport and termination of traffic set based on "additional cost." The Commission concludes that state commissions, during arbitrations, should set symmetrical prices based on the local telephone company's forward-looking economic costs. The state commissions would use the TELRIC methodology when establishing rates for transport and termination. The Commission establishes a default range

of 0.2-0.4 cents per minute for end office termination for states which have not conducted a TELRIC cost study. The Commission finds significant evidence in the record in support of the lower end of the range. In addition, the Commission finds that additional reciprocal charges could apply to termination through a tandem switch. The default ceiling for tandem switching is 0.15 cents per minute, plus applicable charges for transport from the tandem switch to the end office. Each state opting for the default approach for a limited period of time, may select a rate within that range.

12. Access to Rights of Way

36. The Commission amends its rules to implement the pole attachment provisions of the 1996 Act. Specifically, the Commission establishes procedures for nondiscriminatory access by cable television systems and telecommunications carriers to poles, ducts, conduits, and rights-of-way owned by utilities or LECs. The Order includes several specific rules as well as a number of more general guidelines designed to facilitate the negotiation and mutual performance of fair, pro-competitive access agreements without the need for regulatory intervention. Additionally, an expedited dispute resolution is provided when good faith negotiations fail, as are requirements concerning modifications to poles, ducts, conduits, and rights-of-way and the allocation of the costs of such modifications.

13. Obligations Imposed on non-incumbent LECs

37. The Commission concludes that states generally may not impose on non-incumbent LECs the obligations set forth in section 251(c) entitled, "Additional Obligations on Incumbent Local Exchange Carriers." Section 251(h)(2) sets forth a process by which the Commission may decide to treat LECs as incumbent LECs, and state commissions or other interested parties may ask the Commission to issue a rule, in accordance with section 251(h)(2), providing for the treatment of a LEC as an incumbent LEC. In addition to this Report and Order, the Commission addresses in separate proceedings some of the obligations, such as dialing parity and number portability, that section 251(b) imposes on all LECs.

14. Exemptions, Suspensions, and Modifications of Section 251 Requirements

38. Section 251(f)(1) provides for exemption from the requirements in section 251(c) for rural telephone companies (as defined by the 1996 Act) under certain circumstances. Section 251(f)(2) permits LECs with fewer than 2 percent of the nation's subscriber lines to petition for suspension or modification of the requirements in sections 251(b) or (c). In the Report and Order, the Commission establishes a very limited set of rules interpreting the requirements of section 251(f). For example, the Commission finds that LECs bear the burden of proving to the state commission that a suspension or modification of the requirements of section 251(b) or (c) is justified. Rural LECs bear the burden of proving that continued exemption of the requirements of section 251(c) is justified, once a bona fide

request has been made by a carrier under section 251. The Commission also concludes that only LECs that, at the holding company level, have fewer than 2 percent of the nation's subscriber lines are entitled to petition for suspension or modification of requirements under section 251(f)(2). For the most part, however, the states will interpret the provisions of section 251(f) through rulemaking and adjudicative proceedings, and will be responsible for determining whether a LEC in a particular instance is entitled to exemption, suspension, or modification of section 251 requirements.

15. Commission Responsibilities Under Section 252

39. Section 252(e)(5) requires the Commission to assume the state's responsibilities under section 252 if the state "fails to act to carry out its responsibility" under that section. In the Report and Order, the Commission adopts a minimum set of rules that will provide notice of the standards and procedures that the Commission will use if it has to assume the responsibility of a state commission under section 252(e)(5). The Commission concludes that, if it arbitrates agreements, it will use a "final offer" arbitration method, under which each party to the arbitration proposes its best and final offer, and the arbitrator chooses among the proposals. The arbitrator could choose a proposal in its entirety, or could choose different parties' proposals on an issue-by-issue basis. In addition, the parties could continue to negotiate an agreement after they submit their proposals and before the arbitrator makes a decision.

40. Section 252(i) of the 1996 Act requires that incumbent LECs make available to any requesting telecommunications carrier any individual interconnection, service, or network element on the same terms and conditions as contained in any agreement approved under Section 252 to which they are a party. The Commission concludes that section 252(i) entitles all carriers with interconnection agreements to "most favored nation" status regardless of whether such a clause is in their agreement. Carriers may obtain any individual interconnection, service, or network element under the same terms and conditions as contained in any publicly filed interconnection agreement without having to agree to the entire agreement. Additionally, carriers seeking interconnection, network elements, or services pursuant to section 252(i) need not make such requests pursuant to the procedures for initial section 251 requests, but instead may obtain access to agreement provisions on an expedited basis.

II. SCOPE OF THE COMMISSION'S RULES

41. In implementing section 251, we conclude that some national rules are necessary to promote Congress's goals for a national policy framework and serve the public interest, and that states should have the major responsibility for prescribing the specific terms and conditions that will lead to competition in local exchange markets. Our approach in this Report and Order has been a pragmatic one, consistent with the Act, with respect to this allocation of responsibilities. We believe that the steps necessary to implement section 251 are not appropriately characterized as a choice between specific national rules on the one hand and substantial state discretion on the other. We adopt national rules where they facilitate administration of sections 251 and 252, expedite negotiations and arbitrations by narrowing the potential range of dispute where appropriate to do so, offer uniform interpretations of the law that might not otherwise emerge until after years of litigation, remedy significant imbalances in bargaining power, and establish the minimum requirements necessary to implement the nationwide competition that Congress sought to establish. This is consistent with our obligation to "complete all actions necessary to establish regulations to implement the requirements" of section 251.[15] Some of these rules will be relatively self-executing. In many instances, however, the rules we establish call on the states to exercise significant discretion and to make critical decisions through arbitrations and development of state-specific rules. Over time, we will continue to review the allocation of responsibilities, and we will reallocate them if it appears that we have inappropriately or inefficiently designated the decisionmaking roles.

42. The decisions in this Report and Order, and in this Section in particular, benefit from valuable insights provided by states based on their experiences in establishing rules and taking other actions intended to foster local competition. Through formal comments, *ex parte* meetings, and open forums,[16] state commissioners and their staffs provided extensive, detailed information to us regarding difficult or complex issues that they have encountered, and the various approaches they have adopted to address those issues. Information from the states highlighted both differences among communities within states, as well as similarities among states. Recent state rules and orders that take into account the local competition provisions of the 1996 Act have been particularly helpful to our deliberations about the types of national

[15] 47 U.S.C. § 251(d)(1).

[16] Public forum held on March 15, 1996, by FCC's Office of General Counsel to discuss interpretation of sections 251 and 252 of the Telecommunications Act of 1996; public forum held on July 9, 1996, by FCC's Common Carrier Bureau and Office of General Counsel to discuss implementation of section 271 of the Telecommunications Act of 1996.

rules that will best further the statute's goal of encouraging local telephone competition.[17] These state decisions also offered useful insights in determining the extent to which the Commission should set forth uniform national rules, and the extent to which we should ensure that states can impose varying requirements. Our contact with state commissioners and their staffs, as well as recent state actions, make clear that states and the FCC share a common commitment to creating opportunities for efficient new entry into the local telephone market. Our experience in working with state commissions since passage of the 1996 Act confirms that we will achieve that goal most effectively and quickly by working cooperatively with one another now and in the future as the country's emerging competition policy presents new difficulties and opportunities.

43. We also received helpful advice and assistance from other government agencies, including the National Telecommunications and Information Administration (NTIA), the Department of Justice, and the Department of Defense about how national rules could further the public interest. In addition, comments from industry members and consumer advocacy groups helped us understand better the varying and competing concerns of consumers and different representatives of the telecommunications industry. We benefitted as well by discovering that there are certain matters on which there is substantial agreement about the role the Commission should play in establishing and enforcing provisions of section 251.

A. Advantages and Disadvantages of National Rules

1. Background

44. Section 251(d)(1) instructs the Commission, within six months after the enactment of the 1996 Act (that is, by August 8, 1996), to "establish regulations to implement the requirements of [section 251]."[18] In addition, section 253 requires the Commission to preempt the enforcement of any state or local statute, regulation, or legal requirement that "prohibit[s]

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[17] *See, e.g.*, Petition of AT&T for the Commission to Establish Resale Rules, Rates, Terms and Condition and the Initial Unbundling of Services, Docket No. 6352-U (Georgia Commission May 29, 1996); AT&T Communications of Illinois, Inc. *et al.*, Petition for a Total Local Exchange Wholesale Service Tariff from Illinois Bell Telephone Company, Nos. 95-0458 and 95-0531 (consol.) (Illinois Commission June 26, 1996); Hawaii Administrative Rules, Ch. 6-80, "Competition in Telecommunications Services," (Hawaii Commission May 17, 1996); Public Utilities Commission of Ohio Case No. 95-845-TP-COI (Local Competition) (Ohio Commission June 12, 1996) and Implementation of the Mediation and Arbitration Provisions of the Federal Telecommunications Act of 1996, Case No. 96-463-TP-UNC (Ohio Commission May 30, 1996); Proposed Rules regarding Implementation of §§ 40-15-101 *et seq.* Requirements relating to Interconnection and Unbundling, Docket No. 95R-556T (Colorado Commission April 25, 1996) (one of a series of Orders adopted by the Colorado Commission in response to the local competition provisions of the 1996 Act); Washington Utilities and Transportation Commission, Fifteenth Supplemental Order, Decision and Order Rejecting Tariff Revisions, Requiring Refiling, Docket No. UT-950200 (Washington Commission April 1996).

[18] 47 U.S.C. § 251(d)(1). The Commission's implementing rules should be designed "to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition." Joint Explanatory Statement at 1.

or [has] the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."[19]

45. In the NPRM, we stated our belief that we should implement Congress's goal of a pro-competitive, de-regulatory, national policy framework by adopting national rules that are designed to secure the full benefits of competition for consumers, with due regard to work already done by the states.[20] We sought comment on the extent to which we should adopt explicit national rules, and the extent to which permitting variations among states would further Congress's pro-competitive goals.[21] We anticipated that we would rely on actions some states have already taken to address interconnection and other issues related to opening local markets to competition. In the NPRM, we set forth some of the benefits that would likely result from implementing explicit national rules, and some of the benefits that would likely result from allowing variations among states.[22]

2. Comments

46. The parties recommend a broad spectrum of approaches with respect to the scope and detail of Commission regulations. The vast majority of potential local competitors, such as interexchange carriers (IXCs), competitive access providers (CAPs), and cable operators, assert that the Commission should adopt clear and explicit national standards that will serve as the backdrop for negotiations and will establish minimum requirements for arbitrated agreements.[23] Other parties, including federal agencies, consumer groups, and equipment manufacturers, also support explicit national rules.[24] These parties contend that explicit national standards are useful, or even critical, to achieving the pro-competitive goals enunciated by Congress.

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[19] 47 U.S.C. § 253(a) and (d).

[20] NPRM at para. 26 (*citing* Joint Explanatory Statement at 1).

[21] NPRM at paras. 27, 35.

[22] NPRM at paras. 30-33.

[23] *See, e.g.*, AT&T comments at 3; MCI comments at 4-6; Sprint comments at 4-6; MFS comments at 5-6; Jones Intercable comments at 11, 13; Cable & Wireless comments at 6-7; LCI comments at 2, 13; TCC comments at 5-6; Hyperion comments at 6; Ad Hoc Telecommunications Users Committee comments at 3-10; LDDS reply at 4.

[24] *See, e.g.*, SBA comments at 4; Ohio Consumers' Counsel comments at 2-3; DoJ comments at 5-8; Lucent comments at 3; Frontier reply at 7; IDCMA reply at 2-9; NTIA reply at 3; National Association of the Deaf reply at 1-3; Texas Public Utility Counsel reply at 2.

47. Parties supporting explicit national rules assert that national standards will give incumbent LECs an incentive to negotiate if the national rules would subject the incumbents to less advantageous terms than they otherwise would be likely to negotiate.[25] Other advantages of national standards, according to these parties, include: reducing the likelihood of potentially inconsistent determinations by state commissions and courts,[26] and reducing burdens on new entrants that seek to provide service on a regional or national basis by limiting their need for separate network configurations and marketing strategies, and by increasing predictability.[27] As a result, they assert, new entrants would have greater access to capital necessary to develop competing services.[28] Parties state that collectively, these advantages demonstrate that national standards will foster competition more quickly than regulations developed on a state-by-state basis.[29] In addition, some parties contend that clear national standards also will assist both the states in arbitrating and reviewing agreements within the time frames set forth in section 252 and the FCC in arbitrating agreements under section 252(e)(5) where states have failed to act, and in reviewing BOC applications to enter

[25] *See, e.g.*, AT&T comments at 6-8 (noting that this is particularly true for non-BOC incumbent LECs, such as SNET and GTE, which already have interLATA authority and have no reason to comply with section 251); Cable & Wireless comments at 7-9; Hyperion comments at 7; MFS comments at 5-6; Teleport comments at 14-17 (vague standards will allow incumbents to adopt a "take it or leave it" approach); TCC comments at 5-7; Comcast reply at 5; CompTel reply at 7; LDDS reply at 3-4; NTIA reply at 3; PageNet reply at 4; *see also* Citizens Utilities comments at 5 (FCC should establish minimum standards sufficient to equalize bargaining power between incumbents and new entrants); Cox comments at 10; Excel comments at 2-3. *But see, e.g.*, Ameritech comments at 7-9 (incumbent LECs do not have vastly superior bargaining power, and cannot unilaterally impose terms upon other parties); PacTel comments at 6; USTA comments at 6 n.9 (the NPRM overstates the bargaining power of incumbent LECs; in particular, non-BOC LECs may have less bargaining power than IXCs, cable companies, or competitive access providers); USTA reply at 2-4; Bell Atlantic reply at 3.

[26] ALTS comments at 2-4; ACSI comments at 4; AT&T comments at 9-10; Cox comments at 22-23; DoJ comments at 12; Frontier comments at 6; GSA/DoD comments at 4-5; TIA comments at 5; MCI comments at 4-6 (differing rules will make it difficult to develop a rational national policy); TCC comments at 7-8, 13 (federal rules will eliminate the need for new entrants to expend resources fighting the same battle in 50 states); *accord* Cable & Wireless comments at 10 (even 50 excellent plans are not optimal if they are 50 different plans).

[27] AT&T comments at 9; Cable & Wireless comments at 6-9 (cost efficiencies of national networks are substantial); Excel comments at 2; Hyperion comments at 5; GST comments at 2; Jones Intercable comments at 11; Ohio Consumers' Counsel comments at 3; SBA comments at 4 (national rules will particularly help small competitors); Sprint comments at 3; TCC comments at 7-8; ACSI reply at 4; *see also* Intermedia comments at 3 (national uniform standards are necessary to resolve the many regulatory, technical and operational questions that accompany interconnection to incumbent LEC networks); Lucent comments at 3 (national standards will promote industry growth and assist telecommunications equipment vendors); SDN Users Association comments at 2; International Communications Ass'n comments at 3.

[28] ALTS comments at 2-4; GSA/DoD comments at 4-5; MCI comments at 4-6. *But see* GTE reply at 6 (uniform federal rules will not affect the ability of large, financially well-positioned entities like AT&T to obtain capital).

[29] *See, e.g.*, ALTS comments at 2-4; Competition Policy Institute comments at 10; DoJ comments at 13-15 (a single set of rules can be created faster than 50 different sets).

in-region interLATA markets pursuant to section 271.[30] Some parties that favor strong national rules caution against prematurely dismantling consumer protection rules and relying instead on competitive market conditions that do not yet exist.[31] Many commercial mobile radio service (CMRS) providers contend that national rules governing LEC-CMRS interconnection are necessary to foster development of a ubiquitous, nationwide network.[32]

48. Some state regulatory commissions advocate explicit national standards, at least in some areas. For example, the Massachusetts Commission states that the FCC can and should establish national rules in implementing section 251, except in the area of pricing.[33] The Kentucky Commission asserts that uniform national rules for market entry are necessary to ensure successful local competition, and that national pricing principles will aid states in setting rates during the arbitration process and in reviewing BOC statements of generally available terms.[34] The North Dakota Commission asserts that, while some states may not need federal support, specific standards would provide a necessary and significant benefit for North Dakota, in light of its limited resources to implement a pro-competitive regulatory regime.[35] The Illinois Commission states that minimum national rules are a major step toward competitive markets, but that states should be permitted to implement and enforce additional rules.[36]

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[30] Ad Hoc Telecommunications Users Committee comments at 9-10; AT&T comments at 8-9, 11; Cable & Wireless comments at 7-9; CompTel comments at 22; Excel comments at 2.

[31] *See, e.g.*, Competition Policy Institute reply at 2, 11.

[32] *See, e.g.*, Vanguard comments in CC Docket No. 95-185 at 26; Centennial comments in CC Docket No. 95-185 at 31.

[33] Mass. Commission comments at 4-5. What, if any, rules the Commission should, as both a legal and policy matter, adopt with respect to pricing is addressed separately in *infra*, Section II.D.

[34] Kentucky Commission comments at 3-4. Section 252(f) permits a BOC to file for review by a state commission a statement of terms and conditions that the BOC offers to comply with the regulations of section 251 and the regulations thereunder. A BOC may be permitted to provide in-region interLATA service if, ten months after enactment of the 1996 Act, no carrier has requested access and interconnection (as described in section 271(c)(1)(A)) and the BOC has a statement of generally available terms and conditions that a state commission has approved or permitted to take effect. *See also* Kansas Commission comments at 4-5 (national interconnection standards to enable inter-company provisioning and national performance standards will facilitate negotiations and reduce the incumbent's negotiating advantage).

[35] North Dakota Commission comments at 1-2; *see also* Illinois Commission comments at 9-10 (minimum federal standards will give direction to states, will help create consistency among states, and will serve as a major step in the transition toward a competitive market, but states should be able to augment and build upon national standards).

[36] Illinois Commission comments at 9-10.

49. Some parties contend that national rules are particularly important for small competitors' entry into local markets.[37] Barriers to market entry, which cause delay, raise transactional costs, or otherwise impose economically inefficient constraints, are particularly threatening to small competitors, according to the Small Business Administration. Moreover, the Small Business Administration contends that the needs of small competitors deserve special consideration, because they are likely to fill niche market needs that larger competitors typically overlook.[38]

50. Other commenters oppose explicit national rules, or seek significant limits on the scope and detail of FCC requirements. The majority of state commissions and incumbent LECs advocate that the Commission establish general, broad regulations or guidelines, and leave substantial opportunity for the parties to negotiate specific terms,[39] with the states to establish specific requirements if the parties cannot reach agreement.[40] BellSouth urges the Commission merely to codify the language of the 1996 Act.[41]

51. Parties that oppose explicit national standards assert that they are contrary to the Act,[42] could impede the development of local competition,[43] and will undermine progressive

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[37] *See, e.g.*, SBA comments at 3-4.

[38] *Id; accord, e.g.*, Richard N. Koch comments at 1-2; ATSI reply at 7-8. *Contra, e.g.*, Colorado Ind. Tel. Ass'n comments at 2-3; GVNW comments at 2; NARUC comments at 8; Joint Consumer Advocates reply at 5-6 (national standards will be particularly burdensome for small or rural LECs, and will make it difficult for "niche" providers to succeed); Rural Tel. Coalition comments at 4-8.

[39] Ameritech comments at 6; Bell Atlantic comments at 2-3; Georgia Commission comments at 3-5; Illinois Commission comments at 13; Lincoln Tel. comments at 3-4; Rural Tel. Coalition comments at 2; South Carolina Commission comments at 2-3; SBC comments at 4-5, 19-21; TDS comments at 3 (Congress evinced a preference for voluntarily negotiated agreements and the FCC should not try to alter the Act's mechanisms for transitioning to competition); USTA comments at 6; Ohio Consumers' Counsel reply at 3.

[40] *See, e.g.*, USTA comments at 6-8; Alabama Commission comments at 10; Ameritech comments at 4, 6; Bell Atlantic comments at 1-2; Iowa Commission comments at 2, 4; NARUC comments at 4, 22-24; Idaho Commission comments at 2-4; North Carolina Commission Staff comments at 10-11; Oklahoma Commission comments at 1-3; Puerto Rico Tel. comments at 3-4; *accord* Alliance for Public Technology comments at 8-10; CFA/CU comments at 4-5; Rural Tel. Coalition comments at 2, 6; TDS comments at 3; Texas Commission comments at 4-5.

[41] BellSouth comments at 3-5.

[42] Alaska Tel. Ass'n comments at 2; Ameritech comments at 9; Bell Atlantic comments at 2-3; GTE comments at 12-14; Puerto Rico Tel. comments at 2-3; Rural Tel. Coalition comments at 2, 6; SBC comments at 8-10, 18-19.

actions already taken by states.[44] They also assert that states should be given the opportunity to experiment with different approaches intended to promote local competition,[45] and that technical, economic, geographic, and demographic variations require tailored responses by state commissions.[46] For example, GTE states that, "[i]n reality, each local market is different -- some are flat, others are hilly or mountainous; some are densely populated, others are suburban or rural; some have state-of-the-art technology, others retain older facilities; some possess a temperate climate, others suffer harsh storms; some are wealthy, others are poor; some have a high proportion of business customers, others are predominantly residential."[47] Many parties counter that geographic differences do not merit state-specific rules instead of national rules.[48] They contend that the differences cited by GTE exist among different locales, but that many states include most of these variations within their borders.[49]

52. State commissions and incumbent LECs reject the suggestion that the FCC is required to impose nationally uniform requirements in order to achieve Congress's goals. For example, in support of its claim that Congress did not intend national uniformity, the New

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[44] Ad Hoc Coalition of Corporate Telecommunications Managers comments at 2; BellSouth comments at 3-5; District of Columbia Commission comments at 11-12; Georgia Commission comments at 2; Maryland Commission comments at 2-3; Oregon Commission comments at 7, 25; PacTel comments at 1-3; California Commission reply at 8; *see also* Illinois Commission comments at 9-10 (overly extensive federal regulation could inhibit competition by restricting a state's ability to respond to technological and market developments and regional differences).

[45] Connecticut Commission comments at 8-9; GTE comments at 10; Maryland Commission comments at 5-6, 12; MECA comments at 11-12; Municipal Utilities comments at 6-8; North Carolina Commission Staff comments at 9-10; Oregon Commission comments at iv, 7; PacTel comments at 1-3; Washington Commission comments at 1-2.

[46] *See, e.g.*, Alliance for Public Technology comments at 8-10; Florida Commission comments at 2-3, 6; New York Commission comments at 18-19; Pennsylvania Commission comments at 17; TDS comments at 11.

[47] *See, e.g.*, District of Columbia Commission comments at 7; North Carolina Commission comments at 2-8; Wyoming Commission comments at 4-5 (Wyoming is rural and sparsely populated, and has among the highest costs in the country, but residents in both cities and rural areas require access to sophisticated services; it cannot "afford to be subjected needlessly to the problems which models designed to address other people's problems would cause").

[48] GTE comments at 7-8.

[49] ALTS comments at 4 (aside from universal service issues that are being addressed by a Joint Board in a separate proceeding, there are no unique policy concerns that states need to address or that would be endangered by national rules); Cable & Wireless comments at 9; DoJ comments at 13-15; GCI comments at 4; MCI comments at 4-6 (networks are not designed on a state-specific basis); Jones Intercable comments at 12; Cox reply at 4 n.8.

[49] *See, e.g.*, AT&T comments at 12.

York Commission cites the fact that agreements may be negotiated without reference to the Commission's regulations under section 251(b) and (c), and that under section 251(d)(3), states may impose rules consistent with the Act.[50]

3. Discussion

53. Comments and *ex parte* discussions with state commission representatives have convinced us that we share with states a common goal of promoting competition in local exchange markets. We conclude that states and the FCC can craft a working relationship that is built on mutual commitment to local service competition throughout the country, in which the FCC establishes uniform, national rules for some issues, the states and the FCC administer these rules, and the states adopt other critically important rules to promote competition. In implementing the national rules we adopt in this Report and Order, states will help to illuminate and develop innovative solutions regarding many complex issues for which we have not attempted to prescribe national rules at this time, and states will adopt specific rules that take into account local concerns. In this Report and Order, and in subsequent actions we intend to take, we have and will continue to seek guidance from various states that have taken the lead in establishing pro-competitive requirements.[51] Virtually every decision in this Report and Order borrows from decisions reached at the state level, and we expect this close association with and reliance on the states to continue in the future. We therefore encourage states to continue to pursue their own pro-competitive policies. Indeed, we hope and expect that this Report and Order will foster an interactive process by which a number of policies consistent with the 1996 Act are generated by states.

54. We find that certain national rules are consistent with the terms and the goals of the statute. Section 251 sets forth a number of rights with respect to interconnection, resale services, and unbundled network elements. We conclude that the Commission should define at least certain minimum obligations that section 251 requires, respectively, of all telecommunications carriers, LECs, or incumbent LECs. For example, as discussed in more detail below, we conclude that it is reasonable to identify a minimum number of network elements that incumbent LECs must unbundle and make available to requesting carriers pursuant to the standards set forth in sections 251(c) and (d), while also permitting states to go beyond that minimum list and impose additional requirements that are consistent with the 1996 Act and the FCC's implementing rules. We find no basis for permitting an incumbent LEC in some states not to make available these minimum technically feasible network elements that are provided by incumbent LECs in other states. We point out, however, that a

[50] New York Commission comments at 12-13; *see also* Maryland Commission comments at 9, 13, 20; Washington Commission comments at 7-8 (referencing section 252(e)(3)); Rural Tel. Coalition reply at 6.

[51] We also expect to rely heavily on state input and experience in other FCC proceedings, such as access reform and petitions concerning BOC entry into in-region interLATA markets.

uniform rule does not necessarily mean uniform results. For example, a national pricing methodology takes into account local factors and inputs, and thus may lead to different prices in different states, and different regions within states. In addition, parties that voluntarily negotiate agreements need not comply with the requirements we establish under sections 251(b) and (c), including any pricing rules we adopt.[52] We intend to review on an ongoing basis the rules we adopt herein in light of competitive developments, states' experiences, and technological changes.

55. We find that incumbent LECs have no economic incentive, independent of the incentives set forth in sections 271 and 274 of the 1996 Act, to provide potential competitors with opportunities to interconnect with and make use of the incumbent LEC's network and services. Negotiations between incumbent LECs and new entrants are not analogous to traditional commercial negotiations in which each party owns or controls something the other party desires. Under section 251, monopoly providers are required to make available their facilities and services to requesting carriers that intend to compete directly with the incumbent LEC for its customers and its control of the local market. Therefore, although the 1996 Act requires incumbent LECs, for example, to provide interconnection and access to unbundled elements on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, incumbent LECs have strong incentives to resist such obligations. The inequality of bargaining power between incumbents and new entrants militates in favor of rules that have the effect of equalizing bargaining power in part because many new entrants seek to enter national or regional markets. National (as opposed to state) rules more directly address these competitive circumstances.

56. We emphasize that, under the statute, parties may voluntarily negotiate agreements "without regard to" the rules that we establish under sections 251(b) and (c).[53] However, fair negotiations will be expedited by the promulgation of national rules. Similarly, state arbitration of interconnection agreements now and in the future will be expedited and simplified by a clear statement of terms that must be included in every arbitrated agreement, absent mutual consent to different terms. Such efficiency and predictability should facilitate entry decisions, and in turn enhance opportunities for local exchange competition. In addition, for new entrants seeking to provide service on a national or regional basis, minimum national requirements may reduce the need for designing costly multiple network configurations and marketing strategies, and allow more efficient competition. More efficient competition will, in turn, benefit consumers. Further, national rules will reduce the need for competitors to revisit the same issue in 51 different jurisdictions, thereby reducing administrative burdens and litigation for new entrants and incumbents.

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[52] 47 U.S.C. § 252(a)(1).

[53] 47 U.S.C. § 252(a)(1).

57. We also believe that some explicit national standards will be helpful in enabling the Commission and the states to carry out other responsibilities under the 1996 Act. For example, national standards will enable the Commission to address issues swiftly if the Commission is obligated to assume section 252 responsibilities because a state commission has failed to act.[54] In addition, BOCs that seek to offer long distance service in their service areas must satisfy, *inter alia*, a "competitive checklist" set forth in section 271(c)(2)(B). Many of the competitive checklist provisions require compliance with specific provisions of section 251. For example, the checklist requires BOCs to provide "nondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1)."[55] Some national rules also will help the states, the DOJ, and the FCC carry out their responsibilities under section 271, and assist BOCs in determining what steps must be taken to meet the requirements of section 271(c)(2)(B), the competitive checklist. In addition, national rules that establish the minimum requirements of section 251 will provide states with a consistent standard against which to conduct the fact-intensive process of verifying checklist compliance, the DOJ will have standards against which to evaluate the applications, and we will have standards to apply in adjudicating section 271 petitions in an extremely compressed time frame. Moreover, we believe that establishing minimum requirements that arbitrated agreements must satisfy will assist states in arbitrating and reviewing agreements under section 252, particularly in light of the relatively short time frames for such state action. While some states reject the idea that national rules will help the state commissions to satisfy their obligations under section 252 to mediate, arbitrate, and review agreements, other states have welcomed national rules, at least with respect to certain matters.[56]

58. A broad range of parties urge the Commission to adopt minimum requirements that would permit states to impose additional, pro-competitive requirements that are consistent with the 1996 Act to address local or state-specific circumstances. We agree generally that many of the rules we adopt should establish non-exhaustive requirements, and that states may impose additional pro-competitive requirements that are consistent with the purposes and

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[54] *See* 47 U.S.C. § 252(e)(5).

[55] 47 U.S.C. § 271(c)(2)(B)(ii).

[56] For example, the Georgia and Colorado Commissions support national technical standards for interconnection and collocation, although they generally disfavor detailed standards. Georgia Commission comments at 2; Colorado Commission comments at 2-4. The Illinois Commission, which has aggressively sought to open opportunities for local telephone competition, asserts that minimum national rules are important in developing competitive local telephone service, although it urges the Commission to permit states to implement and enforce additional rules that are consistent with the national rules. Illinois Commission comments at 9-10. The North Dakota Commission has expressed a need for specific national guidance to enable the commission to carry out its obligations under the Act. North Dakota Commission comments at 1-2.

terms of the 1996 Act, including our regulations established pursuant to section 251.[57] We also anticipate that the rules we adopt regarding interconnection, services, and access to unbundled elements will evolve to accommodate developments in technology and competitive circumstances, and that we will continue to draw on state experience in applying our rules and in addressing new or additional issues. We recognize that it is vital that we reexamine our rules over time in order to reflect developments in the dynamic telecommunications industry. We cannot anticipate all of the changes that will occur as a result of technological advancements, competitive developments, and practical experience, particularly at the state level. Therefore, ongoing review of our rules is inevitable. Moreover, we conclude that arbitrated agreements must permit parties to incorporate changes to our national rules, or to applicable state rules as such changes may be effective, without abrogating the entire contract. This will ensure that parties, regardless of when they enter into arbitrated agreements, will be able to take advantage of all applicable Commission and state rules as they evolve.

59. Some parties contend that even minimum requirements may impede the ability of state commissions to take varying approaches to address particular circumstances or conditions. We agree with the contention that, although there are different market conditions from one area to another, such distinct areas do not necessarily replicate state boundaries.[58] For example, virtually all states include both more densely-populated areas and sparsely populated rural areas, and all include both business and residential areas. Although each state is unique in many respects, demographic and other differences among states do not suggest that national rules are inappropriate. Moreover, even though it may not be appropriate to impose identical requirements on carriers with different network technologies, our rules are intended to accommodate such differences.[59] Some parties have argued that explicit national standards will delay the emergence of local telephone competition, but none has offered persuasive evidence to substantiate that claim, and new entrants overwhelmingly favor strong national rules. We conclude, for the reasons set forth above, that some national rules will enhance opportunities for local competition, and we have chosen to adopt national rules where necessary to establish the minimum requirements for a nationwide pro-competitive policy framework.

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[57] In contrast, we conclude that the 1996 Act limits the obligations states may impose on non-incumbent carriers. *See infra*, Section XI.C.

[58] AT&T comments at 12.

[59] *See infra*, Section IV.E. (concluding that successful interconnection or access to an unbundled element at a particular point in the network creates a rebuttable presumption that such interconnection or access is technically feasible at networks that employ *substantially similar facilities*). We agree with parties, such as the Ohio Consumers' Counsel, that physical networks are not designed on a state-by-state basis. Ohio Consumers' Counsel comments at 4.

60. We disagree with those parties that claim we are trying to impose a uniformity that Congress did not intend. Variations among interconnection agreements will exist, because parties may negotiate their own terms, states may impose additional requirements that differ from state to state, and some terms are beyond the scope of this Report and Order. We conclude, however, that establishing certain rights that are available, through arbitration, to all requesting carriers, will help advise parties of their minimum rights and obligations, and will help speed the negotiation process. In effect, the Commission's rules will provide a national baseline for terms and conditions for all arbitrated agreements. Our rules also may tend to serve as a useful guide for negotiations by setting forth minimum requirements that will apply to parties if they are unable to reach agreement. This is consistent with the broad delegation of authority that Congress gave the Commission to implement the requirements set forth in section 251.

61. We also believe that national rules will assist smaller carriers that seek to provide competitive local service. As noted above, national rules will greatly reduce the need for small carriers to expend their limited resources securing their right to interconnection, services, and network elements to which they are entitled under the 1996 Act. This is particularly true with respect to discrete geographic markets that include areas in more than one state.[60] We agree with the Small Business Administration that national rules will reduce delay and lower transaction costs, which impose particular hardships for small entities that are likely to have less of a financial cushion than larger entities.[61] In addition, even a small provider may wish to enter more than one market, and national rules will create economies of scale for entry into multiple markets. We reject the position advocated by some parties that we should not adopt national rules because such rules will be particularly burdensome for small or rural incumbent LECs.[62] We note, however, that section 251(f) provides relief from some of our rules.

62. We recognize the concern of many state commissions that the Commission not undermine or reverse existing state efforts to foster local competition. We believe that Congress did not intend for us needlessly to disrupt the pro-competitive actions some states already have taken that are both consistent with the 1996 Act and our rules implementing section 251.[63] We believe our rules will in many cases be consistent with pro-competitive

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[60] Approximately 17 Personal Communications Service (PCS) providers have Basic Service Areas/Metropolitan Statistical Areas, for example, that cross state lines.

[61] SBA comments at 3-4.

[62] *See, e.g.*, Joint Consumer Advocates reply at 5-6.

[63] 47 U.S.C. § 251(d)(3).

actions already taken by states, and in fact, many of the rules we adopt are based directly on existing state commission actions. We also intend to continue to reflect states' experiences as we revise our rules. We also recognize, however, that in at least some instances existing state requirements will not be consistent with the statute and our implementing rules.[64] It will be necessary in those instances for the subject states to amend their rules and alter their decisions to conform to our rules. In our judgment, national rules are highly desirable to achieve Congress's goal of a pro-competitive national policy framework for the telecommunications industry.

B. Suggested Approaches for FCC Rules

1. Comments

63. Parties propose a variety of approaches that the Commission could take in establishing rules for interconnection, network unbundling, and other issues addressed in section 251.[65] Many parties suggest that the Commission can, and should, establish regulations within six months of the date of enactment of the 1996 Act, and continue on an ongoing basis to revise and amend rules regarding interconnection, service, and access to unbundled network elements.[66] Parties have differing views about why Congress imposed relatively short time frames for action by states and the FCC.[67] Some parties suggest that the Commission take a largely "hands off" approach initially, but that it set more specific rules if and when such rules are needed.[68] IXCs, state commissions, incumbent LECs and others

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[64] *See infra*, Section II.C.

[65] *See, e.g.*, Cox comments at 22-23; Illinois Commission comments at 9-10; MCI comments at 12; MFS comments at 5-6; SBA comments at 5; Attorneys General reply at 3; California Commission reply at 10-11; Minnesota Ind. Coalition reply at 3-4; National Association of the Deaf reply at 1-3.

[66] MCI reply at 5; Sprint reply at 11.

[67] *See, e.g.*, DoJ comments at 13-15 (the short time frame in which to establish rules evidences Congress's desire to bring about change quickly, which could only occur through a single set of rules, rather than through many iterations); *contra, e.g.*, SBC comments at 10 (the short time frames for seeking arbitration and for state commission review of agreements reflect Congress's desire to bring about change more quickly than the pace that the regulatory process historically has achieved).

[68] Alliance for Public Technology comments at 8-10; U S West comments at 3-4, Illinois Commission comments at 9-10.

agree that, in setting national rules, the Commission should learn from and build upon the experiences of the states.[69]

64. Some state commissions and incumbent LECs recommend that the FCC establish general, broad principles rather than detailed requirements.[70] Several parties favor a "preferred outcomes" approach similar to the one adopted in California.[71] Under that approach, the FCC would establish acceptable or "preferred" outcomes, but parties would have the opportunity to justify deviation from those outcomes.[72] The California Commission argues that we should establish a range of guidelines that are detailed enough to be easy to implement by states that have not yet developed rules for competition, but flexible enough to allow states to continue their pro-competitive efforts without disruption.[73] At least one party, however, asserts that a "preferred outcomes" approach is not sufficient to provide incumbent LECs with an incentive to bargain in good faith.[74]

65. Some state commissions recommend that, if the FCC does establish explicit requirements, states should be allowed to impose different requirements. For example, the Illinois Commission urges the FCC to adopt a process by which states may seek a waiver from the national regulations, upon a showing of need.[75] The Ohio and Florida Commissions recommend that the FCC adopt explicit requirements that states could choose to adopt, but that states would have the option of developing their own requirements.[76] Under the proposal recommended by the Ohio Commission, existing state regulations that are consistent with the

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[69] *See, e.g.*, Ad Hoc Telecommunications Users Committee comments at 11-13; MCI comments at 12; Sprint comments at 6-7.

[70] Citizens Utilities comments at 3; Guam Telephone Authority comments at 5; Lincoln Tel. comments at 1, 3; District of Columbia Commission comments at 11-12.

[71] *See, e.g.*, GTE comments at 12-14; PacTel comments at 1-3; Washington Commission comments at 1-2; ALTS comments at 2-4; Teleport comments at 14-17; Texas Public Utility Counsel reply at 2; Minnesota Ind. Coalition reply at 8.

[72] ALTS comments at 2-4.

[73] California Commission reply at 4-7.

[74] Comcast reply at 5.

[75] Illinois Commission comments at 13; *accord* AT&T comments at 11; ACTA comments at 2-4.

[76] Florida Commission comments at 2-3; Ohio Commission comments at 4-5; *accord* NYNEX reply at 4.

1996 Act would be "grandfathered."[77] In addition, if a state failed to adopt any rules regarding competitive entry into local markets within a specified time, the FCC rules would be binding.[78]

2. Discussion

66. We intend to adopt minimum requirements in this proceeding; states may impose additional pro-competitive requirements that are consistent with the Act and our rules. We decline to adopt a "preferred outcomes" approach, because such an approach would fail to establish explicit national standards for arbitration, and would fail to provide sufficient guidance to the parties' options in negotiations. To the extent that parties advocate "preferred outcomes" from which the parties could deviate in arbitrated agreements, we reject such a proposal, because we conclude that it would not provide the benefits conferred by establishing "default" requirements. To the extent that commenters advocate a regulatory approach that would require parties to justify a negotiated result different from the preferred outcomes, we believe that such an approach would impose greater constraints on voluntarily negotiated agreements than the 1996 Act permits. Under the 1996 Act, parties may freely negotiate any terms without justifing deviation from "preferred outcomes."[79] The only restriction on such negotiated agreements is that they must be deemed by the state commission to be nondiscriminatory and consistent with the public interest, under the standards set forth in section 252(e)(2)(A). In response to the Illinois Commission's suggestion that we adopt a process by which states may seek waivers of our rules, we note that Commission rules already provide for waiver of our rules under certain circumstances.[80] We decline to adopt a special waiver process in this proceeding.

67. We intend our rules to give guidance to the parties regarding their rights and obligations under section 251. The specificity of our rules varies with respect to different issues; in some cases, we identify broad principles and leave to the states the determination of what specific requirements are necessary to satisfy those principles. In other cases, we find that local telephone competition will be better served by establishing specific requirements. In each of the sections below, we discuss the basis for adopting particular national principles or rules.

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[77] Ohio Commission comments at 4-5; *accord* NARUC comments at 6-7.

[78] Ohio Commission comments at 4-5.

[79] 47 U.S.C. § 252(a) (parties may negotiate and enter into a binding agreement without regard to standards set forth in sections 251(b) and (c)).

[80] 47 C.F.R. § 1.3.

68. We also believe that we should periodically review and amend our rules to take into account experiences of carriers and states, technological changes, and market developments. The actions we take here are fully responsive to Congress's mandate that we complete all actions necessary to establish regulations to implement the requirements of section 251 by August 8, 1996.[81] We nevertheless retain authority to refine or augment our rules, or to follow a different course, after developing some practical experience with the rules adopted herein. It is beyond doubt that the Commission has ongoing rulemaking authority. For example, section 4(i) provides that the Commission "may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with the Act, as may be necessary in the execution of its functions."[82] Section 4(j) provides that the Commission "may conduct its proceedings in such manner as will best conduce to the proper dispatch and to the ends of justice."[83] We agree with Sprint, the Illinois Commission, and other parties that we should address in this rulemaking the most important issues, and continue to refine our rules on an ongoing basis to address additional or unanticipated issues, and especially to learn from the decisions and experiences of the states.[84] We also reject the argument of Margaretville Telephone Company that the 1996 Act constitutes an unconstitutional taking because it seeks to deprive incumbent LECs of their "reasonable, investment-backed expectation to hold competitive advantages over new market entrants."[85]

C. Legal Authority of the Commission to Establish Rules Applicable to Intrastate Aspects of Interconnection, Services, and Unbundled Network Elements

1. Background

69. In the NPRM, we tentatively concluded that Congress intended sections 251 and 252 to apply, and that our rules should apply, to both interstate and intrastate aspects of

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[81] 47 U.S.C. § 251(d)(1).

[82] 47 U.S.C. § 154(i).

[83] 47 U.S.C. § 154(j). Section 11 of the 1996 Act also directs the Commission to review and modify its rules on an ongoing basis. 47 U.S.C. § 161.

[84] Sprint comments at vi, 6-7; Illinois Commission comments at 9-10. Although various parties have encouraged us to address issues that are beyond those identified in the NPRM, we will address only those topics identified in the NPRM, or that are a clear and logical outgrowth from issues specifically identified in the NPRM. *See, e.g.*, Unicom comments at 1-2 (urging the Commission to extend to IXCs the rules it adopts for LECs regarding collocation, interconnection, and unbundling); TCI comments at 15-17 (asking Commission to clarify the extent to which municipalities have control over rights-of-way under section 253).

[85] Margaretville Tel. comments at 1-4.

interconnection, services, and access to network elements.[86] We stated in the NPRM that it would seem to make little sense, in terms of economics or technology, to distinguish between interstate and intrastate components for purposes of sections 251 and 252.[87] We also believed that such a distinction would appear to be inconsistent with Congress's desire to establish a national policy framework for interconnection and other issues critical to achieving local competition. We sought comment on these tentative conclusions.

70. We further tentatively concluded in the NPRM that section 2(b) of the 1934 Act does not require a contrary conclusion.[88] Section 2(b) states that, except as provided in certain enumerated sections not including sections 251 and 252, "nothing in [the 1934] Act shall be construed to apply or to give to the Commission jurisdiction with respect to . . . charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier . . . ."[89] We noted in the NPRM that sections 251 and 252 do not alter the jurisdictional division of authority with respect to matters falling outside the scope of these provisions.[90] For example, rates charged to end users for local exchange service have traditionally been subject to state authority, and will continue to be.

2. Comments

71. The parties disagree about the extent to which the FCC has authority to establish regulations pursuant to sections 251 and 252. A majority of commenters that address the issue contend that sections 251 and 252 apply to both interstate and intrastate aspects of interconnection, services, and access to unbundled network elements.[91] Other commenters contend, however, that sections 251 and 252 apply only to intrastate aspects of

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[86] NPRM at para. 37.

[87] NPRM at para. 37.

[88] NPRM at para. 39.

[89] 47 U.S.C § 152(b).

[90] NPRM at para. 40.

[91] *See, e.g.*, ACTA comments at 4; ALTS comments at 6; ACSI comments at 5; Arch comments at 5; Bell Atlantic comments at 7-8 (section 251 addresses matters of a "predominantly intrastate nature"); BellSouth comments at 8; Cable & Wireless comments at 11; CompTel comments at 15; Florida Commission comments at 7; GCI comments at 4; GSA/DoD comments at 6; GTE comments at 3; Jones Intercable comments at 10; MCI comments at 7-8; Sprint comments at 7; TCI comments at 12; Texas Commission comments at 5; NTIA reply at 6 n.15; NCTA reply at 2-7.

interconnection, services, and access to unbundled network elements.[92] None of the commenters appears to claim that section 251 addresses exclusively interstate matters. As discussed below, many parties, including BOCs and state commissions, contend that the FCC's role under sections 251 and 252 is quite limited.[93]

72. The IXCs and other potential competitors in local exchange markets generally assert that the 1996 Act expressly authorizes, and even obligates, the Commission to establish regulations regarding interstate and intrastate aspects of interconnection, service, and access to unbundled network elements. For example, MCI contends that, "[b]ecause the technical feasibility and cost of providing a particular arrangement do not depend on whether the requesting carrier uses that arrangement to provide interstate or intrastate services," it would make no sense to interpret section 251 to include a jurisdictional distinction between interstate and intrastate aspects of interconnection that does not appear on the face of that provision.[94] Several parties assert that sections 251 and 252 alter traditional jurisdictional boundaries by giving states some authority over interstate matters that they previously did not have, and by giving the FCC some new authority over intrastate matters.[95] Other parties assert that section 251 clearly applies to intrastate aspects of interconnection, services, and access to unbundled elements, and that, as a basic principle of administrative law, to the extent that section 251 addresses intrastate matters, the FCC has authority to adopt implementing regulations.[96]

73. Parties point to other provisions in the 1996 Act to show that the traditional jurisdictional division of authority between states and the FCC does not apply with respect to sections 251 and 252. MCI contends that section 253, by addressing federal preemption of both interstate and intrastate barriers to competition, makes it clear that the jurisdictional division of responsibility is inapplicable.[97] Parties also point to the fact that the Commission must in some circumstances assume the state commission's responsibilities as evidence of a

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[92] NARUC comments at 9-10; New York Commission comments at 10-11; U S West comments at 10-11.

[93] Bell Atlantic comments at 7-8; GTE comments at 3; PacTel comments at 11.

[94] MCI comments at 7, 8 (it is highly unlikely that interconnection arrangements will be used exclusively for jurisdictional-specific traffic).

[95] Illinois Commission comments at 3-5, 15; Sprint comments at 5; CompTel reply at 5; Rural Tel. Coalition reply at 3.

[96] MCI reply at 36-37; Vanguard reply at 4 (*citing Time Warner v. FCC*, 56 F.3d 151, 174-76 (D.C. Cir. 1995) for the proposition that agencies are empowered to interpret their organic statutes, through rules and other mechanisms, to govern the behavior of parties regulated under those statutes).

[97] MCI comments at 7-8; *accord* Sprint comments at 4; CompTel comments at 15; TCI reply at 6.

shift in jurisdictional authority.[98] Jones Intercable asserts that sections 251 and 252 of the 1996 Act make distinctions among classes of entities (telecommunications carriers, LECs, and incumbent LECs), rather than between interstate and intrastate service.[99]

74. AT&T contends that, by requiring the Commission to "complete all actions necessary to establish regulations to implement the requirements of this Section," section 251(d)(1) requires the Commission to establish minimum national standards for interconnection, unbundling, pricing, resale, and related requirements.[100] AT&T states that the 1996 Act was created pursuant to the settled rule that federal agency regulations preempt any inconsistent state policies unless the underlying federal statute otherwise provides.[101] It interprets section 251(d)(3) to mean that any Commission regulation that reasonably implements section 251 bars state enforcement of any inconsistent state regulations, without regard to whether the preemptive provisions of section 253 would also apply. According to AT&T, the only limitation on the Commission's preemptive powers is that it may not preclude the enforcement of state access and interconnection requirements that are consistent with the 1996 Act and the FCC's implementing regulations.[102] AT&T maintains that this interpretation is consistent with the fact that section 252(c)(1) requires state commissions to ensure that nonvoluntary agreements are consistent with the Commission's regulations under section 251(d).[103]

75. AT&T further contends that section 2(b) of the Act does not limit the Commission's authority to promulgate rules under section 251, because section 251 "gives the FCC explicit authority to prescribe and enforce preemptive rules that are necessary to achieve

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[98] *See, e.g.*, ACTA comments at 4; New Jersey Cable Ass'n, *et al.* reply at 18-19; TCI reply at 6.

[99] Jones Intercable comments at 10; *see also* Time Warner comments at 7; Cable & Wireless comments at 11-12 (sections 251 and 252 apply to *all* telecommunications services, and the definitions of "telecommunications," "telecommunications service," and "telecommunications carrier" are defined without reference to jurisdictional boundaries); New Jersey Cable Ass'n, *et al.* reply at 18-19; GSA/DoD reply at 7 (Congress did not intend to expand traditional interstate and intrastate jurisdictional distinctions); Competitive Policy Institute reply at 10.

[100] AT&T comments at 4 (*quoting* § 251(d)(1) of the Act).

[101] AT&T comments at 4-5 (*citing Fidelity Federal Savings and Loan Assoc. v. de la Cuesta*, 458 U.S. 141, 152-154 (1982); *City of New York v. FCC*, 467 U.S. 57, 64 (1988); *Oklahoma Natural Gas v. FERC*, 28 F.3d 1281, 1283 (D.C. Cir. 1994)).

[102] AT&T comments at 5 and nn.3-4; *accord* Cable & Wireless comments at 11 (in section 253, Congress made clear that the Commission has authority to preempt any state requirement that creates a barrier to either interstate or intrastate services, or that is inconsistent with the 1996 Act); MCI comments at 7-8; Sprint comments at 4.

[103] AT&T comments at 5-6.

the Act's purpose of developing local services competition."[104] Sprint, Comcast, and other parties assert that Congress intended section 251 to give the Commission authority over both interstate and intrastate aspects of interconnection, notwithstanding the fact that it left section 2(b) unamended.[105] For example, Comcast contends that section 253(a) authorizes the Commission to preempt any state or local requirement that prohibits or has the effect of prohibiting any interstate or intrastate telecommunications service.[106] In view of the explicit grants of authority in sections 251 and 253, Comcast asserts that it was unnecessary to amend section 2(b). Cable & Wireless contends that the fact that section 251(d)(1) provides that the FCC "shall" in some cases preempt state regulations is evidence that Congress did not believe it was required to amend section 2(b) before delegating intrastate authority to the FCC.[107] AT&T asserts that the fact that prior versions of the legislation amended section 2(b) to except Part II of Title II of the Act is not dispositive; when the language was taken out, it was not listed as a substantive change, but treated as a "minor drafting" or "clerical" change.[108] AT&T asserts that this was an appropriate characterization, because section 2(b) would not have had any effect in any event.

76. Several parties contend that the Act makes clear that states are required to apply FCC rules established under section 251. For example, sections 252(c)(1) and (f)(2) explicitly require the states to apply the FCC's regulations.[109] In addition, section 261(c) provides that state requirements must be "not inconsistent" with Part II of Title II, including the Commission's regulations thereunder.[110] Thus, the parties contend that these provisions constitute express federal preemption, and that section 601(c), which provides that any

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[104] AT&T comments at 6 (section 2(b) cannot be read to nullify section 2(a) and sections 201 to 205) (*citing California v. FCC*, 39 F.3d 919, 931-33 (9th Cir. 1994); *PUC of Texas v. FCC*, 886 F.2d 1325 (D.C. Cir. 1990); *NARUC v. FCC*, 746 F.2d 1492 (D.C. Cir. 1984); *Louisiana PSC v. FCC*, 476 U.S. 355, 375-76 n.4 (1986)).

[105] Sprint comments at 7; Comcast reply at 2-3; NCTA reply at 5-6.

[106] Comcast reply at 2-3.

[107] Cable & Wireless reply at 9-10.

[108] AT&T reply at 4 n.5 (citing Joint Explanatory Statement at 113).

[109] AT&T reply at 2.

[110] Jones Intercable comments at 11-12; MCI reply at 7; MFS reply at 7; New Jersey Cable Ass'n, *et al.* reply at 23.

preemptive effect of the new law must be express, does not establish limits to the FCC's authority to establish regulations under section 251.[111]

77. Sprint states that other provisions of the 1996 Act:

> subordinate state actions and policies with respect to intrastate service to those of the Commission, *e.g.*, sections 253 (entry barriers), 254(f) (universal service), 258 (PIC change procedures), and 276 (payphone services). If Congress had intended the jurisdictional split in section 2(b) to remain unaffected by the 1996 Act, all of these very specific subordinations of state policy to federal policy would be nullities, and much of the 1996 Act would make no sense at all.[112]

Sprint contends that the only way to give meaning to both section 2(b) and the above-referenced provisions is to conclude that the section 2(b) distinctions remain in effect for "retail" services offered to end users, but that the detailed scheme for intercarrier relationships set forth in Part II of Title II supersedes section 2(b).[113] MCI concurs, and adds that this interpretation is consistent with settled principles of statutory construction that the specific prevails over the general, and the later-enacted provision prevails over the earlier-enacted provision.[114]

78. Some state commissions and some other commenters assert that section 251, as well as other provisions of the 1996 Act, support the interpretation that Congress intended states to have a primary role in setting requirements for intrastate interconnection. For example, these parties assert that section 251(d)(3) is evidence that Congress intended to permit states to implement their own access and interconnection regulations, and that this statutory language requires the FCC to fashion its regulations to avoid precluding state interconnection policy or rules.[115] They note that section 251(d)(3) requires consistency with

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[111] New Jersey Cable Ass'n, *et al.* reply at 23; Jones Intercable reply at 15.

[112] Sprint comments at 7.

[113] Sprint comments at 7-8.

[114] MCI comments at 8 (*citing Stendor Enterprises Ltd. v. Armtex, Inc.*, 947 F.2d 727,732 (4th Cir. 1991); *Redhouse v. C.I.R.*, 728 F.2d 1249, 1253 (9th Cir. 1984); *Mesa Petroleum Co. v. FERC*, 688 F.2d 1014, 1016 (5th Cir. 1982)).

[115] Maryland Commission comments at 22; Ohio Commission comments at 16-17 (*citing* Joint Explanatory Statement at 1, 119); *accord, e.g.*, Bogue, Kansas comments at 4; Connecticut Commission comments at 7; NARUC comments at 14; PacTel comments at 14; Pennsylvania Commission comments at 7-9.

the Act, but does not mandate consistency with the FCC's regulations.[116] SNET asserts that, if Congress intended to preclude state discretion to interpret section 251 requirements, it would have preempted all state policies addressing those requirements, rather than just policies that substantially prevent implementation of the statute.[117] Some parties also point out that section 251(d)(3) is entitled "Preservation of state access regulations," and argue that the stated purpose of that provision is to preserve or "grandfather" most, if not all, state access and interconnection regulations.[118] They also allege that section 601(c) of the 1996 Act demonstrates that Congress intended to preserve states' authority over intrastate matters, and that any preemption finding would have to be based on an express provision.[119] Bogue, Kansas states that section 256(c) also makes clear that nothing in that section expands or limits the Commission's authority prior to the enactment of the 1996 Act.[120] The Oregon Commission argues that section 261 also permits states to impose requirements, as long as those requirements are not inconsistent with the 1996 Act.[121]

79. Some state commissions and incumbent LECs contend that the Commission's authority to establish regulations that may preempt state requirements is limited to those instances where section 251 expressly provides for Commission action.[122] Some parties also contend that, because section 252(e)(5) specifically requires the FCC to assume the responsibilities of the state commission if the state commission fails to act under section 252, the FCC's role under section 252 is limited to that specific delegation of authority.[123]

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[116] Maryland Commission comments at 22; Washington Commission comments at 6-7.

[117] SNET reply at 1-2; *accord* Colorado Commission comments at 5-9.

[118] Ohio Commission reply at 3; BellSouth reply at 5.

[119] *See, e.g.*, District of Columbia Commission comments at 6; Maryland Commission comments at 21; NARUC comments at 13; Ohio Commission comments at 15-16; Wyoming Commission comments at 10; BellSouth reply at 5-6.

[120] Bogue, Kansas comments at 5.

[121] Oregon Commission comments at 13-14; *accord* Washington Commission comments at 9; Rural Tel. Coalition reply at 4.

[122] Rural Tel. Coalition comments at 5 (Commission authority should be limited to establishing number portability requirements, regulations for limitations on resale, minimum unbundling requirements, rules for administering the North American Numbering Plan, enforcing existing access and interconnection requirements, and determining whether to treat additional carriers as incumbent LECs); *see also* District of Columbia Commission comments at 8-10; NARUC comments at 14-15; New York Commission comments at 2-3, 8.

[123] *See, e.g.*, NARUC comments at 15; New York Commission comments at 9; PacTel comments at 13.

80. These parties also reject the claim that section 251 takes precedence over section 2(b).[124] They note that section 2(b) was not amended by the 1996 Act, although prior version of the bills would have done so.[125] Moreover, parties claim that, in other instances, Congress did specifically amend section 2(b) to give the Commission authority over intrastate aspects of specified matters.[126] Bell Atlantic asserts that the failure to amend section 2(b) is "fatal to the notice's proposed federalization of intrastate interconnection and other intrastate matters."[127] The Ohio Commission expressly rejects the suggestion in the NPRM that there was no need to amend section 2(b) because sections 251 and 252 do not affect end user rates.[128]

81. Some parties further contend that preemption must be express, not implied, and that no such express statement was made in section 251.[129] Parties also assert that, by comparison, the Act is "quite clear in preempting states where it intended to do so."[130] For example, the New York Commission asserts that, in certain circumstances, section 254(f) expressly directs states to act in a manner that is "not inconsistent" with FCC rules.[131] NARUC asserts that there is a "well established presumption against finding preemption of State law in areas traditionally regulated by the States" that weighs against an interpretation

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[124] *See, e.g.*, Bell Atlantic comments at 4; Connecticut Commission comments at 5; Oregon Commission comments at 12; Indiana Commission Staff comments at 4-5; Iowa Commission comments at 6.

[125] *See, e.g.*, Maryland Commission comments at 16 (*citing* Conf. Rep. No. 104-230 at 78 and H.R. 1555 Rep. No. 104-204 at 53); *accord* NARUC comments at 10 (*citing Russello v. U.S.*, 464 U.S. 16 (1989)); Oregon Commission comments at 15.

[126] California Commission comments at 11; Connecticut Commission comments at 7 (*citing* the Omnibus Budget Reconciliation Act of 1993 as an example of congressional intent to alter jurisdictional authority); Maryland Commission comments at 20; Ohio Commission comments at 14-15; BellSouth reply at 4.

[127] Bell Atlantic comments at 7.

[128] Ohio Commission comments at 15 (the 1993 amendments to section 2(b) expressly reserved to states responsibility for wholesale rates in general).

[129] *See, e.g.*, NARUC comments at 12 (*citing Hillsborough County v. Automated Medical Laboratories*, 471 U.S. 707, 175 (1985)); Arizona Commission comments at 16; Bogue, Kansas comments at 3 (*citing Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991)); New York Commission comments at 6 (*citing Washington Market v. Hoffman*, 101 U.S. 112 (1879)); Municipal Utilities reply at 5 (FCC may not preempt state regulations that are consistent with the Act).

[130] Bogue, Kansas comments at 4 n.3 (section 251(e) gives FCC "exclusive jurisdiction" over some aspects of Number Administration); Maryland Commission comments at 15; Ohio Commission comments at 12, 16.

[131] New York Commission comments at 8; *see also* NARUC comments at 12 (contrasting section 276, which explicitly provides that Commission regulations shall preempt inconsistent state requirements).

that the FCC has broad regulatory authority to establish rules governing local exchange markets.[132]

82. To support their claim that, in 1934, Congress established a dual regulatory system, and that the FCC's jurisdiction is limited to interstate issues, except where otherwise expressly provided, these parties cite to the Supreme Court's decision in *Louisiana Public Service Comm'n v. FCC*.[133] The Maryland Commission contends that *Louisiana PSC* is controlling here, because: (1) the dual regulatory system was not eliminated by the 1996 Act; (2) the FCC may not rely upon the broad congressional intent to promote competition as a delegation of authority over intrastate issues; and (3) the 1996 Act does not embody a federal regulatory scheme that is so pervasive as to infer that Congress left no room for states to supplement it.[134] PacTel claims that, because section 251 was created after the decision in *Louisiana PSC*, Congress was aware that, if it wanted section 251 to override section 2(b), it would have to do so in an unambiguous manner. Consequentially, because Congress did not amend section 2(b) or otherwise expressly limit its effect, section 2(b) takes precedence over section 251 to the extent the provisions conflict.[135] Several parties offer additional bases for finding that the *Louisiana PSC* decision controls the scope of the Commission's authority under section 251.[136]

3. Discussion

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[132] NARUC comments at 12 (*quoting California v. ARC America Corp.*, 490 U.S. 91, 101 (1989)).

[133] 476 U.S. 335 (1986) (*Louisiana PSC*). In that case, the Supreme Court held that section 220 of the 1934 Act, which directs the FCC to set depreciation regulations, did not give the FCC authority to preempt inconsistent state depreciation regulations for intrastate ratemaking purposes.

[134] Maryland Commission comments at 17-18 (*citing Fidelity Savings and Loan Assn v. de la Cuesta*, 458 U.S. 141, 153 (1982)); *accord* Ohio Commission comments at 11; Oregon Commission comments at 13; Washington Commission comments at 9-10.

[135] PacTel comments at 14-15.

[136] The Maryland Commission further asserts that compliance with both federal and state regulation as envisioned by the 1996 Act is not a physical impossibility that would support a claim of implied preemption. Maryland Commission comments at 18 (*citing Florida Lime & Avocado Growers Inc. v. Paul*, 373 U.S. 132, 142-43 (1963)); *accord* Washington Commission comments at 10. The Ohio Commission avers that it is possible for the FCC to promulgate rules that apply to interstate services only. Ohio Commission comments at 13. Several states also reject the idea that section 251 squarely addresses, and therefore controls, the jurisdictional issue, because there is "no mention of intrastate services or preemption of states' authority over such matters in Section 251." Ohio Commission comments at 12; Maryland Commission comments at 23; *accord* Bell Atlantic comments at 6. Pacific Telesis asserts that sections 251 and 2(b) may be read as internally consistent, and that, under rules of statutory construction, they must be so interpreted. PacTel comments at 12-13 (*citing Washington Market Co v. Hoffman*, 101 U.S. 112 (1879)). Bell Atlantic states that the Supreme Court held in *Louisiana PSC* that the rule of statutory construction that the specific takes precedence over the general does not apply where two provisions "address 'different subject[s]' and therefore 'are not general or specific with respect to each other.'" Bell Atlantic comments at 6 (*quoting Louisiana PSC*, 476 U.S. at 376 n.5); GTE reply at 5.

83. We conclude that, in enacting sections 251, 252, and 253, Congress created a regulatory system that differs significantly from the dual regulatory system it established in the 1934 Act.[137] That Act generally gave jurisdiction over interstate matters to the FCC and over intrastate matters to the states. The 1996 Act alters this framework, and expands the applicability of both national rules to historically intrastate issues, and state rules to historically interstate issues.[138] Indeed, many provisions of the 1996 Act are designed to open telecommunications markets to all potential service providers, without distinction between interstate and intrastate services.

84. For the reasons set forth below, we hold that section 251 authorizes the FCC to establish regulations regarding both interstate and intrastate aspects of interconnection, services, and access to unbundled elements. We also hold that the regulations the Commission establishes pursuant to section 251 are binding upon states and carriers and section 2(b) does not limit the Commission's authority to establish regulations governing intrastate matters pursuant to section 251. Similarly, we find that the states' authority pursuant to section 252 also extends to both interstate and intrastate matters. Although we recognize that these sections do not contain an explicit grant of intrastate authority to the Commission or of interstate authority to the states, we nonetheless find that this interpretation is the only reasonable way to reconcile the various provisions of sections 251 and 252, and the statute as a whole. As we indicated in the NPRM, it would make little sense in terms of economics or technology to distinguish between interstate and intrastate components for purposes of sections 251 and 252.[139]

85. We view sections 251 and 252 as creating parallel jurisdiction for the FCC and the states. These sections require the FCC to establish implementing rules to govern interconnection, resale of services, access to unbundled network elements, and other matters, and direct the states to follow the Act and those rules in arbitrating and approving arbitrated agreements under sections 251 and 252. Among other things, the fact that the Commission is

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[137] According to Senator Pressler, "Progress is being stymied by a morass of regulatory barriers which balkanize the telecommunications industry into protective enclaves. We need to design a *national policy framework* -- a new regulatory paradigm for telecommunications -- which accommodates and accelerates technological change and innovation." 141 Cong. Rec. S7881-2, S7886 (June 7, 1995) (emphasis added). According to Representative Fields, "[Congress] is decompartmentalizing segments of the telecommunications industry, opening the floodgates of competition through deregulation, and most importantly, giving consumers choice . . .", 142 Cong. Rec. H1149 (Feb. 1, 1996).

[138] For example, section 253(a) suggests that states may establish regulations regarding interstate as well as intrastate matters.

[139] We believe that this interpretation is the most reasonable one in light of our expectation that marketing and product offerings by telecommunications carriers will diminish or eliminate the significance of interstate-intrastate distinctions.

required to assume the state commission's responsibilities if the state commission fails to carry out its section 252 responsibilities[140] gives rise to the inevitable inference that both the states and the FCC are to address the same matters through their parallel jurisdiction over both interstate and intrastate matters under sections 251 and 252.

86. The only other possible interpretations would be that: (1) sections 251 and 252 address only interstate aspects of interconnection, services, and access to unbundled elements; (2) the provisions address only the intrastate aspects of those issues; or (3) the FCC's role is to establish rules for interstate aspects, and the states' role is to arbitrate and approve agreements on intrastate aspects. As explained below, none of these interpretations withstands examination. Accordingly, we conclude that sections 251 and 252 address both interstate and intrastate aspects of interconnection services and access to unbundled elements.

87. Some parties have argued that our authority under section 251 is limited by section 2(b). Ordinarily, in light of section 2(b), we would interpret a provision of the Communications Act as addressing only the interstate jurisdiction unless the provision (as well as section 2(b) itself) provided otherwise. That interpretation is contradicted in this case, however, by strong evidence in the statute that the local competition provisions of the 1996 Act are directed to both intrastate and interstate matters. For example, section 251(c)(2), the interconnection requirement, requires LECs to provide interconnection "for the transmission and routing of *telephone exchange service* and exchange access."[141] Because telephone exchange service is a local, intrastate service, section 251(c)(2) plainly addresses intrastate service, but it also addresses interstate exchange access. In addition, we note that in section 253," the statute explicitly authorizes the Commission to preempt intrastate and interstate barriers to entry.[142]

88. More generally, if these sections are read to address only interstate services, the grant of substantial responsibilities to the states under section 252 is incongruous. A statute designed to develop a *national* policy framework to promote local competition cannot reasonably be read to reduce significantly the FCC's traditional jurisdiction over interstate matters by delegating enforcement responsibilities to the states, unless Congress intended also

[140] *See* 47 U.S.C. § 252(e)(5).

[141] 47 U.S.C. § 251(c)(2).

[142] 47 U.S.C. § 253(a).

to implement its national policies by enhancing our authority to encompass rulemaking authority over intrastate interconnection matters.[143]

89. Some parties argue that section 251 addresses solely intrastate matters. We do not find this argument persuasive.[144] Under this narrow view, section 251(c)(6) requiring incumbent LECs to offer physical collocation would apply only to equipment used for intrastate services, while new entrants would be limited to the use of virtual collocation for equipment used in the provision of interstate services, pursuant to the decision in *Bell Atlantic*.[145] Such an interpretation would force new entrants to use different methods of collocation based on the jurisdictional nature of the traffic involved, and would thereby greatly increase new entrants' costs. Moreover, such an interpretation would fail to give effect to Congress's intent in enacting section 251(c)(6) to reverse the result reached in *Bell Atlantic*.[146]

90. Another factor that makes clear that sections 251 and 252 did not address exclusively intrastate matters is the provision in section 251(g), "Continued Enforcement of Exchange Access and Interconnection Requirements." That section provides that BOCs must follow the Commission's "equal access and nondiscriminatory interconnection restrictions (including receipt of compensation)" until they are explicitly superseded by Commission regulations after the date of enactment of the 1996 Act. This provision refers to existing Commission rules governing interstate matters, and therefore it contradicts the argument that section 251 addresses intrastate matters exclusively.

91. Nor does the savings clause of section 251(i) require us to conclude that sections 251 and 252 address only intrastate issues. Section 251(i) provides that "[n]othing in this section shall be construed to limit or otherwise affect the Commission's authority under section 201." This subsection merely affirms that the Commission's preexisting authority

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[143] The legislative history is replete with statements indicating that Congress meant to address intrastate local exchange competition. For instance, Senator Lott stated that "[i]n addressing *local and long distance issues*, creating an open access and sound interconnection policy was the key objective . . ." 141 Cong. Rec. S7906 (June 7, 1995) (emphasis added). Representative Markey noted that "we take down the barriers of *local and long distance* and cable company, satellite, computer software entry into any business they want to get in." 142 Cong. Rec. H1151 (Feb. 1, 1996) (emphasis added).

[144] *See, e.g.*, New York Commission comments at 5-8.

[145] *Bell Atlantic Telephone Companies v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994) (*Bell Atlantic*) (holding that the Commission did not have authority to require physical collocation for the provision of interstate services).

[146] The language in the House bill which closely matches the language that appears in section 251(c)(6), noted that a provision requiring physical collocation was necessary "because a recent court decision indicates that the Commission lacks authority under the Communications Act to order physical collocation." H.R. Rep. No. 204, pt. 1, 104th Cong., 1st Sess., at 73 (1995).

under section 201 continues to apply for purely interstate activities. It does not act as a limitation on the agency's authority under section 251.

92. As to the third possible interpretation, the FCC's role is to establish rules for only the interstate aspects of interconnection, and the states' role is to arbitrate and approve only the intrastate aspects of interconnection agreements. No commenters support this position, and we find that it would be inconsistent with the 1996 Act to read into sections 251 and 252 such a distinction. The statute explicitly contemplates that the states are to comply with the Commission's rules, and the Commission is required to assume the state commission's responsibilities if the state commission fails to act to carry out its section 252 responsibilities.[147] Thus, we believe the only logical conclusion is that the Commission and the states have parallel jurisdiction. We conclude, therefore, that these sections can only logically be read to address both interstate and intrastate aspects of interconnection, services, and access to unbundled network elements, and thus to grant the Commission authority to establish regulations under 251, binding on both carriers and states, for both interstate and intrastate aspects.

93. Section 2(b) of the Act does not require a different conclusion. Section 2(b) provides that, except as provided in certain enumerated sections not including sections 251 and 252, "nothing in [the 1934] Act shall be construed to apply or to give to the Commission jurisdiction with respect to . . . charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier . . .".[148] As stated above, however, we have found that sections 251 and 252 do apply to "charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service."[149] In enacting sections 251 and 252 after section 2(b), and squarely addressing therein the issue of interstate and intrastate jurisdiction, we find that Congress intended for sections 251 and 252 to take precedence over any contrary implications based on section 2(b).[150] We note also, that in enacting the 1996 Act, there are other instances where Congress indisputably gave the Commission intrastate jurisdiction without amending section 2(b). For instance, section 251(e)(1) provides that "[t]he Commission shall

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[147] 47 U.S.C. § 252(e)(5).

[148] 47 U.S.C. § 152(b).

[149] 47 U.S.C. § 152(b).

[150] *See, e.g., Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992) ("it as a commonplace of statutory construction that the specific governs the general"); *see also* 2 J. Sutherland, Statutory Construction § 22.34 (6th ed.) (where amended and original sections of a statute cannot be harmonized, the new provisions should prevail as the latest declaration of legislative will); *American Airlines, Inc. v. Remis Industries, Inc.*, 494 F.2d 196, 200 (2nd Cir. 1974).

have exclusive jurisdiction over those portions of the North American Numbering Plan that pertain to the United States."[151] Section 253 directs the FCC to preempt state regulations that prohibit the ability to provide intrastate services. Section 276(b) directs the Commission to "establish a per call compensation plan to ensure that payphone service providers are fairly compensated for each and every completed intrastate and interstate call."[152] Section 276(d) provides that "[t]o the extent that any State requirements are inconsistent with the Commission's regulations, the Commission's regulations on such matters shall preempt such State requirements."[153] None of these provisions is specifically excepted from section 2(b), yet *all* of them explicitly give the FCC jurisdiction over intrastate matters. Thus, we believe that the lack of an explicit exception in section 2(b) should not be read to require an interpretation that the Commission's jurisdiction under sections 251 and 252 is limited to interstate services. A contrary holding would nullify several explicit grants of authority to the FCC, noted above, and would render parts of the statute meaningless.[154]

94. Some parties find significance in the fact that earlier drafts of the legislation would have amended section 2(b) to make an exception for Part II of Title II, including section 251, but the enacted version did not include that exception. These parties argue that this change in drafting demonstrates an intention by Congress that the limitations of section 2(b) remain fully in force with regard to sections 251 and 252. We find this argument unpersuasive.

95. Parties that attach significance to the omission of the proposed amendment of section 2(b) rely on a rule of statutory construction providing that, when a provision in a prior draft is altered in the final legislation, Congress intended a change from the prior version. This rule of statutory construction has been rejected, however, when changes from one draft to another are not explained.[155] In this instance, the only statement from Congress regarding the meaning of the omission of the section 2(b) amendment appears in the Joint Explanatory Statement of the Conference Report. According to the Joint Explanatory Statement, all differences between the Senate Bill, the House Amendment, and the substitute reached in conference are noted therein "except for clerical corrections, conforming changes made

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[151] 47 U.S.C. § 251 (e)(1).

[152] 47 U.S.C. § 276(b).

[153] 47 U.S.C. § 276(d).

[154] *See* Sprint comments at 7.

[155] *Mead Corp v. Tilley*, 490 U.S. 714, 723 (1989); *Rastelli v. Warden*, 782 F.2d 17, 23 (2d Cir. 1986); *Drummond Coal v. Watt*, 735 F.2d 469, 474 (11th Cir. 1984).

necessary by agreements reached by the conferees, and minor drafting and clerical changes."[156] Because the Joint Explanatory Statement did not address the removal of the section 2(b) amendment from the final bill, the logical inference is that Congress regarded the change as an inconsequential modification rather than a significant alteration. Moreover, it seems implausible that, by selecting the final version, Congress intended a radical alteration of the Commission's authority under section 251, given the total lack of legislative history to that effect. We conclude that elimination of the proposed amendment of section 2(b) was a nonsubstantive change because, as AT&T contends, such amendment was unnecessary in light of the grants of authority under sections 251 and 252, and would have had no practical effect.[157]

96. Some parties have argued that, to the extent that sections 251 and 252 address intrastate matters, the Commission's rulemaking authority under those sections is limited to those instances where Commission action regarding intrastate matters is specifically mandated, such as number administration. We disagree. There is no language limiting the Commission's authority to establish rules under section 251. To the contrary, section 251(d)(1) affirmatively requires Commission rules, stating that "the Commission *shall* complete *all* actions necessary to implement the requirements of *this section*."[158] Pursuant to sections 4(i), 201(b), and 303(r) of the Act, the Commission generally has rulemaking authority to implement all provisions of the Communications Act. Courts have held that the Commission, pursuant to its general rulemaking authority, has "expansive" rather than limited powers.[159] Further, where Congress has expressly delegated to the Commission rulemaking responsibility with respect to a particular matter, such delegation constitutes "something more than the normal grant of authority permitting an agency to make ordinary rules and regulations . . .".[160] Indeed, to read these provisions otherwise would negate the requirement that states ensure that arbitrated agreements are consistent with the Commission's rules. Thus, the explicit rulemaking requirements pointed out by some of the parties is best read as giving the Commission more jurisdiction than usual, not less. We believe that the delegation of authority set forth in section 251(d)(1) is "expansive" and not limited. We therefore reject

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[156] Joint Explanatory Statement at 113.

[157] AT&T reply at 4 n.5.

[158] 47 U.S.C. § 251(d)(1) (emphasis added).

[159] *National Broadcasting Co. v. United States*, 319 U.S. 190, 219 (1943); *see also Federal Communications Commission v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 793 (1978).

[160] *Fulani v. FCC*, 49 F.3d 904, 909 (2d Cir. 1995) (cite omitted); *see also Kay v. FCC*, 443 F.2d 638, 640 (D.C.Cir. 1970).

assertions that the Commission has authority to establish regulations regarding intrastate matters only with respect to certain provisions of section 251, such as number administration.

97. Moreover, the Court in *Louisiana PSC* does not suggest a different result. The reasoning in *Louisiana PSC* applies to the dual regulatory system of the 1934 Act. As set forth above, however, in sections 251-253, Congress amended the dual regulatory system that the Court addressed in *Louisiana PSC*. As a result, preemption in this case is governed by the usual rule, also recognized in *Louisiana PSC*, that an agency, acting within the scope of its delegated authority, may preempt inconsistent state regulation.[161] As discussed above, Congress here has expressed an intent that our rules apply to intrastate interconnection, services, and access to network elements. Therefore, *Louisiana PSC* does not foreclose our adoption of regulations under section 251 to govern intrastate matters.

98. Parties have raised other arguments suggesting that the Commission lacks authority over intrastate matters. We are not persuaded by the argument that sections 256(c) and 261, as well as section 601(c) of the 1996 Act, evince an intent by Congress to preserve states' exclusive authority over intrastate matters. In fact, section 261 supports the finding that the Commission may establish regulations regarding intrastate aspects of interconnection, services and access to unbundled elements that the states may not supersede. Section 261(b) *generally* permits states to enforce regulations prescribed prior to the date of enactment of the 1996 Act, and to prescribe regulations after such date, if such regulations are not inconsistent with the provisions of Part II of Title II.[162] Section 261(c) *specifically* provides that nothing in Part II of Title II "precludes a State from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the State's requirements are not inconsistent with this part *or the Commission's regulations to implement this part*."[163] We conclude that state access and interconnection obligations referenced in section 251(d)(3) fall within the scope of section 261(c). Section 261(c), as the more specific provision, controls over section 261(b) for matters that fall within its scope.[164] We note, too, that section 261(c) encompasses all state requirements. It is not limited to requirements that were prescribed prior to the enactment of the 1996 Act. By providing that state requirements for *intrastate* services must be consistent with the Commission's regulations, section 261(c) buttresses our

[161] *Louisiana PSC*, 476 U.S. at 368.

[162] 47 U.S.C. § 261(b).

[163] 47 U.S.C. § 261(c) (emphasis added).

[164] *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974).

conclusion that the Commission may establish regulations regarding intrastate aspects of interconnection, services, and access to unbundled elements.

99. Section 601 of the 1996 Act and section 256 also are consistent with our conclusion. Section 601(c) of the 1996 Act provides that the Act and its amendments "shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments."[165] We conclude that section 251(d)(1), which requires the Commission to "establish regulations to implement the requirements of this section,"[166] and section 261(c), were expressly intended to modify federal and state law and jurisdictional authority.

100. Section 256, entitled "Coordination for Interconnectivity," has no direct bearing on the issue of the Commission's authority under section 251, because it provides only that "[n]othing *in this section* shall be construed as expanding or limiting any authority that the Commission may have under law in effect before the date of enactment of the Telecommunications Act of 1996."[167] That provision is relevant, however, as a contrast to section 251, which does not contain a similar statement that the scope of the Commission's authority is unchanged by section 251.[168]

101. We further conclude that the Commission's regulations under section 251 are binding on the states, even with respect to intrastate issues. Section 252 provides that the agreements state commissions arbitrate must comply with the Commission's regulations established pursuant to section 251. In addition, section 253 requires the Commission to preempt state or local regulations or requirements that "prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."[169] As discussed above, section 261(c) provides further support for the conclusion that states are bound by the regulations the Commission establishes under section 251.

102. We disagree with claims that section 251(d)(3) "grandfathers" existing state regulations that are consistent with the 1996 Act, and that such state regulations need not

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[165] Telecommunications Act of 1996, § 601(c)(1).

[166] 47 U.S.C. § 251(d)(1).

[167] 47 U.S.C. § 256(c) (emphasis added).

[168] *Russello v. United States*, 464 U.S. 16, 23 (1983); *Cramer v. Internal Revenue Service*, 64 F.3d 1406, 1412 (9th Cir. 1995) (where Congress includes a provision in one section of statute but omits it in another section of the same Act, it should not be implied where it is excluded).

[169] 47 U.S.C. § 253(a).

comply with the Commission's implementing regulations. Section 251(d)(3) only specifies that the Commission may not preclude enforcement of state access and interconnection requirements that are consistent with section 251, and that do not substantially prevent implementation of the requirements of section 251 or the purposes of Part II of Title II. In this Report and Order, we set forth only such rules that we believe are necessary to implement fully section 251 and the purposes of Part II of Title II. Thus, state regulations that are inconsistent with our rules may "substantially prevent implementation of the requirements of this section and the purposes of [Part II of Title II]."[170]

103. We are not persuaded by arguments that, because other provisions of the 1996 Act specifically require states to comply with the Commission's regulations, the absence of such requirement in section 251(d)(3) indicates that Congress did not intend such compliance. Section 251(d)(3) permits states to prescribe and to enforce access and interconnection requirements only to the extent that such requirements "are consistent with the requirements" of section 251[171] and do not "substantially prevent implementation" of the requirements of section 251 and the purposes of Part II of Title II.[172] The Commission is required to establish regulations to "implement the requirements of the section."[173] Therefore, in order to be consistent with the requirements of section 251 and not "substantially prevent" implementation of section 251 or Part II of Title II, state requirements must be consistent with the FCC's implementing regulations.[174]

D. Commission's Legal Authority and the Adoption of National Pricing Rules

1. Background

104. In the NPRM, we sought comment on our tentative conclusion that sections 251(c)(2), (c)(3), and (c)(6) establish the Commission's legal authority under section 251(d) to adopt pricing rules to ensure that the rates, terms, and conditions for interconnection, access to

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[170] 47 U.S.C. § 251(d)(3)(C).

[171] 47 U.S.C. § 251(d)(3)(B).

[172] 47 U.S.C. § 251(d)(3)(C).

[173] 47 U.S.C. § 251(d)(1).

[174] We recognize that, in some instances, whether particular state requirements are consistent with the Commission's rules may need to be considered on a case-by-case basis.

unbundled network elements, and collocation are just, reasonable, and nondiscriminatory.[175] We also sought comment on our tentative conclusion that sections 251(b)(5) and 251(c)(4) establish our authority to define "wholesale rates" for purposes of resale, and "reciprocal compensation arrangements" for purposes of transport and termination of telecommunications services.[176] In addition, we asked parties to comment on our tentative conclusion that the Commission's statutory duty to implement the pricing requirements of section 251, as elaborated in section 252, requires that we establish pricing rules interpreting and further explaining the provisions of section 252(d). The states would then apply these rules in establishing rates pursuant to arbitrations and in reviewing BOC statements of generally available terms and conditions.[177]

105. We further sought comment on our tentative conclusion that national pricing rules would likely reduce or eliminate inconsistent state regulatory requirements, increase the predictability of rates, and facilitate negotiation, arbitration, and review of agreements between incumbent LECs and competitive providers.[178] We also sought comment on the potential consequences of the Commission not establishing specific pricing rules.[179]

2. Comments

106. *Legal Authority*. The Department of Justice, GSA/DoD, many potential new entrants, and a few state commissions maintain that the Act gives the Commission a critical role in establishing national pricing rules to ensure that the rates for interconnection, access to unbundled network elements, and collocation are just, reasonable, and nondiscriminatory.[180] They contend that section 251(d)(1) specifically directs the Commission, without limitation, to

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[175] NPRM at para. 117.

[176] *Id.* at 118.

[177] *Id.* at para. 118.

[178] *Id.* at para. 119.

[179] *Id.*

[180] *See, e.g.*, DoJ comments at 24-25; GSA/DoD comments at 8, reply at 6; Teleport comments at 44; ALTS comments at 33; GST comments at 25-26; Hyperion comments at 19; ACSI comments at 53, reply at 18-19; MFS comments at 49; MCI comments at 59; Sprint comments at 42; Cox comments at 22; TCI comments at 6; Time Warner comments at 45; WinStar comments at 28, reply at 6-7; Comcast reply at 12; AT&T reply at 5; Kentucky Commission comments at 3; Wyoming Commission comments at 27; *see also* NCTA comments at 8-9; Texas Public Utility Counsel comments at 15; Jones Intercable comments at 10-12, reply at 10-13 (arguing that the Commission should adopt national binding pricing rules); New Jersey Cable Ass'n, *et al.* reply at 6-9, 11 (arguing that the pricing rules adopted by the Commission should be binding); Vanguard reply at 4-5.

develop pricing rules governing transport and termination, interconnection, the provisioning of unbundled network elements, and resale.[181] These parties maintain that nothing in sections 251 and 252 expressly precludes the Commission from establishing pricing rules for the states to apply.[182] Therefore, they argue that the broad grant of authority under section 251(d)(1) includes authority to establish pricing rules.[183]

107. On the other hand, most state commissions, BOCs, and incumbent LEC trade associations contend that nothing in the 1996 Act specifically authorizes the Commission to adopt pricing rules.[184] A group of state commissions and NARUC contend that the Commission's authority to implement the requirements of section 251 is limited to the express activities assigned to the Commission in that section, such as prescribing regulations for resale and numbering portability, determining unbundled network elements, and establishing a North American Numbering Plan Administrator (NANPA) and a cost recovery mechanism for the administrators' operations.[185] The New York Commission contends that the 1996 Act is unambiguous in reserving intrastate pricing to the states under section 252(d), and that any Commission regulations would apply only to states that do not act to open local markets to competition and to those provisions in section 251 that require specific Commission rules.[186] The Ohio Commission asserts that section 251(d)(3) explicitly provides that the Commission

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[181] DoJ comments at 24-25; Sprint comments at 42; Teleport comments at 44; GST comments at 25-26.

[182] *Id*; *see also* Citizens Utilities comments at 15-16.

[183] DoJ comments at 24-25; Sprint comments at 42; Teleport comments at 44; GST comments at 25-26.

[184] *See, e.g.*, Wisconsin Commission comments at 4; Ohio Commission comments at 36-39; Florida Commission comments at 24-25; Colorado Commission comments at 10; Pennsylvania Commission comments at 10-11, 26-27; Washington Commission comments at 23; Maryland Commission comments at 11; South Carolina Commission comments at 2; Minnesota Commission reply at 2-3; Nebraska Rural Development Commission comments at 1; Virginia Commission Staff comments at 2-3; Mass. Commission comments at 4; Idaho Commission comments at 10; New York Commission comments at 10, 23, reply at 4-5; Georgia Commission comments at 2-3, 7; Arizona Commission comments at 18; District of Columbia Commission comments at 24-28 (stating that the Commission has authority to adopt non-binding guidelines that would be helpful to states); Missouri Commission comments at 7-8; Texas Commission comments at 21; Alabama Commission comments at 6, 9, 22; Maine Commission, *et al.* comments at 2-4; Illinois Commission comments at 8, 41; Indiana Commission comments at 4-5; New Hampshire Commission, *et al.* reply at 3; NARUC comments at 16-20, reply at 3-5; PacTel comments at 13, 63; SBC comments at 51-53, 70-71; BellSouth comments at 48-49, reply at 31-32; Rural Tel. Coalition comments at 24; USTA comments at 4-5; GTE comments at 59, reply at 3-5; SNET comments at 28; TDS comments at 17 n.14.

[185] NARUC comments at 14-15; Maine Commission, *et al.* comments at 2-4; *see also* GTE comments at 6-7.

[186] New York Commission comments at 2-3; *see also* Pennsylvania Commission comments at 10-11, 26-27; Virginia Commission Staff comments at 3.

shall not preclude states from enforcing or implementing the requirements of section 251, as long as the state's policy is consistent with section 251.[187]

108. The Illinois Commission states that section 252(d) governs pricing standards for interconnection and network element charges, transport and termination of traffic, and wholesale services.[188] It argues that each provision expressly establishes standards under which state commissions are to determine prices, without reference to any Commission rulemaking.[189] The Illinois Commission further contends that in establishing standards for state commissions to apply during arbitration under section 252(b), subsections 252(c)(1) and 252(c)(2) distinguish between section 251 and the Commission's regulations prescribed thereunder, and the pricing standards set forth in section 252(d), which do not reference any Commission regulations.[190] The Illinois Commission infers from these subsections that Congress did not intend for the Commission to exercise broad rulemaking authority under sections 251 and 252.[191] Other state commissions similarly argue that the general language of section 251(c)(2)(D) and the specific grant of authority to states under section 252(d) to price interconnection elements reveal Congress's intent to confer responsibility over pricing on the states.[192]

109. *National Standards.* The Department of Justice, the SBA, and most of the IXCs, CAPs, and cable companies addressing this issue agree that the Commission should establish national pricing rules for interconnection and unbundled elements under 252(d)(1) for the reasons stated in the NPRM.[193] Citizens Utilities, NEXTLINK, and WinStar also support the

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[187] Ohio Commission comments at 36-39.

[188] Illinois Commission comments at 7.

[189] *Id.*

[190] *Id.* at 8, 41.

[191] *Id.*

[192] Colorado Commission comments at 10; Pennsylvania Commission comments at 10-11, 26-27; Virginia Commission comments at 2-3; Mass. Commission comments at 4; Arizona Commission comments at 18.

[193] *See, e.g.*, DoJ comments at 25-26; SBA comments at 4; LDDS comments at 19-20, 58; AT&T comments at 45; LCI comments at 3, 12; MCI comments at 59; Sprint comments at 42, reply at 5-11; CompTel comments at 19-22; Vartec, *et al.* comments at 10 (national pricing standards for databases); ALTS comments at 33; Teleport comments at 45-46, reply at 32; Hyperion comments at 3, reply at 5-6; ASCI comments at 51-53; Intermedia comments at 14; MFS comments at 52-54, 58, 64; Cable & Wireless comments at 32; Cox comments at 12, 22, reply at 5, 13-16; Comcast comments at 44; Continental comments at 16; TCI comments at 22-24, reply at 1-3; Jones Intercable comments at 2-4, reply at 3, 9; Time Warner comments at 47, reply at 2, 7-9; *see also*

Commission's tentative conclusion that national pricing rules should be adopted to guide the states in facilitating the negotiation and arbitration process.[194] The majority of consumer organizations urge the Commission to establish uniform, national rules and argue that inconsistent and unpredictable state rules would inhibit or delay the efforts of new entrants to obtain interconnection arrangements with incumbent LECs and undermine their ability to raise capital in the financial markets.[195] Several state commissions also support the adoption of national rules. For example, the Kentucky Commission contends that national pricing rules would facilitate competitive entry,[196] and the North Dakota Commission argues that such national rules would provide significant assistance to those states that have not opened their local markets to competition.[197]

110. The RBOCs, with the exception of Ameritech, generally oppose the adoption of national pricing rules on legal and policy grounds.[198] The majority of states also express opposition to national pricing rules and argue that section 251(d)(3) reserves to the states the details of local service competition.[199] Other state commissions advocate that the Commission

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Vanguard reply at 3, 7-9.

[194] *See, e.g.*, Citizens Utilities comments at 15-16; NEXTLINK comments at 24-25; WinStar comments at 28; *see also* CompTel comments at 19-20.

[195] *See, e.g.*, Ad Hoc Telecommunications Users Committee comments at 3-4, 11, 29-32; SDN Users Ass'n comments at 2; CFA/CU comments at 26; Competition Policy Institute comments at 9-10, reply at 10; *see also* ITIC comments at 3-5; TRACER comments at 37, reply at 6; NTIA reply at 15-16.

[196] *See, e.g.*, Kentucky Commission comments at 4; *see also* Texas Public Utility Counsel comments at 15.

[197] *See, e.g.*, North Dakota Commission comments at 1-2.

[198] *See, e.g.*, NYNEX comments at 40-41; SBC comments at 48, 50, reply at 29, 33; PacTel comments at 2, 8, 64, and 65, reply at 23; BellSouth comments at 49, 55, reply at 33; Ameritech comments at 59 (favoring national pricing principles that allow incumbent LECs to recover all costs); *see also* Cincinnati Bell comments at 20 (supporting FCC rules, but arguing that rules should only be general and for the purpose of guiding states in the negotiation and arbitration process).

[199] *See, e.g.*, Ohio Commission comments at 39-40; Colorado Commission comments at 28, reply at 4-6; Wyoming Commission comments at 20, 27-29; Minnesota reply at 2-3; Maryland Commission comments at 12; New York Commission comments at 11-12, reply at 9-10; Georgia Commission comments at 7, reply at 1; Indiana Commission comments at 2, 21; Alaska Commission comments at 4; Missouri Commission comments at 8; Oregon Commission comments at 30; Alabama Commission comments at 20-21; North Carolina Commission comments at 10; Maine Commission, *et al.* comments at 2-3; California Commission comments at 11-12, reply at 18; Arizona Commission comments at 19; Connecticut Commission comments at 9-10; Washington Commission reply at 2; New Hampshire Commission, *et al.* reply at 2-3; Mississippi Commission comments at 13; Pennsylvania Commission comments at 26; NARUC comments at 23, 24, reply at 12-13; Florida Commission comments at 25; *see also* Ohio Consumers' Counsel comments at 21, 27; MECA comments at 39-41; Municipal Utilities comments at 17-18, reply at 7; Attorneys General, *et al.* reply at 2, 7; Puerto Rico Tel. comments at 5-6; reply at 9-10; Alaska Tel. Ass'n comments at 2.

should adopt either preferred outcomes for interconnection that narrow the range of issues in arbitration and negotiation,[200] or general nonbinding guidelines that recognize the rights of states to adopt their own pricing standards.[201] For instance, the Illinois Commission contends that, if the Commission finds that it has authority to establish pricing rules to govern the states, it could determine that rates for interconnection and unbundled network elements are to be based upon forward-looking costs rather than historical costs, and leave all other details to the states. In addition, the Illinois Commission argues that any pricing standards that the Commission prescribes should be focused narrowly on those services addressed in section 252(d).[202] The Iowa Commission maintains that the Commission's rules may be explicit only to the extent that they prohibit state policies that are inconsistent with section 251.[203] Some incumbent LEC trade associations suggest that the Commission adopt only broad guidelines and minimum pricing requirements.[204] NADO, Joint Consumer Advocates, and the Rural Tel. Coalition oppose the adoption of any national pricing rules on the ground that such a regime would not allow for flexibility and innovation.[205] The Rural Tel. Coalition further asserts that if the Commission insists on prescribing pricing standards for all states, it must take into account the myriad of different classes of customers, geographic characteristics, population densities, and technologies.[206]

3. Discussion

111. In adopting sections 251 and 252, we conclude that Congress envisioned complementary and significant roles for the Commission and the states with respect to the

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[200] *See* Washington Commission comments at 2.

[201] *See, e.g.*, Pennsylvania Commission comments at 28; South Carolina Commission comments at 3; Illinois Commission comments at 41, reply at 12-13; Washington Commission comments at 2, 22; *see also* NYNEX comments at 42.

[202] *See* Illinois Commission comments at 41-43.

[203] *See* Iowa Commission comments at 5.

[204] *See, e.g.*, NECA comments at 6; USTA comments at 37; *see also* George Washington Urban League comments at 2; Alliance for Public Technology comments at 9-11, reply at 1; ALLTEL comments at 4-7, reply at summary.

[205] *See* NADO, *et al.* at 4, 6; Joint Consumer Advocates reply at 9-10; Rural Tel. Coalition comments at 19, reply at 13-14.

[206] Rural Tel. Coalition comments at 19, reply at 14.

rates for section 251 services, interconnection, and access to unbundled elements.[207] We interpret the Commission's role under section 251 as ensuring that rates are just, reasonable, and nondiscriminatory: in doing so, we believe it to be within our discretion to adopt national pricing rules in order to ensure that rates will be just, reasonable, and nondiscriminatory. The Commission is also responsible for ensuring that interconnection, collocation, access to unbundled elements, resale services, and transport and termination of telecommunications are reasonably available to new entrants.[208] The states' role under section 252(c) is to establish specific rates when the parties cannot agree, consistent with the regulations prescribed by the Commission under sections 251(d)(1) and 252(d).

112. While we recognize that sections 201 and 202 create a very different regulatory regime from that envisioned by sections 251 and 252, we observe that Congress used terms in section 251, such as the requirement that rates, terms, and conditions be "just, reasonable, and nondiscriminatory," that are very similar to language in sections 201 and 202. This lends additional support for the proposition that Congress intended to give us authority to adopt rules regarding the justness and reasonableness of rates pursuant to section 251, comparable in some respects to the authority Congress gave us pursuant to sections 201 and 202.

113. We believe that national pricing rules are a critical component of the interconnection regime set out in sections 251 and 252. Congress intended these sections to promote opportunities for local competition, and directed us to establish regulations to ensure that rates under this regime would be economically efficient. This, in turn, should reduce potential entrants' capital costs, and should facilitate entry by all types of service providers, including small entities.[209] Further, we believe that national rules will help states review and arbitrate contested agreements in a timely fashion. From August to November and beyond, states will be carrying the tremendous burden of setting specific rates for interconnection and network elements, for resale, and for transport and termination when parties bring these issues before them for arbitration. As discussed in more detail below, we are setting forth default proxies for states to use if they are unable to set these rates using the necessary cost studies within the statutory time frame. After that, both we and the states will need to review the level of competition, revise our rules as necessary, and reconcile arbitrated interconnection arrangements to those revisions on a going-forward basis.

114. We believe that national rules should reduce the parties' uncertainty about the outcome that may be reached by different states in their respective regulatory proceedings,

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[207] *See infra*, Sections VII and VIII.

[208] For a further discussion of specific pricing rules, *see infra*, Section VII.

[209] *See* Regulatory Flexibility Act, 5 U.S.C. § 601 *et seq.*

which will reduce regulatory burdens for all parties including small incumbent LECs and small entities. A national regime should also help to ensure consistent federal court decisions on review of specific state orders under sections 251 and 252.[210] In addition, under the national pricing rules that we adopt for interconnection and unbundled network elements, states will retain the flexibility to consider local technological, environmental, regulatory, and economic conditions. Failure to adopt national pricing rules, on the other hand, could lead to widely disparate state policies that could delay the consummation of interconnection arrangements and otherwise hinder the development of local competition. Lack of national rules could also provide opportunities for incumbent LECs to inhibit or delay the interconnection efforts of new competitors, and create great uncertainty for the industry, capital markets, regulators, and courts as to what pricing policies would be pursued by each of the individual states, frustrating the potential entrants' ability to raise capital. In sum, we believe that the pricing of interconnection, unbundled elements, resale, and transport and termination of telecommunications is important to ensure that opportunities to compete are available to new entrants.

115. As we observed in the NPRM,[211] section 251 explicitly sets forth certain requirements regarding rates for interconnection, access to unbundled elements, and related offerings. Sections 251(c)(2) and (c)(3) require that incumbent LECs' "*rates*, terms, and conditions" for interconnection and unbundled network elements be "just, reasonable, and nondiscriminatory in accordance with . . . the requirements of sections 251 and 252."[212] Section 251(c)(4) requires that incumbent LECs offer "for resale at wholesale *rates* any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers," without unreasonable conditions or limitations.[213] Section 251(c)(6) provides that all LECs must provide physical collocation of equipment, "on *rates*, terms, and conditions that are just, reasonable, and nondiscriminatory."[214] Section 251(b)(5) requires that all LECs "establish reciprocal *compensation* arrangements for the transport and termination of telecommunications."[215] Section 251(d)(1) further expressly directs the

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[210] *See* 47 U.S.C.§ 252(e)(6).

[211] NPRM at para. 117.

[212] 47 U.S.C. §§ 251(c)(2) and (c)(3) (emphasis added).

[213] 47 U.S.C. § 251(c)(4) (emphasis added).

[214] 47 U.S.C. § 251(c)(6) (emphasis added).

[215] 47 U.S.C. § 251(b)(5) (emphasis added).

Commission, without limitation, to "complete all actions necessary to implement the requirements of [section 251]."[216]

116. Section 252 generally sets forth the procedures that state commissions, incumbent LECs, and new entrants must follow to implement the requirements of section 251 and establish specific interconnection arrangements. Section 252(c)(1) provides that "in resolving by arbitration . . . any open issues and imposing conditions upon the parties to the agreement, a State commission shall . . . ensure that such resolution and conditions meet the requirements of section 251, *including the regulations prescribed by the Commission pursuant to section 251.*"[217]

117. We conclude that, under section 251(d)(1), Congress granted us broad authority to complete all actions necessary to implement the requirements of section 251, including actions necessary to ensure that rates for interconnection, access to unbundled elements, and collocation are "just, reasonable, and nondiscriminatory."[218] We also determine that the statute grants us the authority to define reasonable "wholesale rates" for purposes of services to be resold, and "reciprocal compensation" for purposes of transport and termination of telecommunications.[219] The argument advanced by the New York Commission, NARUC, and others that the Commission's implementing authority under section 251(d)(1) is limited to those provisions in section 251 that mandate specific Commission rules, such as prescribing regulations for number portability, unbundling, and resale, reads into section 251(d)(1) limiting language that the section does not contain. Congress did not confine the Commission's rulemaking authority to only those matters identified in sections 251(b)(2), 251(c)(4)(B), and 251(d)(2), and there is no basis for inferring such an implicit limitation. A narrow reading of section 251(d)(1), as proposed by the New York Commission, NARUC, and others, would require the Commission to neglect its statutory duty to implement the provisions of section 251 and to promote rapid competitive entry into local telephone markets.

118. We also reject the arguments raised by several state commissions that the language in section 252(c) indicates Congress's intent for the Commission to have little or no authority with respect to pricing of interconnection, access to unbundled elements, and collocation. We do not believe that the statutory directive that state commissions establish rates according to section 252(d) restricts our authority under section 251(d)(1). States must

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[216] 47 U.S.C. § 251(d)(1).

[217] 47 U.S.C. § 252(c)(1) (emphasis added).

[218] *See* 47 U.S.C. §§ 251(c)(2), (c)(3), and (c)(6).

[219] *See* 47 U.S.C. §§ 251(b)(5) and (c)(4).

comply with both the statutory standards under section 252(d) *and* the regulations prescribed by the Commission pursuant to section 251 when arbitrating rate disputes or when reviewing BOC statements of generally available terms. Section 252(c) enumerates three requirements that states must follow in arbitrating issues.[220] These requirements are not set forth in the alternative; rather, states must comply with all three.

119. We further reject the argument that section 251(d)(3) restricts the Commission's authority to establish national pricing regulations. Section 251(d)(3) provides that the Commission shall not preclude the enforcement of any regulation, order, or policy of a state commission that, *inter alia*, is consistent with the requirements of section 251 and does not substantially prevent implementation of the requirements of section 251. This subsection, as discussed in section II.C., *supra*, is intended to allow states to adopt regulations that are not inconsistent with the Commission's rules; it does not address state policies that are inconsistent with the pricing rules established by the Commission.

120. We also address the impact of our rules on small incumbent LECs. For example, Rural Tel. Coalition argues that rigid rules, based on the properties of large urban LECs, cannot blindly be applied to small and rural LECs.[221] As discussed above, however, we believe that states will retain sufficient flexibility under our rules to consider local technological, environmental, regulatory, and economic conditions. We also note that section 251(f) may provide relief to certain small carriers.[222]

E. Authority to Take Enforcement Action

1. Background

121. The Commission's implementation of section 251 must be given full effect in arbitrated agreements and incorporated into all such agreements. There is judicial review of such arbitrated agreements, and one issue surely will be the adherence of these agreements to our rules. The Commission will have the opportunity to participate, upon request by a party or a state or by submitting an *amicus* filing, in the arbitration or the judicial review thereof. To clarify our potential role, we consider the extent of the Commission's authority to review and enforce agreements entered into pursuant to section 252. Section 252(e)(6) provides that, in "any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court

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[220] *See* 47 U.S.C. §§ 252(c)(1), (c)(2), and (c)(3).

[221] Rural Tel. Coalition reply at 14.

[222] *See* 47 U.S.C. § 251(f).

to determine whether the agreement or statement meets the requirements of section 251 and this section."[223]

122. In the NPRM, we sought comment on the relationship between sections 251 and 252 and the Commission's existing authority under section 208(a), which allows any person to file a complaint with the Commission regarding "anything done or omitted to be done by any common carrier subject to this Act, in contravention of the provisions thereof . . ."[224] We asked whether section 208 gives the Commission authority over complaints alleging violations of requirements set forth in sections 251 or 252. We also sought comment on the relationship between sections 251 and 252 and any other applicable Commission enforcement authority. We further sought comment on how we might increase the effectiveness of the Commission's enforcement mechanisms. Specifically, we asked for comment on how private rights of action might be used under the Act, and the Commission's role in speeding dispute resolution in forums used by private parties.

2. Comments

123. The majority of commenters agree that the Commission's section 208 complaint authority extends to the acts or omissions of common carriers in contravention of sections 251 and 252.[225] TCI further asserts that the Commission retains authority to issue declaratory rulings pursuant to the Administrative Procedure Act, 5 U.S.C. 554(e), and to initiate investigations pursuant to section 403 of the Communications Act.[226] Several state commissions argue, however, that allowing parties to file section 208 complaints would be inconsistent with the states' preeminent role under sections 251 and 252, at least in some circumstances. For example, the New York Commission contends that, to the extent that sections 251 and 252 apply to both interstate and intrastate services, the FCC only has authority to hear complaints regarding interstate communications.[227] The Illinois Commission asserts that a section 208 remedy would be appropriate only after an agreement is

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[223] 47 U.S.C. § 252(e)(6).

[224] *See* 47 U.S.C. § 208; *see also* NPRM at para. 41.

[225] *See, e.g.*, ALTS comments at 7; AT&T comments at 10-11; BellSouth comments at 9; CompTel comments at 103; Florida Commission comments at 10-11; Ind. Cable & Telecomm. Ass'n reply at 4; Jones Intercable comments at 13-14; MCI comments at 7-8; MFS comments at 8-9; Ohio Commission comments at 17; Sprint comments at 8-9; TCI comments at 10; TCC comments at 62.

[226] TCI comments at 10.

[227] New York Commission reply; *see also* Wyoming Commission comments at 15-16.

implemented, and only to the extent the complaint does not allege that the agreement violates standards set forth in sections 251 and 252.[228]

3. Discussion

124. Consistent with our decision in *Telephone Number Portability*[229] and the views of most commenters, we conclude that parties have several options for seeking relief if they believe that a carrier has violated the standards under section 251 or 252. Pursuant to section 252(e)(6), a party aggrieved by a state commission arbitration determination under section 252 has the right to bring an action in federal district court.[230] Federal district courts may choose to stay or dismiss proceedings brought pursuant to section 252(e)(6), and refer issues of compliance with the substantive requirements of sections 251 and 252 to the Commission under the primary jurisdiction doctrine.[231] We find, however, that federal court review is not the exclusive remedy regarding state determinations under section 252. The 1996 Act is clear when it intends for a remedy to be exclusive. For example, section 252(e)(6) provides that, if a state commission fails to act, as described in section 252(e)(5), "the proceeding by the Commission under [section 252(e)(5)] and any judicial review of the Commission's actions *shall be the exclusive remedies* for a State commission's failure to act."[232] In contrast, the succeeding sentence in section 252(e)(6) provides that any party aggrieved by a state commission determination under section 252 "*may* bring an action in an appropriate Federal district court . . . ."[233]

125. The Commission also stands ready to provide guidance to states and other parties regarding the statute and our rules. In addition to the informal consultations that we hope to continue with state commissions, they or other parties may at any time seek a declaratory

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[228] Illinois Commission comments at 16-18.

[229] *See Number Portability Order*.

[230] Commenters also suggest that the statute's provision for federal district court review of state public utility commission decisions is inconsistent with the 11th Amendment. That issue is not properly before the Commission since it is the federal courts that will have to determine the scope of their jurisdiction and in any case "regulatory agencies are not free to declare an act of Congress unconstitutional." *See Meredith Corp. v. FCC*, 809 F.2d 863, 873 (D.C. Cir. 1987).

[231] *See Reiter v. Cooper*, 507 U.S. 258, 268-269 (1993); *Allnet Comm. Servs. v. National Exchange Carrier Ass'n*, 965 F.2d 1118 (D.C. Cir. 1992); *see also* TCC Comments at 61.

[232] 47 U.S.C. § 252(e)(6) (emphasis added).

[233] *Id.* (emphasis added).

ruling where necessary to remove uncertainty or eliminate a controversy.[234] Because section 251 is critical to the development of competitive local markets, we intend to act expeditiously on such requests for declaratory rulings.

126. We further conclude that section 252(e)(6) does not divest the Commission of jurisdiction, in whole or in part, over complaints that a common carrier violated section 251 or 252 of the Act. Section 601(c)(1) of the 1996 Act provides that the 1996 Act "shall not be construed to modify, impair or supersede" existing federal law -- which includes the section 208 complaint process -- "unless expressly so provided."[235] Sections 251 and 252 do not divest the Commission of its section 208 complaint authority.

127. An aggrieved party could file a section 208 complaint with the Commission, alleging that the incumbent LEC or requesting carrier has failed to comply with the requirements of sections 251 and 252, including Commission rules thereunder, even if the carrier is in compliance with an agreement approved by the state commission. Alternatively, a party could file a section 208 complaint alleging that a common carrier is violating the terms of a negotiated or arbitrated agreement. We plan to initiate a proceeding to adopt expedited procedures for resolving complaints filed pursuant to section 208.

128. We note that, in acting on a section 208 complaint, we would not be directly reviewing the state commission's decision, but rather, our review would be strictly limited to determining whether the common carrier's actions or omissions were in contravention of the Communications Act.[236] Thus, consistent with our past decisions in analogous contexts,[237] we conclude that a person aggrieved by a state determination under sections 251 and 252 of the Act may elect to either bring an action for federal district court review or a section 208 complaint to the Commission against a common carrier. Such a person could, as a further alternative, pursuant to section 207, file a complaint against a common carrier with the

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[234] *See* 47 C.F.R. § 1.2 (the Commission, in accordance with section 5(d) of the Administrative Procedures Act, 5. U.S.C. § 554(e), may issue a declaratory ruling terminating a controversy or removing uncertainty).

[235] Telecommunications Act of 1996, § 601(c)(1).

[236] While we would have authority to review such complaints, we note that we might decline, at least in some instances, to impose financial penalties upon a common carrier that is acting pursuant to state requirements or authorization, even if we sustain the allegations in the complaint.

[237] *See Number Portability Order, supra*; *Freemon v. AT&T*, 9 FCC Rcd 4032, 4033 (1994) (provision permitting persons aggrieved by violation of prohibition against unauthorized publication of certain communications to "bring a civil action in United States district court or any other court of competent jurisdiction" did not bar a complaint under section 208 of the Communications Act); *see also Policies Governing the Provision of Shared Telecommunications Service*, 3 FCC Rcd 6931 (1988) (the section 208 complaint process is available to resolve any specific problems that might arise regarding shared telecommunications service regulation by a state that impinges upon a federal interest).

Commission or in federal district court for the recovery of damages.[238] We are unlikely, in adjudicating a complaint, to examine the consistency of a state decision with sections 251 and 252 if a judicial determination has already been made on the issues before us.[239]

129. Finally, we clarify, as one commenter requested,[240] that nothing in sections 251 and 252 or our implementing regulations is intended to limit the ability of persons to seek relief under the antitrust laws, other statutes, or common law. In addition, in appropriate circumstances, the Commission could institute an inquiry on its own motion, 47 U.S.C. § 403, initiate a forfeiture proceeding, 47 U.S.C. § 503(b), initiate a cease-and-desist proceeding, 47 U.S.C. § 312(b), or in extreme cases, consider initiating a revocation proceeding for violators with radio licenses, 47 U.S.C. § 312(a), or referring violations to the Department of Justice for possible criminal prosecution under 47 U.S.C. § 501, 502 & 503(a).

F. Regulations of BOC Statements of Generally Available Terms

130. We noted in the NPRM that section 251 and our implementing regulations govern the states' review of BOC statements of generally available terms and conditions,[241] as well as arrangements reached through compulsory arbitration pursuant to section 252(b).[242] We tentatively concluded that we should adopt a single set of standards with which both arbitrated agreements and BOC statements of generally available terms must comply.

131. Only a few commenters addressed this issue, and most concurred with the tentative conclusion that we should apply the same requirements to both arbitrated agreements and BOC statements of generally available terms.[243] The Illinois Commission, for example, asserts that, "[s]ince the generally available terms could be viewed as a baseline against which to craft arbitrated arrangements, it is reasonable to hold both arbitrated agreements and the

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[238] *See* 47 U.S.C. § 207.

[239] *Town of Deerfield v. FCC*, 992 F.2d 420, 428-430 (2d Cir. 1993).

[240] *See* MCI comments at 9.

[241] *See* 47 U.S.C. §§ 252(f) and 271(c)(2)(B).

[242] NPRM at para. 36 (*citing* 47 U.S.C. §§ 252(b), (f)).

[243] ACTA comments at 4; Arch comments at 5; BellSouth comments at 7; CompTel comments at 105; Illinois Commission comments at 14; MCI comments at 7; Sprint comments at 8.

BOC statements of generally available terms to the same standards."[244] CompTel asserts that, particularly if states require incumbent LECs to tariff the terms and conditions in agreements that are subject to arbitration, there will be few if any distinctions between arbitrated agreements and generally available terms and conditions.[245]

132. We hereby find that our tentative conclusion that we should apply a single set of standards to both arbitrated agreements and BOC statements of generally available terms is consistent with both the text and purpose of the 1996 Act. BOC statements of generally available terms are relevant where a BOC seeks to provide in-region interLATA service, and the BOC has not negotiated or arbitrated an agreement. Therefore, such statements are to some extent a substitute for an agreement for interconnection, services, or access to unbundled elements. We also find no basis in the statute for establishing different requirements for arbitrated agreements and BOC statements of generally available terms. Moreover, a single set of requirements will substantially ease the burdens of state commissions and the FCC in reviewing agreements and statements of generally available terms pursuant to sections 252 and 271.

G. States' Role in Fostering Local Competition Under Sections 251 and 252

133. As already referenced, states will play a critical role in promoting local competition, including by taking a key role in the negotiation and arbitration process. We believe the negotiation/arbitration process pursuant to section 252 is likely to proceed as follows. Initially, the requesting carrier and incumbent LEC will seek to negotiate mutually agreeable rates, terms, and conditions governing the competing carrier's interconnection to the incumbent's network, access to the incumbent's unbundled network elements, or the provision of services at wholesale rates for resale by the requesting carrier. Either party may ask the relevant state commission to mediate specific issues to facilitate an agreement during the negotiation process.

134. Because the new entrant's objective is to obtain the services and access to facilities from the incumbent that the entrant needs to compete in the incumbent's market, the negotiation process contemplated by the 1996 Act bears little resemblance to a typical commercial negotiation. Indeed, the entrant has nothing that the incumbent needs to compete with the entrant, and has little to offer the incumbent in a negotiation. Consequently, the 1996 Act provides that, if the parties fail to reach agreement on all issues, either party may seek arbitration before a state commission. The state commission will arbitrate individual issues specified by the parties, or conceivably may be asked to arbitrate the entire agreement.

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[244] Illinois Commission comments at 14.

[245] Comptel comments at 105.

In the event that a state commission must act as arbitrator, it will need to ensure that the arbitrated agreement is consistent with the Commission's rules. In reviewing arbitrated and negotiated agreements, the state commission may ensure that such agreements are consistent with applicable state requirements.

135. Under the statutory scheme in sections 251 and 252, state commissions may be asked by parties to define specific terms and conditions governing access to unbundled elements, interconnection, and resale of services beyond the rules the Commission establishes in this Report and Order. Moreover, the state commissions are responsible for setting specific rates in arbitrated proceedings. For example, state commissions in an arbitration would likely designate the terms and conditions by which the competing carrier receives access to the incumbent's loops. The state commission might arbitrate a description or definition of the loop, the term for which the carrier commits to the purchase of rights to exclusive use of a specific network element, and the provisions under which the competing carrier will order loops from the incumbent and the incumbent will provision an order. The state commission may establish procedures that govern should the incumbent refurbish or replace the element during the agreement period, and the procedures that apply should an end user customer decide to switch from the competing carrier back to the incumbent or a different provider. In addition, the state commission will establish the rates an incumbent charges for loops, perhaps with volume and term discounts specified, as well as rates that carriers may charge to end users.

136. State commissions will have similar responsibilities with respect to other unbundled network elements such as the switch, interoffice transport, signalling and databases. State commissions may identify network elements to be unbundled, in addition to those elements identified by the Commission, and may identify additional points at which incumbent LECs must provide interconnection, where technically feasible. State commissions are responsible for determining when virtual collocation may be provided instead of physical collocation, pursuant to section 251(c)(6). States also will determine, in accordance with section 251(f)(1), whether and to what extent a rural incumbent LEC is entitled to continued exemption from the requirements of section 251(c) after a telecommunications carrier has made a bona fide request under section 251. Under section 251(f)(2), states will determine whether to grant petitions that may be filed by certain LECs for suspension or modification of the requirements in sections 251(b) or (c).

137. The foregoing is a representative sampling of the role that states will have in steering the course of local competition. State commissions will make critical decisions concerning a host of issues involving rates, terms, and conditions of interconnection and unbundling arrangements, and exemption, suspension, or modification of the requirements in section 251. The actions taken by a state will significantly affect the development of local competition in that state. Moreover, actions in one state are likely to influence other states,

and to have a substantial impact on steps the FCC takes in developing a pro-competitive national policy framework.

III. DUTY TO NEGOTIATE IN GOOD FAITH

A. Background

138. Section 251(c)(1) of the statute imposes on incumbent LECs the "duty to negotiate in good faith in accordance with section 252 the particular terms and conditions of agreements to fulfill the duties described" in sections 251(b) and(c), and further provides that "(t)he requesting telecommunications carrier also has the duty to negotiate in good faith the terms and conditions of such agreements."[246] In the NPRM, we asked parties to comment on the extent to which the Commission should establish national rules defining the requirements of the good faith negotiation obligation.

B. Advantages and Disadvantages of National Rules

1. Comments

139. Some potential new entrants and other parties assert that clear national guidelines will prevent incumbent LECs from abusing their bargaining power for the purpose of undermining efforts to eliminate barriers to competition.[247] Some parties also assert that, in the absence of specific rules, negotiations between potential competitors are likely to be needlessly prolonged and contentious.[248] SBA claims that delay and other anticompetitive tactics are particularly burdensome on small businesses.[249] In addition, Independent Cable & Telecommunications Ass'n expresses concern that states might establish guidelines that favor the incumbent.[250] Other parties agree that national rules defining some limited aspects of good faith can simplify both negotiations and dispute resolution, but nevertheless contend that

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[246] 47 U.S.C. § 251(c)(1).

[247] *See, e.g.*, AT&T comments at 86-88; CEDRA comments at 1-9; TCC comments at 7-13.

[248] *See, e.g.*, ACSI comments at 7-11; AT&T comments at 86-88; Centennial Cellular Corp. comments at 2-10; Cox comments at 43-46; NCTA comments at 59-63.

[249] SBA comments at 8.

[250] Ind. Cable & Telecomm. Ass'n reply at 7.

the Commission should not establish extensive or detailed rules in this area, because the facts and tactics of various negotiations will display only a few characteristics in common.[251]

140. Some incumbent LECs and other parties contend that the FCC need not establish any rules regarding good faith negotiation, because the statute builds in a remedy of arbitration for parties that are dissatisfied with the negotiation process.[252] They maintain that national rules are inappropriate because a determination of whether a party has acted in good faith requires examination of specific facts that will not describe a pattern across the country.[253] SBC contends that national standards are inflexible, and thus will slow down the negotiation process, and that national rules are unnecessary, because the 1996 Act provides incentives for incumbents to negotiate.[254] Some parties also claim that section 252(b)(5) sets forth standards for good faith negotiation, and that provision makes no mention of a role for the FCC.[255]

2. Discussion

141. We conclude that establishing some national standards regarding the duty to negotiate in good faith could help to reduce areas of dispute and expedite fair and successful negotiations, and thereby realize Congress's goal of enabling swift market entry by new competitors. In order to address the balance of the incentives between the bargaining parties, however, we believe that we should set forth some minimum requirements of good faith negotiation that will guide parties and state commissions. As discussed above, the requirements in section 251 obligate incumbent LECs to provide interconnection to competitors that seek to reduce the incumbent's subscribership and weaken the incumbent's dominant position in the market. Generally, the new entrant has little to offer the incumbent. Thus, an incumbent LEC is likely to have scant, if any, economic incentive to reach agreement. In addition, incumbent LECs argue that requesting carriers may have incentives to

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[251] *See, e.g.*, Georgia Commission comments at 6; Pennsylvania Commission comments at 19-20; SBA comments at 9; Sprint comments at 10-11; Attorneys General reply at 12-13.

[252] BellSouth comments at 10-11; Texas Commission comments at 6-8; USTA comments at 8; *see also* District of Columbia Commission comments at 14-17.

[253] *See, e.g.*, Bell Atlantic comments at 47 (*citing Amendment to the Commission's Rules Regarding a Plan for Sharing the Costs of Microwave Relocation*, WT Docket 95-157, Notice of Proposed Rulemaking, FCC 96-196 (rel. Apr. 30, 1996)); Citizens Utilities comments at 6; Illinois Commission comments at 20-21; Ohio Commission comments at 21.

[254] SBC comments at 12-15.

[255] Citizens Utilities comments at 6; SBC comments at 7, 20.

make unreasonable demands or otherwise fail to act in good faith.[256] The fact that an incumbent LEC has superior bargaining power does not itself demonstrate a lack of good faith, or ensure that a new entrant will act in good faith.

142. We agree with commenters that it would be futile to try to determine in advance every possible action that might be inconsistent with the duty to negotiate in good faith. As discussed more fully below, determining whether or not a party's conduct is consistent with its statutory duty will depend largely on the specific facts of individual negotiations. Therefore, we believe that it is appropriate to identify factors or practices that may be evidence of failure to negotiate in good faith, but that will need to be considered in light of all relevant circumstances.

143. Consistent with our discussion in Section II, above, we believe that the Commission has authority to review complaints alleging violations of good faith negotiation pursuant to section 208.[257] Penalties may be imposed under sections 501, 502 and 503 for failure to negotiate in good faith. In addition, we believe that state commissions have authority, under section 252(b)(5), to consider allegations that a party has failed to negotiate in good faith. We also reserve the right to amend these rules in the future as we obtain more information regarding negotiations under section 252.

C. Specific Practices that May Constitute a Failure to Negotiate in Good Faith

1. Comments

144. The comments included numerous suggestions regarding what might constitute a violation of the duty to negotiate in good faith. Commenters disagree about whether requiring another party to sign a nondisclosure agreement constitutes failure to negotiate in good faith. Some parties urge the Commission to prohibit nondisclosure agreements altogether,[258] but other parties assert that there may be legitimate reasons to seek nondisclosure.[259] Some parties assert that the Commission should only prohibit overly broad or restrictive nondisclosure agreements, such as agreements that cover information that is not commercially sensitive, or

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[256] *See e.g.*, Bell Atlantic comments at 49; U S West comments at 40-42.

[257] We previously have held that parties may raise allegations regarding good faith negotiation pursuant to section 208. *Cellular Interconnection Proceeding*, 4 FCC Rcd 2369, 2371 (1989). The Commission also held in that case that "the conduct of good faith negotiations is not jurisdictionally severable." *Id.* at 2371.

[258] *See, e.g.*, LCI comments at 24; SBA comments at 9; TCI comments at 24.

[259] *See, e.g.*, Bell Atlantic comments at 48-49; GVNW comments at 3-4; Illinois Commission comments at 21; Sprint comments at 11-12; USTA comments at 8 n.11; U S West comments at 39-40.

that require withholding information from regulatory agencies.[260] Some potential competitors also propose that incumbents should not be permitted to refuse to negotiate until a requesting carrier signs a nondisclosure agreement.[261]

145. Commenters assert that other practices constitute a violation of the duty to negotiate in good faith. For example, most commenters on this issue agree that demands that a party limit its legal rights or remedies signal a lack of good faith.[262] Many new entrants also assert that actions that have the purpose or effect of delaying or impeding negotiations constitute failure to negotiate in good faith. For example, GST asserts parties should be required to respond within a reasonable time to a request to begin negotiations.[263] Some parties also claim that failing to respond to a proposal or participate meaningfully and with the intention of reaching agreement demonstrates a lack of good faith.[264] For instance, Time Warner contends that a party may not simply present proposals that do not include critical terms, or that it knows are unacceptable.[265] Parties also maintain that establishing preconditions, such as requiring requesting carriers to complete unnecessary forms before beginning negotiations, should be prohibited.[266]

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[260] *See, e.g.*, GST comments at 5; MFS comments at 10-14; TCC comments at 9 (very broad nondisclosure agreements puts the incumbent in a powerful position, because it has information about numerous companies and the competitor does not have access to that same information); Teleport comments at 5-10; Texas Commission comments at 6-8.

[261] *See, e.g.*, ACTA comments at 6-7; Arch comments at 9-10; ITIC comments at 7-8; NCTA comments at 59-63; Teleport comments at 5-10; *accord* Washington Commission comments at 12.

[262] *See, e.g.*, ACTA comments at 6-7; Illinois Commission comments at 21; SBA comments at 9; Sprint comments at 11; TCI comments at 24; Washington Commission comments at 12.

[263] GST comments at 5; *accord* ACSI comments at 7-11; Bell Atlantic comments at 49 (refusing to schedule negotiations after making a request demonstrates bad faith); MFS comments at 10-14; Time Warner comments at 22-23.

[264] MFS comments at 10-14; Time Warner comments at 22-23.

[265] Time Warner comments at 22.

[266] ALTS comments at 12; AT&T comments at 86-88; Cox comments at 45-46; Excel comments at 8-9; Intelcom comments at 3-13; ITIC comments at 7-8; MFS comments at 10-14; LCI comments at 23; NCTA comments at 59-60; Time Warner comments at 22; Washington Commission comments at 12; NTIA reply at 6 n.14.

146. New entrants argue that the failure of an incumbent LEC to provide information necessary to conduct meaningful negotiations constitutes a refusal to negotiate in good faith.[267] Incumbent LECs similarly assert that requesting carriers should be required to provide certain information necessary to respond to their requests. For example, U S West states that an incumbent should be able to require a carrier that seeks interconnection to disclose what it wants to obtain, where, when, and for what duration.[268] U S West contends that a requesting carrier should not be permitted to demand immediate unbundling or interconnection, thereby forcing the incumbent to incur costs, while refusing to provide a proposed purchase and deployment schedule. Some incumbent LECs advocate a "bona fide request" requirement for all interconnection requests.[269] Under such a requirement, a requesting carrier would have to: (1) certify that it will make use of the services or facilities it requests within a specified period from the date of the request; (2) describe the purpose of the request; (3) specify precisely what it was requesting; and (4) agree to purchase the requested services or facilities for a minimum time. Other parties specifically object to a "bona fide request" requirement. For example, LCI states that such a requirement would force a carrier to agree to purchase services or facilities before prices and other terms and conditions have been established.[270]

147. Other practices to which some commenters object include a refusal to negotiate any proposed term or condition, or conditioning negotiation on one issue upon first reaching agreement on another issue.[271] Time Warner contends, for example, that parties should not be permitted to require agreement on non-price terms before beginning to negotiate prices.[272] Time Warner also contends that it is a failure to negotiate in good faith to link negotiations under section 252 with negotiations between parties in another context. Some parties contend that it demonstrates a lack of good faith for a party to fail to appoint a representative in

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[267] *See, e.g.*, ACSI comments at 7-11; AT&T comments at 86-88; Cox comments at 45-46; GST comments at 6-7; MFS comments at 10-14 (for example, incumbent LECs must provide detailed documentation to support claims that a request to unbundle an element is technically infeasible); TCC comments at 9 (incumbent LECs must provide cost studies that underlie proposed rates); Time Warner comments at 22.

[268] U S West comments at 40-42.

[269] *See, e.g.*, Cincinnati Bell comments at 8-9; GTE comments at 15-17; PacTel comments at 16-21; TDS comments at 5-6; Anchorage Tel. Utility reply at 6-7.

[270] LCI comments at 24; *accord* GCI reply at 3.

[271] ALTS comments at 12; AT&T comments at 86-88; BellSouth comments at 10-11; Time Warner comments at 22.

[272] Time Warner comments at 26.

negotiations that has authority to bind the party it represents,[273] or at least authority to enter into tentative agreements on behalf of such party,[274] and that such failure needlessly delays negotiations. SCBA asserts that delays caused by failing to appoint an appropriate representative are particularly burdensome on small cable operators, which lack the resources to endure protracted negotiations and arbitrations.[275]

2. Discussion

148. The Uniform Commercial Code defines "good faith" as "honesty in fact in the conduct of the transaction concerned."[276] When looking at good faith, the question "is a narrow one focused on the subjective intent with which the person in question has acted."[277] Even where there is no specific duty to negotiate in good faith, certain principles or standards of conduct have been held to apply.[278] For example, parties may not use duress or misrepresentation in negotiations.[279] Thus, the duty to negotiate in good faith, at a minimum, prevents parties from intentionally misleading or coercing parties into reaching an agreement they would not otherwise have made. We conclude that intentionally obstructing negotiations also would constitute a failure to negotiate in good faith, because it reflects a party's unwillingness to reach agreement.

149. Because section 252 permits parties to seek mediation "at any point in the negotiation,"[280] and also allows parties to seek arbitration as early as 135 days after an

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[273] AT&T comments at 86-88; CEDRA comments at 8.

[274] MFS comments at 10-14.

[275] SCBA comments at 10; *accord* Excel comments at 8-9; SBA comments at 8; Frontier reply at 6.

[276] U.C.C. § 1-201(19) (1981); *see also* Black's Law Dictionary at 353 (Abridged ed. 1983) ("Good faith is an intangible and abstract quality with no technical meaning or statutory definition, and it encompasses, among other things, an honest belief, the absence of malice, and the absence of design to defraud or to seek an unconscionable advantage . . .").

[277] U.C.C. § 1-201 (84).

[278] Steven J. Burton and Eric G. Anderson, *Contractual Good Faith*, § 8.2.2 at 332 (1995).

[279] *Id.*, § 8.3.1 at 335-341.

[280] 47 U.S.C. § 252(a)(2).

incumbent LEC receives a request for negotiation under section 252,[281] we conclude that Congress specifically contemplated that one or more of the parties may fail to negotiate in good faith, and created at least one remedy in the arbitration process.[282] The possibility of arbitration itself will facilitate good faith negotiation. For example, parties seeking to avoid a legitimate accusation of breach of the duty of good faith in negotiation will work to provide their negotiating adversary all relevant information -- given that section 252(b)(4)(B) authorizes the state commission to require the parties "to provide such information as may be necessary for the State commission to reach a decision on the unresolved issues."[283] That provision also states that, if either party "fails unreasonably to respond on a timely basis to any reasonable request from the State commission, then the State commission may proceed on the basis of the best information available to it from whatever source derived."[284] The likelihood that an arbitrator will review the positions taken by the parties during negotiations also should discourage parties from refusing unreasonably to provide relevant information to each other or to delay negotiations.

150. We believe that determining whether a party has acted in good faith often will need to be decided on a case-by-case basis by state commissions or, in some instances the FCC, in light of all the facts and circumstances underlying the negotiations.[285] In light of these considerations, we set forth some minimum standards that will offer parties guidance in determining whether they are acting in good faith, but leave specific determinations of whether a party has acted in good faith to be decided by a state commission, court, or the FCC on a case-by-case basis.

151. We find that there may be pro-competitive reasons for parties to enter into nondisclosure agreements. A broad range of commenters, including IXCs, state commissions, and incumbent LECs, support this view. We conclude that there can be nondisclosure agreements that would not constitute a violation of the good faith negotiation duty, but we caution that overly broad, restrictive, or coercive nondisclosure requirements may well have

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[281] 47 U.S.C. § 252(b)(1).

[282] Section 252(b)(4)(C) requires state commissions to "conclude the resolution of any unresolved issues not later than 9 months after the date on which the local exchange carrier received the request under this section." 47 U.S.C. § 252(b)(4)(C).

[283] 47 U.S.C. § 252(b)(4)(B).

[284] *Id.*

[285] This is consistent with earlier Commission decisions. *See Amendment to the Commission's Rules Regarding a Plan for Sharing the Costs of Microwave Relocation*, WT Docket 95-157, First Report and Order, FCC 96-196, at para. 20 (rel. Apr. 30, 1996).

anticompetitive effects. We therefore will not prejudge whether a party has demonstrated a failure to negotiate in good faith by requesting another party to sign a nondisclosure agreement, or by failing to sign a nondisclosure agreement; such demands by incumbents, however, are of concern and any complaint alleging such tactics should be evaluated carefully. Agreements may not, however, preclude a party from providing information requested by the FCC, a state commission, or in support of a request for arbitration under section 252(b)(2)(B).

152. We reject the general contention that a request by a party that another party limit its legal remedies as part of a negotiated agreement will in all cases constitute a violation of the duty to negotiate in good faith. A party may voluntarily agree to limit its legal rights or remedies in order to obtain a valuable concession from another party. In some circumstances, however, a party may violate this statutory provision by demanding that another waive its legal rights. For example, we agree with ALTS' contention that an incumbent LEC may not demand that the requesting carrier attest that the agreement complies with all provisions of the 1996 Act, federal regulations, and state law,[286] because such a demand would be at odds with the provisions of sections 251 and 252 that are intended to foster opportunities for competition on a level playing field. In addition, we find that it is a *per se* failure to negotiate in good faith for a party to refuse to include in an agreement a provision that permits the agreement to be amended in the future to take into account changes in Commission or state rules. Refusing to permit a party to include such a provision would be tantamount to forcing a party to waive its legal rights in the future.

153. We decline to find that other practices identified by parties constitute *per se* violations of the duty to negotiate in good faith. Time Warner contends that we should find that a party is not negotiating in good faith under section 252 if it seeks to tie resolution of issues in that negotiation to the resolution of other, unrelated disputes between the parties in another proceeding. On its face, the hypothetical practice raises concerns. Time Warner, however, did not present specific examples of how linking two independent negotiation proceedings would undermine good faith negotiations. We believe that requesting carriers have certain rights under sections 251 and 252, and those rights may not be derogated by an incumbent LEC demanding *quid pro quo* concessions in another proceeding. Parties, however, could mutually agree to link section 252 negotiations to negotiations on a separate matter. In fact, to the extent that concurrent resolution of issues could offer more potential solutions or may equalize the bargaining power between the parties, such action may be pro-competitive.[287]

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[286] ALTS comments at Attachment A, 15.

[287] For example, an incumbent LEC that offers video programming may be negotiating for the right to use video programming owned by a cable company while the cable company is negotiating terms for interconnecting with the incumbent LEC. Addressing some or all of the issues in the two negotiations collectively could expand the options for reaching agreement, and would equalize the parties' bargaining power, because each has something that the other party desires.

154. We agree with parties contending that actions that are intended to delay negotiations or resolution of disputes are inconsistent with the statutory duty to negotiate in good faith.[288] The Commission will not condone any actions that are deliberately intended to delay competitive entry, in contravention of the statute's goals. We agree with SCBA that small entities seeking to enter the market may be particularly disadvantaged by delay. However, whether a party has failed to negotiate in good faith by employing unreasonable delaying tactics must be determined on a specific, case-by-case basis. For example, a party may not refuse to negotiate with a requesting telecommunications carrier, and a party may not condition negotiation on a carrier first obtaining state certification.[289] A determination based upon the intent of a party, however, is not susceptible to a standardized rule. If a party refuses throughout the negotiation process to designate a representative with authority to make binding representations on behalf of the party, and thereby significantly delays resolution of issues, such action would constitute failure to negotiate in good faith.[290] In particular, we believe that designating a representative authorized to make binding representations on behalf of a party will assist small entities and small incumbent LECs by centralizing communications and thereby facilitating the negotiation process.[291] On the other hand, it is unreasonable to expect an agent to have authority to bind the principal on every issue -- i.e., a person may reasonably be an agent of limited authority.

155. We agree with incumbent LECs and new entrants that contend that the parties should be required to provide information necessary to reach agreement.[292] Parties should provide information that will speed the provisioning process, and incumbent LECs must prove to the state commission, or in some instances the Commission or a court, that delay is not a

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[288] *See United States v. American Tel. and Tel. Co.*, 524 F. Supp. 1336, 1356 and n.84 (D.D.C. 1981); *see also National Labor Relations Board v. Katz*, 369 U.S. 736, 742 (1962); *Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles*, 4 FCC Rcd 468, 472 (1989).

[289] *See, e.g.*, ALTS comments at 12-13 (contending that U S West has refused to start negotiations until it formed its positions regarding section 251, and that SBC has attempted to interpret and "enforce" state certification requirements).

[290] The Commission has reached a consistent conclusion in other instances. *See, e.g., Application of Gross Telecasting, Inc.*, 92 FCC 2d 250, 442 (1981); *Public Notice*, FCC Asks for Comments Regarding the Establishment of and Advisory Committee to Negotiate Proposed Regulations, 7 FCC Rcd 2370, 2372 (1992).

[291] For purposes of our analysis pursuant to the Regulatory Flexibility Act, 5 U.S.C. §§ 601 *et seq.*, our use of the terms "small entities" and "small businesses" does not encompass "small incumbent LECs." We use the term "small incumbent LECs" to refer to any incumbent LECs that arguably might be defined by the Small Business Administration as "small business concerns."

[292] *See National Labor Relations Board v. Truitt Mfg Co.*, 351 U.S. 149, 153 (1956) (the trier of fact can reasonably conclude that a party lacks good faith if it raises assertions about inability to pay without making the slightest effort to substantiate that claim); *see also Microwave Facilities Operating in 1850-1990 MHz (2GHz) Band*, 61 F.R. 29679, 29689 (1996).

motive in their conduct. Review of such requests, however, must be made on a case-by-case basis to determine whether the information requested is reasonable and necessary to resolving the issues at stake. It would be reasonable, for example, for a requesting carrier to seek and obtain cost data relevant to the negotiation, or information about the incumbent's network that is necessary to make a determination about which network elements to request to serve a particular customer.[293] It would not appear to be reasonable, however, for a carrier to demand proprietary information about the incumbent's network that is not necessary for such interconnection.[294] We conclude that an incumbent LEC may not deny a requesting carrier's reasonable request for cost data during the negotiation process, because we conclude that such information is necessary for the requesting carrier to determine whether the rates offered by the incumbent LEC are reasonable. We find that this is consistent with Congress's intention for parties to use the voluntary negotiation process, if possible, to reach agreements. On the other hand, the refusal of a new entrant to provide data about its own costs does not appear on its face to be unreasonable, because the negotiations are not about unbundling or leasing the new entrants' networks.

156. We also find that incumbent LECs may not require requesting carriers to satisfy a "bona fide request" process as part of their duty to negotiate in good faith. Some of the information that incumbent LECs propose to include in a bona fide request requirement may be legitimately demanded from the requesting carrier; some of the proposed requirements, on the other hand, exceed the scope of what is necessary for the parties to reach agreement, and imposing such requirements may discourage new entry. For example, parties advocate that a "bona fide request" requirement should require requesting carriers to commit to purchase services or facilities for a specified period of time. We believe that forcing carriers to make such a commitment before critical terms, such as price, have been resolved is likely to impede new entry. Moreover, we note that section 251(c) does not impose any bona fide request requirement. In contrast, section 251(f)(1) provides that a rural telephone company is exempt from the requirements of 251(c) until, among other things, it receives a "bona fide request" for interconnection, services, or network elements. This suggests that, if Congress had intended to impose a "bona fide request" requirement on requesting carriers as part of their duty to negotiate in good faith, Congress would have made that requirement explicit.

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[293] *See* discussion of technical feasibility, *infra*, Section IV. In addition, the Commission's federal advisory committee, the Network Reliability Council, has developed templates that summarize and list activities that need to occur when service providers connect their networks pursuant to defined interconnection specifications or when they are attempting to define a new network interface specification. As consensus recommendations from the Council, we presume the elements defined in the templates are "good faith" issues for negotiation. Comments of the Secretariat of the Second Network Reliability Council at 4-5 (*citing Network Reliability: The Path Forward*, (1996), Section 2, pp. 51-56).

[294] This is consistent with previous FCC determinations. *See, e.g., Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles*, 4 FCC Rcd 468, 472 (1989) (good faith negotiations necessitate that, at a minimum, one party must approach the other with a specific request).

D. Applicability of Section 252 to Preexisting Agreements

1. Background

157. Section 252(a)(1) provides that, "[u]pon receiving a request for interconnection, services, or network elements pursuant to section 251, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251 . . . . The agreement, including any interconnection agreement negotiated before the date of enactment of the Telecommunications Act of 1996, shall be submitted to the State commission under subsection (e) of this section."[295]

158. In the NPRM, we sought comment on whether sections 252(a)(1) and 252(e) require parties that have negotiated agreements for interconnection, services or network elements prior to the passage of the 1996 Act to submit such agreements to state commissions for approval. We also asked whether one party to such an existing agreement could compel renegotiation and arbitration in accordance with the procedures set forth in section 252.

2. Comments

159. In general, potential local competitors that addressed this issue argue that the plain language of section 251(a)(1) requires such agreements to be filed with the appropriate state commission for review under section 252(e).[296] In addition, these parties assert that, pursuant to section 252(i), the terms of such agreements must be made available to other carriers.[297] These parties claim that filing such agreements also should be required as a matter of public policy, because they provide evidence of existing interconnection terms that may provide the baseline for other negotiations,[298] and ensure that incumbents are not favoring

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[295] 47 U.S.C. § 252(a)(1). Section 252(e) provides that "(a)ny interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission." 47 U.S.C. § 252(e).

[296] *See, e.g.*, ALTS comments at 14-16; CompTel comments at 104; GST comments at 7; Jones Intercable comments at 22-23; Ohio Consumers' Counsel comments at 6; Sprint comments at 12; TCC comments at 9-10; *see also* Louisiana Commission comments at 8 (carriers must submit preexisting agreements upon request by the state commission).

[297] Section 252(i) provides that a LEC "shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement." 47 U.S.C. § 252(i).

[298] AT&T comments at 88-90; Jones Intercable comments at 22-23.

some carriers over others.[299] Parties also claim that preexisting agreements will provide useful information to the states,[300] and that states should have the ability to review preexisting agreements to ensure that they comply with the 1996 Act.[301]

160. Incumbent LECs allege that the statute does not require that preexisting agreements be filed with state commissions. They contend that Congress only intended parties to file agreements negotiated pursuant to section 251.[302] These parties point out that section 252(a) specifically refers to requests for interconnection, services, or network elements "pursuant to section 251," and contend that an agreement reached prior to the enactment of the 1996 Act, by definition, could not have been negotiated pursuant to section 251.[303] Several parties suggest that the 1996 Act only requires filing of preexisting agreements that have been amended subsequent to the enactment of the 1996 Act, or that have been incorporated by reference into agreements negotiated pursuant to section 251.[304] Some commenters also contend that, as a policy matter, there is no reason to require filing of preexisting agreements. The California Commission asserts that requiring filing and review of preexisting agreements would be burdensome for states, and is unnecessary, because many states already reviewed such agreements prior to the passage of the 1996 Act.[305]

161. A related question is whether there should be a distinction between preexisting interconnection agreements between competitors within the same service area and agreements between non-competing or neighboring LECs. Several parties contend that the 1996 Act does not exempt such agreements from the filing requirement.[306] They also claim that it may be

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[299] ALTS comments at 14-16, reply at 39-41.

[300] *See, e.g.*, AT&T comments at 88-90.

[301] *See, e.g.*, Arch comments at 9-10; Time Warner comments at 25.

[302] *See, e.g.*, BellSouth comments at 10-11; Cincinnati Bell comments at 9-10; Home Tel. comments at 2; J. Staurulakis comments at 3; F. Williamson comments at 5.

[303] *See, e.g.*, Ameritech comments at 95-96; BellSouth comments at 10-11; NYNEX reply at 15-16 (section 251(i) also applies only to agreements approved under section 252).

[304] *See, e.g.*, Ameritech comments at 95-96; BellSouth comments at 10-11.

[305] California Commission comments at 33.

[306] *See, e.g.*, Colorado Commission comments at 50; MFS comments at 66; Michigan Commission Staff comments at 20; Ohio Consumers' Counsel comments at 34; Oregon Commission comments at 33; ALTS reply at 35; Cox reply at 38-39; WinStar reply at 18-19.

difficult to monitor whether parties are competing, and that, in light of the 1996 Act, parties that did not compete in the past may do so in the future.[307] ACTA asserts that such agreements will provide the best information available on technically, economically and operationally feasible interconnection arrangements, because these agreements were reached in a noncompetitive context, where the incumbent was not striving to protect its market from competition, and therefore, as a public policy matter, they should be publicly filed.[308] ALTS states that Wisconsin and other states have already addressed this issue and reached the same conclusion.[309]

162. Incumbent LECs argue that Congress did not contemplate that agreements between non-competing LECs would be used as models for agreements between competitors,[310] and that such agreements bear no relation to competitive interconnection agreements.[311] Some parties argue that requiring preexisting agreements between noncompeting LECs would jeopardize universal service in many areas, especially where extended area service arrangements are in place.[312] NYNEX and the Rural Telephone Coalition contend that agreements between neighboring LECs fall within the provisions of section 259, which give rural LECs that lack economies of scope or scale the right to obtain or continue "infrastructure sharing" with neighboring larger LECs.[313]

163. Several parties recommend that agreements reached before enactment of the 1996 Act should be subject to a period of renegotiation.[314] For example, Sprint contends that

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[307] *See, e.g.*, MFS comments at 67; Oregon Commission comments at 34; ALTS reply at 36; Cox reply at 39.

[308] ACTA comments at 6-8; *accord* Cox reply at 38; WinStar reply at 19.

[309] ALTS reply at 35-36. *See, e.g., Investigation of the Implementation of the Federal Telecommunications Act of 1996 in Wisconsin*, 05-TI-140 (Wisconsin Commission May 17, 1996); *In re Negotiated Interconnection Agreements of Telecommunications Carriers*, Docket No. 96-098-U (Arkansas Commission rel. Apr. 1, 1996).

[310] *See, e.g.*, NYNEX comments at 27 (*citing* Joint Explanatory Statement at 117, 120; Cong. Rec. S7893 (daily ed. June 7, 1995) (statement of Sen. Pressler)); Rural Tel. Coalition comments at 16; SBC comments at 53; USTA comments at 68-69.

[311] Cincinnati Bell comments at 9-10; MECA comments at 20-21; Texas Statewide Telephone Cooperative, Inc. reply at 8-9; U S West reply at 29-30.

[312] Home Tel. comments at 2; J. Staurulakis comments at 3; *see also* USTA comments at 69.

[313] NYNEX reply at 15; Rural Tel. Coalition reply at 12.

[314] Intermedia comments at 16; LCI comments at 24-26; Sprint comments at 12-13, reply at 13-14.

the passage of the 1996 Act constitutes a "changed circumstance" that would justify renegotiation of preexisting agreements.[315] Sprint proposes that parties should be required to file preexisting agreements with the state commission, but that parties should be given a six-month period to renegotiate before the terms of such agreements are made available to others under section 252(i). Intermedia Communications advocates that parties that signed long-term contracts with incumbent LECs before additional rights and competitive alternatives were available under the 1996 Act should be permitted to terminate those agreements, with minimal liability, for a period of six months after such competitive alternatives become available.[316] GST advocates that only non-incumbent LECs that are parties to an agreement should have the right to renegotiate contracts.[317] The Texas Commission states that parties should be permitted to renegotiate in the event that the state determines that the preexisting agreement violates section 252.[318]

164. Some parties contend that there is no basis for renegotiation of preexisting contracts.[319] The Illinois Commission maintains that parties have a legal obligation to abide by the terms of their contracts, and the 1996 Act does not affect that obligation.[320] It claims that a unilateral right to abrogate existing contracts could undo progress that has already been made to foster local competition. The Illinois Commerce Commission notes that parties may mutually agree to amend existing contracts, and that a party that already has an agreement with an incumbent may request a new agreement under section 252(i) if the interconnection, services, or access to unbundled elements it seeks are different from those encompassed in the existing agreement. Pacific Telesis asserts that requiring renegotiation and arbitration of existing agreements would waste resources and interfere with parties' settled expectations.[321]

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[315] Sprint comments at 12 (pre-Act agreements were entered into under a different regulatory scheme, and without contemplation by the parties that the local market might become competitive; in addition, such contracts might be inconsistent with section 251, and states should not expend resources reviewing them); *accord* Time Warner comments at 26 (the Commission should establish "fresh look" period as it has done in other cases involving changed circumstances).

[316] Intermedia comments at 16; *accord* LCI comments at 24-26.

[317] GST comments at 7.

[318] Texas Commission comments at 7-8.

[319] *See, e.g.*, Illinois Commission comments at 23-24; Louisiana Commission comments at 8; F. Williamson comments at 5.

[320] Illinois Commission comments at 23-24.

[321] PacTel comments at 21.

3. Discussion

165. We conclude that the 1996 Act requires all interconnection agreements, "including any interconnection agreement negotiated before the date of enactment of the Telecommunications Act of 1996," to be submitted to the state commission for approval pursuant to section 252(e).[322] The 1996 Act does not exempt certain categories of agreements from this requirement. When Congress sought to exclude preexisting contracts from provisions of the new law, it did so expressly. For example, section 276(b)(3) provides that "nothing in this section shall affect any existing contracts between location providers and payphone service providers or interLATA or intraLATA carriers that are in force and effect as of the date of enactment of the Telecommunications Act of 1996."[323] Nothing in the legislative history leads us to a contrary conclusion. Congress intended, in enacting sections 251 and 252, to create opportunities for local telephone competition. We believe that this pro-competitive goal is best effected by subjecting all agreements to state commission review.

166. The first sentence in section 252(a)(1) refers to requests for interconnection "pursuant to section 251."[324] The final sentence in section 252(a)(1) requires submission to the state commission of all negotiated agreements, including those negotiated *before* the enactment of the 1996 Act. Some parties have asserted that there is a tension between those two sentences. We conclude that the final sentence of section 252(a)(1), which requires that *any* interconnection agreement must be submitted to the state commission, can and should be read to be independent of the prior sentences in section 252(a)(1). The interpretation suggested by some commenters that preexisting contracts need only be filed if they are amended subsequent to the 1996 Act, or incorporated by reference into agreements negotiated pursuant to the 1996 Act, would force us to impose conditions that were not intended by Congress.

167. As a matter of policy, moreover, we believe that requiring filing of all interconnection agreements best promotes Congress's stated goals of opening up local markets to competition, and permitting interconnection on just, reasonable, and nondiscriminatory terms. State commissions should have the opportunity to review *all* agreements, including those that were negotiated before the new law was enacted, to ensure that such agreements do not discriminate against third parties, and are not contrary to the public interest. In particular, preexisting agreements may include provisions that violate or are inconsistent with the pro-

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[322] 47 U.S.C. § 252(a).

[323] 47 U.S.C. § 276(b)(3) (addressing nondiscrimination safeguards and regulations regarding payphone service).

[324] 47 U.S.C. § 252(a)(1).

competitive goals of the 1996 Act, and states may elect to reject such agreements under section 252(e)(2)(A). Requiring all contracts to be filed also limits an incumbent LEC's ability to discriminate among carriers, for at least two reasons. First, requiring public filing of agreements enables carriers to have information about rates, terms, and conditions that an incumbent LEC makes available to others. Second, any interconnection, service or network element provided under an agreement approved by the state commission under section 252 must be made available to any other requesting telecommunications carrier upon the same terms and conditions, in accordance with section 252(i).[325] In addition, we believe that having the opportunity to review existing agreements may provide state commissions and potential competitors with a starting point for determining what is "technically feasible" for interconnection.[326]

168. Conversely, excluding certain agreements from public disclosure could have anticompetitive consequences. For example, such contracts could include agreements not to compete. In addition, if we exempt agreements between neighboring non-competing LECs, those parties might have a disincentive to compete with each other in the future, in order to preserve the terms of their preexisting agreements. Such a result runs counter to the goal of the 1996 Act to encourage local service competition. Moreover, preserving such "non-competing" agreements could effectively insulate those parties from competition by new entrants. For example, if a new entrant seeking to provide competitive local service in a rural community is unable to obtain from a neighboring BOC interconnection or transport and termination on terms that are as favorable as those the BOC offers to the incumbent LEC in the rural area, the new entrant cannot effectively compete.[327] This is because the new entrant will have to charge its subscribers higher rates than the incumbent LEC charges to place calls to subscribers of the neighboring BOC.

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[325] *See infra*, Section XV.B.

[326] *See, e.g.*, 47 U.S.C. §§ 251(c)(2)(B) and 251(c)(3).

[327] This analysis does not address the separate question of whether an incumbent LEC in a rural area must offer interconnection, resale services, or unbundled network elements. As discussed *infra*, Section XII, Congress provided rural carriers with an exemption from section 251(c) requirements until the state commission removes such exemption. 47 U.S.C. § 251(f)(1).

169. We find that section 259 does not compel us to reach a different conclusion regarding the application of section 252 to agreements between neighboring LECs.[328] Section 259 is limited to agreements for infrastructure sharing between incumbent LECs and telecommunications carriers that lack "economies of scale or scope," as determined in accordance with regulations prescribed by the Commission.[329] We conclude that the purpose and scope of section 259 differ significantly from the purpose and scope of section 251.[330] Section 259 is a limited and discrete provision designed to bring the benefits of advanced infrastructure to additional subscribers, in the context of the pro-competitive goals and provisions of the 1996 Act. Moreover, section 259(b)(7) requires LECs to file with the Commission or the state "any tariffs, contracts or other arrangements showing the rates, terms, and conditions under which such carrier is making available public switched network infrastructure and functions under this section."[331] We believe that this language further supports our conclusion that Congress intended agreements between neighboring LECs to be filed and available for public inspection. Commenters also have failed to persuade us that universal service is jeopardized by our finding that agreements between neighboring LECs are subject to section 252 filing and review provisions. Concerns regarding universal service should be addressed by the Federal-State Joint Board, empaneled pursuant to section 254 of the 1996 Act.[332] The Joint Board has initiated a comprehensive review of universal service issues and is considering, among other matters, access to telecommunications and information services in rural and high cost areas.[333] In addition, as discussed in Section XII, *infra*, the 1996 Act provides for exemptions, suspension, or modification of some of the requirements in section 251 for rural or smaller carriers.

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[328] Section 259 requires the Commission to prescribe, within one year after the date of enactment of the 1996 Act, regulations that require incumbent LECs "to make available to any qualifying carrier such public switched network infrastructure, technology, information, and telecommunications facilities and functions as may be requested by such qualifying carrier to provide telecommunications services, or to provide access to information services . . . " 47 U.S.C. § 259(a). A "qualifying carrier" is a telecommunications carrier that "lacks economies of scale or scope," and that offers telephone exchange service, exchange access, and any other service included in universal service to all consumers in the service area without preference. 47 U.S.C. § 259(d).

[329] 47 U.S.C. § 259(d)(1).

[330] The Commission plans to initiate a proceeding to establish regulations pursuant to section 259.

[331] 47 U.S.C. § 259(b)(7).

[332] *Universal Service NPRM*, *supra*.

[333] *See* 47 U.S.C. § 251(f).

170. Some parties have suggested that we provide parties an opportunity to renegotiate preexisting contracts. Parties, of course, may mutually agree to renegotiate agreements, but we decline to mandate that parties renegotiate existing contracts. In addition, as discussed below, commercial mobile radio service (CMRS) providers that are party to preexisting agreements with incumbent LECs that provide for non-mutual compensation have the option of renegotiating such agreements with no termination liabilities or contract penalties.[334] We believe that generally requiring renegotiation of preexisting contracts is unnecessary, however, because state commissions will review preexisting agreements, and may reject any negotiated agreement that "discriminates against a telecommunications carrier not a party to the agreement," or that "is not consistent with the public interest, convenience, and necessity."[335] We recognize that preexisting agreements were negotiated under very different circumstances, and may not provide a reasonable basis for interconnection agreements under the 1996 Act. For example, non-competing neighboring LECs may have negotiated terms that simply are not viable in a competitive market. It would not foster efficient long-term competition to force parties to make available to all requesting carriers interconnection on terms not sustainable in a competitive environment. In such circumstances, a state commission would have authority to reject a preexisting agreement as inconsistent with the public interest. If a state commission approves a preexisting agreement, that agreement will be available to other parties in accordance with section 252(i). Contrary to NYNEX's assertion, once a state approves an agreement under section 252(e), that agreement is "approved under" section 252.

171. We decline to require immediate filing of pre-existing agreements. States should establish procedures and reasonable time frames for requiring filing of preexisting agreements in a timely manner. We leave these procedures largely in the hands of the states in order to ensure that we do not impair some states' ability to carry out their other duties under the 1996 Act, especially if a large number of such agreements must be filed and approved by the state commission. We believe, nevertheless, that we should set an outer time period to file with the appropriate state commission agreements that Class A carriers have with other Class A carriers that pre-date the 1996 Act.[336] We conclude that setting such a time limit will ensure that third parties are not prevented indefinitely from reviewing and taking advantage of the terms of preexisting agreements. We are concerned, however, about the burden that a national filing deadline might impose on small telephone companies that have preexisting

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[334] *See infra*, Section XI.A.

[335] 47 U.S.C. § 252(e)(2)(A).

[336] Class A companies are defined as companies "having annual revenues from regulated telecommunications operations of $100,000,000 or more." 47 C.F.R. § 32.11(a)(1).

agreements with Class A carriers or with other small carriers.[337] We therefore limit the filing deadline requirement to preexisting agreements between Class A carriers. We encourage all carriers to file preexisting contracts with the appropriate state commission no later than June 30, 1997, but impose this as a *requirement* only with respect to agreements between Class A carriers. We find that requiring preexisting agreements between Class A carriers to be filed no later than June 30, 1997 is unlikely to burden state commissions unduly, and will give parties a reasonable opportunity to renegotiate agreements if they so choose, while at the same time, establishing this outer time limit ensures that third parties will have access to the terms of such agreements, under section 252(i), within a reasonable period. We expect to have completed proceedings on universal service and access charges by this filing deadline. States may impose a shorter time period for filing preexisting agreements.

[337] *See* Regulatory Flexibility Act, 5 U.S.C. §§ 601 *et seq.*

IV. INTERCONNECTION

172. This section of the Report and Order, and the three sections that follow it, address the interconnection and unbundling obligations that the Act imposes on incumbent LECs. Beyond the resale of incumbent LEC services, it is these obligations that pave the way for the introduction of facilities-based competition with incumbent LECs. The interconnection obligation of section 251(c)(2), discussed in this section, allows competing carriers to choose the most efficient points at which to exchange traffic with incumbent LECs, thereby lowering the competing carriers' costs of, among other things, transport and termination of traffic. The unbundling obligation of section 251(c)(3) further permits new entrants, where economically efficient, to substitute incumbent LEC facilities for some or all of the facilities the new entrant would have had to obtain in order to compete. Finally, both the interconnection and unbundling sections of the Act, in combination with the collocation obligation imposed on incumbents by section 251(c)(6), allow competing carriers to choose technically feasible methods of achieving interconnection or access to unbundled elements.

173. Section 251(c)(2) imposes upon incumbent LECs "the duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network . . . for the transmission and routing of telephone exchange service and exchange access."[338] Such interconnection must be: (1) provided by the incumbent LEC at "any technically feasible point within [its] network;"[339] (2) "at least equal in quality to that provided by the local exchange carrier to itself or . . . [to] any other party to which the carrier provides interconnection;"[340] and (3) provided on rates, terms, and conditions that are "just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252."[341]

A. Relationship Between Interconnection and Transport and Termination

1. Background

174. In the NPRM, we sought comment on the relationship between the obligation of incumbent LECs to provide "interconnection" under section 251(c)(2) and the obligation of all LECs to establish reciprocal compensation arrangements for the "transport and termination" of

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[338] 47 U.S.C. § 251(c)(2)(A).

[339] 47 U.S.C. § 251(c)(2)(B).

[340] 47 U.S.C. § 251(c)(2)(C).

[341] 47 U.S.C. § 251(c)(2)(D).

telecommunications pursuant to section 251(b)(5). We stated that the term "interconnection" might refer only to the physical linking of two networks or to both the linking of facilities and the transport and termination of traffic. We noted in the NPRM that section 252(d) sets forth different pricing standards for interconnection and transport and termination.

2. Comments

175. The BOCs, several state commissions, and other parties argue that a plain reading of section 251(c)(2) requires a determination that interconnection refers only to the physical linking of facilities.[342] In contrast, the IXCs and several other parties claim that interconnection includes both the physical connection of the facilities and the transmission and termination of traffic across that link.[343] CompTel contends that it would make no sense for Congress to require an incumbent LEC to engage in a physical linking with another network without requiring the incumbent LEC to route and terminate traffic from the other network.[344] Several parties claim that there is no inherent contradiction between the pricing standard in section 252(d)(1) for interconnection[345] and section 252(d)(2) for transport and termination[346] because, to the extent that section 252(d)(2) allows for the mutual and reciprocal recovery of each carrier's costs, the recovery could be interpreted to mean total service long run

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[342] *See, e.g.*, Bell Atlantic comments at 20-21; BellSouth comments at 15; USTA comments at 9-10 (no useful purpose served by introducing ambiguity into the pricing standards that apply to the separate provisions); U S West comments at 11-12; GTE comments at 17-18 (interconnection denotes links between an incumbent LEC's network and a competitor's network while transport and termination refers to the transmission of a call from the point of interconnection to the called party); Florida Commission comments at 13; Illinois Commission comments at 29; New York Commission comments at 31; MFS comments at 15; Sprint comments at 13.

[343] *See, e.g.*, CompTel comments at 66-67; LDDS comments at 76; Texas Commission comments at 10; ACSI comments at 11.

[344] CompTel comments at 66-67.

[345] Section 252(d)(1) states that determinations by a state commission of the just and reasonable rate for interconnection pursuant to section 251(c)(2) and network elements pursuant to section 251(c)(3) shall be: (1) based on the cost determined without reference to a rate-of-return proceeding; (2) nondiscriminatory; and (3) may include a reasonable profit. 47 U.S.C. § 252(d)(1).

[346] Section 252(d)(2) states that, in connection with an incumbent LEC's compliance with section 251(b)(5), a state commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless: (1) the terms and conditions provide for mutual and reciprocal recovery of costs associated with the transport and termination of calls that originate on the network of another carrier; and, (2) such terms and conditions are a reasonable approximation of the additional costs of terminating such calls. Section 252(d)(2) explicitly states that bill-and-keep arrangements are not precluded under section 252(d)(2) and neither the Commission nor the states are authorized to establish rate regulation proceedings to establish the additional costs of transporting or terminating calls, or to require carriers to maintain records with respect to the additional costs of such calls. 47 U.S.C. § 252(d)(2).

incremental cost (TSLRIC) (including a reasonable profit) plus a reasonable contribution to joint and common costs, which is consistent with section 252(d)(1).[347]

3. Discussion

176. We conclude that the term "interconnection" under section 251(c)(2) refers only to the physical linking of two networks for the mutual exchange of traffic. Including the transport and termination of traffic within the meaning of section 251(c)(2) would result in reading out of the statute the duty of all LECs to establish "reciprocal compensation arrangements for the transport and termination of telecommunications," under section 251(b)(5).[348] In addition, in setting the pricing standard for section 251(c)(2) interconnection, section 252(d)(1) states it applies when state commissions make determinations "of the just and reasonable rate for interconnection of *facilities and equipment* for purposes of subsection (c)(2) of section 251."[349] Because section 251(d)(1) states that it only applies to the interconnection of "facilities and equipment," if we were to interpret section 251(c)(2) to refer to transport and termination of traffic as well as the physical linking of equipment and facilities, it would still be necessary to find a pricing standard for the transport and termination of traffic apart from section 252(d)(1). We also reject CompTel's argument that reading section 251(c)(2) to refer only to the physical linking of networks implies that incumbent LECs would not have a duty to route and terminate traffic. That duty applies to all LECs and is clearly expressed in section 251(b)(5). We note that because interconnection refers to the physical linking of two networks, and not the transport and termination of traffic, access charges are not affected by our rules implementing section 251(c)(2).

B. National Interconnection Rules

1. Background

177. In the NPRM, we tentatively concluded that national interconnection rules would facilitate swift entry by competitors in multiple states by eliminating the need to comply with a multiplicity of state variations in technical and procedural requirements.[350] We sought comment on this tentative conclusion.

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[347] ACSI comments at 11; Texas Public Utility Counsel comments at 1, 50; Texas Commission comments at 10.

[348] 47 U.S.C. § 251(b)(5).

[349] 47 U.S.C. § 251(d)(1) (emphasis added).

[350] NPRM at paras. 50-51.

2. Comments

178. Parties raise many of the same arguments discussed above, in section II.A., regarding the advantages and disadvantages of explicit national rules for interconnection. IXCs, CAPs, cable operators, and others claim that national rules could prevent incumbent LECs from erecting artificial barriers to entry,[351] facilitate comprehensive business and network planning,[352] equalize bargaining power,[353] and expedite and simplify negotiations.[354] Other parties, including several BOCs and state commissions, argue that national rules should only be established for core requirements and should allow for state variations.[355] Some parties contend, for example, that the pace of technological change makes it impossible to create immutable and uniform interconnection rules.[356] SBC and PacTel claim that industry standards already exist for interconnection and that national standards would preclude the deployment of new technologies.[357] PacTel also claims that Commission rules requiring untested interconnection methodologies may slow competitive entry.[358]

3. Discussion

179. As discussed more fully above, we conclude that national rules regarding interconnection pursuant to section 251(c)(2) are necessary to further Congress's goal of creating conditions that will facilitate the development of competition in the telephone

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[351] *See* MFS comments at 14; Teleport comments at 22; CompTel comments at 21; Ad Hoc Telecommunications Users Committee comments at 5; ACTA comments at 10; ACSI comments at 10; MCI reply at 24.

[352] *See* ACTA comments at 10; Vanguard comments at 10; Omnipoint comments at 17-18; NTIA reply at 3.

[353] *See* Teleport comments at 17; Kansas Commission comments at 5; AT&T reply at 9; MCI reply at 24; Time Warner reply at 6-7.

[354] *See* Intermedia comments at 3; Teleport reply at 8.

[355] *See, e.g.*, Ameritech comments at 11; BellSouth comments at 13-14; Bell Atlantic reply at 6-7; GTE reply at 9; Lincoln Tel. comments at 3; California Commission comments at 16; Illinois Commission comments at 25; New York Commission comments at 33; Texas Commission comments at 8; TCA comments at 4; Texas Tel. Ass'n comments at 1; F. Williamson comments at 7.

[356] *See* Ad Hoc Telecommunications Users Committee comments at 2; Citizens Utilities comments at 6-7; Rural Tel. Coalition comments at 31; Pennsylvania Commission reply at 23.

[357] SBC comments at 33; PacTel comments at 24, 28.

[358] PacTel comments at 23-24.

exchange market.[359] Uniform rules will permit all carriers, including small entities and small incumbent LECs, to plan regional or national networks using the same interconnection points in similar networks nationwide. Uniform rules will also guarantee consistent, minimum nondiscrimination safeguards and "equal in quality" standards in every state. Such rules will also avoid relitigating, in multiple states, the issue of whether interconnection at a particular point is technically feasible.

180. We believe, however, that inflexible or overly detailed national rules implementing section 251(c)(2) may inhibit the ability of the states or the parties to reach arrangements that reflect technological and market advances and regional differences. We also believe that, on several issues, the record is not adequate at this time to justify the establishment of national rules. Therefore, as required by section 251(d)(3) and as discussed in section II.C. above, our rules will permit states to go beyond the national rules discussed below, and impose additional procompetitive interconnection requirements, as long as such requirements are otherwise consistent with the 1996 Act and the Commission's regulations. We believe that we can benefit from state experience in our ongoing review of these issues.

C. Interconnection for the Transmission and Routing of Telephone Exchange Service and Exchange Access

1. Background

181. Section 251(c)(2) imposes a duty upon incumbent LECs to provide "interconnection with the [LEC's] network . . . for the transmission and routing of telephone exchange service and exchange access."[360] In the NPRM, we sought comment on whether a carrier could request interconnection pursuant to subsection (c)(2) for purposes of transmitting and routing telephone exchange service, exchange access, or both, or whether this provision requires that such a request be solely for purposes of providing *both* telephone exchange service and exchange access.[361]

2. Comments

182. The BOCs and several other parties state that a telecommunications carrier should not be able to request cost-based interconnection under section 251(c)(2) solely for the purpose of offering access services. They argue that a carrier requesting interconnection

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[359] *See supra*, Section II.A.

[360] 47 U.S.C. § 251(c)(2).

[361] NPRM at para. 162.

solely under section 251(c)(2) must use that interconnection for the transmission and routing of both telephone exchange service *and* exchange access.[362] USTA concurs, and suggests that competitive access providers (CAPs) will not be harmed because, if CAPs wish to provide only exchange access, they are fully protected by the Commission's *Expanded Interconnection* rules.[363]

183. IXCs and the DOJ argue that carriers should be able to request cost-based interconnection under section 251(c)(2) solely for the purpose of offering access services. The IXCs claim that, in view of congressional intent not to limit entry into the local telecommunications market, the statute should be read to permit telecommunications carriers to provide either local exchange service, exchange access, or both.[364] DOJ and CompTel contend that permitting the use of section 251(c)(2) interconnection to provide competitive exchange access is not inconsistent with section 251(g)[365] because section 251(g) only preserves the rights of IXCs to equal access under the Commission's preexisting rules until such time that the Commission adopts new requirements. They argue that section 251(g) was not intended to limit the provision of exchange access by new entrants.[366] AT&T argues that, by requiring incumbent LECs to provide interconnection for the transmission and routing of telephone exchange access, Congress used the word "and" to make clear that incumbent LECs must make interconnection available for purposes of allowing new entrants to provide local exchange *and* exchange access, and thereby prevent incumbent LECs from claiming that, as long as they offered interconnection for at least one of these two purposes, they had met the requirement in section 251(c)(2).[367]

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[362] *See, e.g.*, USTA comments at 62-64 (requiring both is in keeping with the Act's purpose of encouraging facilities-based competition); Ameritech comments at 17-19 (nothing in the Act or the legislative history indicates that Congress was concerned about exchange access service per se); Bell Atlantic comments at 8; BellSouth comments at 61; GTE comments at 75; Ohio Consumers' Counsel comments at 32.

[363] USTA comments at 65.

[364] *See, e.g.*, CompTel reply at 26, 33; AT&T reply at 24 n.40; Sprint comments at 68 n.38; DoJ comments at 44, 52; PageNet comments at 15-16 (the word "and" in the context of legislative history can be read alternatively as "and" or "or", depending on congressional intent).

[365] Section 251(g) states that each LEC "shall provide exchange access, information access, and exchange services for such access to [IXCs] and information service providers in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation)" that apply prior to enactment of the 1996 Act. Section 251(g) also states that these rules shall remain in effect until the Commission "explicitly supersede[s]" them. 47 U.S.C. § 251(g).

[366] DoJ comments at 53 n.26; CompTel reply at 28.

[367] AT&T reply at 24 n.40.

3. Discussion

184. We conclude that the phrase "telephone exchange service and exchange access" imposes at least three obligations on incumbent LECs: an incumbent must provide interconnection for purposes of transmitting and routing telephone exchange traffic or exchange access traffic or both. We believe that this interpretation is consistent with both the language of the statute and Congress's intent to foster entry by competitive providers into the local exchange market.[368] Moreover, the term "local exchange carrier" is defined in the Act as "any person that is engaged in the provision of telephone exchange service *or* exchange access."[369] Thus, we believe that Congress intended to facilitate entry by carriers offering either service. In imposing an interconnection requirement under section 251(c)(2) to facilitate such entry, however, we believe that Congress did not want to deter entry by entities that seek to offer either service, or both, and, as a result, section 251(c)(2) requires incumbent LECs to interconnect with carriers providing "telephone exchange service *and* exchange access."[370] Congress made clear that incumbent LECs must provide interconnection to carriers that seek to offer telephone exchange service *and* to carriers that seek to offer exchange access. This interpretation is consistent with section 251(c)(2), which imposes an obligation on incumbent LECs, but not requesting carriers.[371] Thus, for example, an analogous requirement might be that incumbent LECs must provide interconnection for the transmission and routing of "electrical and optical signals." Such a hypothetical requirement could not rationally be read to obligate *requesting carriers* to provide both electrical and optical signals.[372]

185. We also conclude that requiring new entrants to make available both local exchange service and exchange access as a prerequisite to obtaining interconnection to the

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[368] As the U.S. Court of Appeals for the Fifth Circuit stated in *Peacock v. Lubbock Compress Company*, "the word 'and' is not a word with a single meaning, for chameleonlike, it takes its color from its surroundings." The court held that "[i]n the construction of statutes, it is the duty of the Court to ascertain the clear intention of the legislature. In order to do this, Courts are often compelled to construe 'or' as meaning 'and,' and again 'and' as meaning 'or'." *Peacock v. Lubbock Compress Company*, 252 F.2d 892, 893 (5th Cir. 1958) (*citing United States v. Fisk*, 70 U.S. 445, 448).

[369] 47 U.S.C. § 153(26) (emphasis added).

[370] 47 U.S.C. § 251(c)(2) (emphasis added).

[371] Where Congress intended to impose obligations on requesting carriers in section 251(c), it did so expressly. For example, section 251(c)(1) includes a specific and separate requirement on requesting carriers to negotiate in good faith. 47 U.S.C. § 251(c)(1).

[372] One definition of the word "and" is "as well as." Random House College Dictionary 50 (rev. ed. 1984). Under this definition, the provision can be read, and we believe should be read, to require LECs to provide interconnection for the transmission and routing of telephone exchange service as well as exchange access.

incumbent LEC's network under subsection (c)(2) would unduly restrict potential competitors. For example, CAPs often enter the telecommunications market as exchange access providers prior to offering telephone exchange services. Further, applying separate regulatory regimes (*i.e.*, section 251 related-rules for providers of telephone exchange and exchange access services and section 201 related-rules for providers of only exchange access services) with divergent requirements to parties using essentially the same equipment to transmit and route traffic, is undesirable in light of the new procompetitive paradigm created by section 251.[373] We see no convincing justification for treating providers of exchange access services that offer telephone exchange services differently from access providers who do not offer telephone exchange services. We therefore conclude that parties offering only exchange access are permitted to seek interconnection pursuant to section 251(c)(2).

D. Interexchange Service is Not Telephone Exchange Service or Exchange Access

1. Background

186. Sections 251(c)(2) and 251(c)(3) impose duties upon incumbent LECs to provide interconnection and nondiscriminatory access to unbundled network elements to "any requesting telecommunications carrier."[374] In the NPRM, we tentatively concluded that carriers providing interexchange services are "telecommunications carriers" and thus may seek interconnection and unbundled elements under subsections (c)(2) and (c)(3). We also tentatively concluded, however, that with respect to section 251(c)(2), the statute imposes limits on the purposes for which any telecommunications carrier, including IXCs, may request interconnection pursuant to that section. Section 251(c)(2) imposes an obligation upon incumbent LECs to provide requesting carriers with interconnection if the purpose of the interconnection is for the "transmission and routing of telephone exchange service and exchange access."[375] We tentatively concluded in the NPRM that interexchange service does not appear to constitute either "telephone exchange service" or "exchange access." "Exchange access" is defined in section 3(16) as "the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services."[376] We stated that an IXC that requests interconnection to originate or terminate an interexchange toll call is not "offering" access services, but rather is "receiving" access services.

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[373] *See infra*, Section VI.B.2.a. for a discussion of the relationship between *Expanded Interconnection* tariffs and section 251. Competitive access providers use the same equipment in essentially the same manner as other providers of both telephone exchange and exchange access services.

[374] 47 U.S.C. §§ 251(c)(2) and (c)(3).

[375] 47 U.S.C. § 251(c)(2)(A).

[376] 47 U.S.C. § 153(16).

2. Comments

187 DOJ and the Illinois Commission agree with the Commission's tentative conclusion that IXCs may obtain interconnection pursuant to 251(c)(2) to provide exchange service and exchange access.[177] DOJ states that this would permit IXCs to participate fully in the provision of local exchange and exchange access services.[178]

188. Many parties, including several incumbent LECs and DOJ, agree with the Commission's tentative conclusion in the NPRM that carriers are not permitted to receive interconnection pursuant to 251(c)(2) solely for the purpose of originating or terminating interexchange traffic.[179] Several parties contend that, although IXCs are telecommunications carriers under the 1996 Act, they provide neither "exchange service" nor "exchange access" when they offer only long distance service to their customers.[180] Some commenters assert that an IXC requesting interconnection to originate or terminate a toll call would be receiving access services, not offering them, and thus would not fall within the definition of exchange access.[181] Parties also claim that permitting interconnection for this purpose would conflict with the plain meaning of sections 251(i)[182] and (g).[183] USTA argues that section 251(g)

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[177] DoJ comments at 42-43; Illinois Commission comments at 48-49

[178] DoJ comments at 42-43.

[179] *See, e.g.*, BellSouth comments at 60-61; NYNEX comments at 5; GTE comments at 75; DoJ comments at 42; California Commission comments at 34; Bell Atlantic reply at 4-5; PacTel reply at 36; Rural Tel. Coalition reply at 8; NYNEX reply at 7 (it is not a question of the type of party that is applying for interconnection but rather the purpose for which the interconnection is being sought).

[180] DoJ comments at 42; USTA reply at 5; BellSouth reply at 45. NYNEX argues that, although some parties contend that section 251(c)(2)(A) refers to the services that the incumbent LEC provides rather than the services the requesting carrier seeks, this is contrary to the most natural reading of the language of the statute and is inconsistent with the legislative history, which makes clear that the section was intended to apply to interconnection between LECs. NYNEX reply at 7-8.

[181] *See, e.g.*, DoJ comments at 42; USTA reply at 5; BellSouth reply at 45; PacTel reply at 36; Sprint reply at 33; Rural Tel. Coalition reply at 8.

[182] *See, e.g.*, USTA comments at 61; Bell Atlantic comments at 9; NYNEX comments at 12-13; NYNEX reply at 9-10; Rural Tel. Coalition reply at 9.

requires LECs to continue to provide exchange access service to IXCs under the Commission's existing rules. USTA claims that if Congress had intended to change the access charge regime within the timeframe for implementing section 251, it would not have granted the Joint Board, created under section 254, nine months to make recommendations to the Commission.[384] Several parties also argue that the legislative history supports the conclusion that section 251 was not designed to permit IXCs to avoid application of our current access charge rules.[385] Other carriers claim that permitting interconnection pursuant to section 251(c)(2) to allow parties to avoid access charges would be unwise from a policy perspective, because it would divest the Commission of jurisdiction over the rates for interstate exchange access services,[386] and would preempt state pricing regulations that were the result of years of consideration.[387]

189. IXCs and others argue that section 251(c)(2) permits carriers to obtain interconnection solely for the purpose of originating and terminating interexchange traffic.[388] CompTel claims that IXCs satisfy the "offering" requirement when they offer and provide

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[383] *See, e.g.*, USTA comments at 61; NYNEX comments at 13; Bell Atlantic comments at 9; GTE comments at 75; Citizens Utilities comments at 22; Rural Tel. Coalition reply at 10. GTE argues that if, as some parties claim, section 251(g) preserves the Commission's access charge regime only until the Commission adopts new rules under section 251(d), this renders section 251(g) unnecessary because the need to preserve those rules does not arise until the new section 251(d) rules are implemented. GTE reply at 39. Also, GTE claims that interpreting section 251(g) as maintaining only the existing equal access and nondiscrimination requirements of the MFJ, GTE Decree, and the Commission's rules overlooks the fact that section 251(g) explicitly preserves rules regarding "receipt of compensation" for such access. *Id.*

[384] USTA comments at 61.

[385] *See, e.g.*, NECA comments at 4-5; PacTel reply at 36; Rural Tel. Coalition reply at 9-10 (the Joint Explanatory Statement (p. 123) evinces Congress's intent to preserve the Commission's access charge regime and authority over interstate access).

[386] Ameritech comments at 21; Bell Atlantic comments at 10; NYNEX comments at 78; PacTel reply at 36; Rural Tel. Coalition reply at 8.

[387] NYNEX comments at 19; NECA comments at 2-4.

[388] *See, e.g.*, AT&T reply at 23; MCI reply at 20-22; CompTel reply at 25-26; American Petroleum Institute comments at 3-13; ALTS comments at 46; Cable & Wireless comments at 28; Citizens Utilities comments at 21; Excel comments at 3 (use restrictions will hinder competition).

exchange access as an integral part of long distance service to the end-user subscribers.[389] Cable and Wireless claims that section 251(i) merely preserves the Commission's authority under section 201(a), which requires carriers to establish physical connection with each other in compliance with the Commission's rules.[390] ALTS argues that any erosion of access revenues that might occur as a result of the IXCs' migration to section 251 interconnection arrangements would not occur so rapidly as to affect incumbent LECs materially before the Commission completes its reform of the universal service subsidy flows.[391] CompTel suggests an interim plan that would permit incumbent LECs to charge non-cost-based rates for access until the Commission completes access charge reform, but would declare that until that time, incumbent LECs would be deemed not to have met the section 271 checklist for providing in-region interexchange service.[392] Excel claims that it would be unlawful under section 202(a) for an IXC to pay charges for local network connections that are substantially higher than the charges paid by other users of the same network services.[393] Finally, CompTel and MCI argue that the legislative history of section 251 supports the conclusion that IXCs are permitted to obtain interconnection pursuant to section 251.[394]

3. Discussion

[389] CompTel comments at 51-52. CompTel claims that by writing a broader "offering" requirement into the statute, the FCC would limit interconnection under section 251(c)(2) to LECs, and not "telecommunications carriers" as Congress intended. CompTel also claims that there is no feasible interpretation that would prevent IXCs, regardless of whether they "offer" exchange access, from obtaining stand-alone exchange access indirectly through co-carrier interconnection arrangements under section 251(c)(2). CompTel reply at 31-32. Cable & Wireless claims that the canons of statutory construction preclude a reading of the Act that holds that Congress provided all telecommunications providers with the ability to purchase access to unbundled elements for telecommunications services, but forbade them from interconnecting to the network in order to utilize unbundled elements for all telecommunications services. Cable & Wireless comments at 29.

[390] Cable & Wireless comments at 31.

[391] ALTS comments at 46; Citizens Utilities comments at 21; MCI reply at 21 (the loss of access charge revenues for incumbent LECs due to the Act cannot be used to deny the full benefits of section 251 to IXCs).

[392] CompTel comments at 81-87.

[393] Excel comments at 4-5.

[394] CompTel reply at 32 (although the Senate bill, S.652, expressly required requesting carriers to obtain interconnection for the purpose of providing exchange access service, Congress rewrote that provision in conference to remove the requirement that carriers obtain interconnection for the purpose of providing exchange access); MCI reply at 21 (arguments based on provisions in unenacted drafts of the Act excluding access from the local interconnection provisions are rebutted by the fact that both the House and Senate bills included provisions mandating cost-based access rates in other sections).

190. We conclude that IXCs are telecommunications carriers[395] under the 1996 Act, because they provide telecommunications services[396] (*i.e.*, "offer telecommunications for a fee directly to the public") by originating or terminating interexchange traffic. IXCs are permitted under the statute to obtain interconnection pursuant to section 251(c)(2) for the "transmission and routing of telephone exchange service and exchange access."[397] Moreover, traditional IXCs are a significant potential new local competitor and we conclude that denying them the right to obtain section 251(c)(2) interconnection lacks any legal or policy justification. Thus, all carriers (including those traditionally classified as IXCs) may obtain interconnection pursuant to section 251(c)(2) for the purpose of terminating calls originating from their customers residing in the same telephone exchange (*i.e.*, non-interexchange calls).

191. We conclude, however, that an IXC that requests interconnection solely for the purpose of originating or terminating its *interexchange* traffic, not for the provision of telephone exchange service and exchange access to others, on an incumbent LEC's network is not entitled to receive interconnection pursuant to section 251(c)(2).[398] Section 251(c)(2) states that incumbent LECs have a duty to interconnect with telecommunications providers "for the transmission and routing of telephone exchange service and exchange access."[399] A telecommunications carrier seeking interconnection only for interexchange services is not within the scope of this statutory language because it is not seeking interconnection for the purpose of providing telephone exchange service. Nor does a carrier seeking interconnection of interstate traffic only -- for the purpose of providing interstate services only -- fall within the scope of the phrase "exchange access." Such a would-be interconnector is not "offering" access to telephone exchange services. As we stated in the NPRM, an IXC that seeks to interconnect solely for the purpose of originating or terminating its own interexchange traffic

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[395] 47 U.S.C. § 153(44).

[396] 47 U.S.C. § 153(46).

[397] 47 U.S.C. § 251(c)(2).

[398] As stated above, interconnection pursuant to section 251(c)(2) is merely the physical linking of facilities between two networks, and thus access charges are not implicated by the Commission's decisions regarding whether parties who seek to interconnect solely for the purpose of originating or terminating interexchange traffic on the incumbent's network are entitled to obtain interconnection pursuant to section 251(c)(2). *See supra*, Section IV.A.

[399] Section 153(47) defines telephone exchange service as "(A) service within a telephone exchange, or within a connected system of [ ] exchanges within the same exchange area operated to furnish . . . intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge, or (B) comparable service provided through a system of switches, transmission equipment, or other facilities . . . ." 47 U.S.C. § 153(47). Section 153(16) states that exchange access means "the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services." 47 U.S.C. § 153(16).

is not offering access, but rather is only obtaining access for its own traffic. Thus, we disagree with CompTel's position that IXCs are offering exchange access when they offer and provide exchange access as a part of long distance service. We conclude that a carrier may not obtain interconnection pursuant to section 251(c)(2) for the purpose of terminating interexchange traffic, even if that traffic was originated by a local exchange customer in a different telephone exchange of the same carrier providing the interexchange service, if it does not offer exchange access services to others. As we stated above, however, providers of competitive access services are eligible to receive interconnection pursuant to section 251(c)(2). Thus, traditional IXCs that offer access services in competition with an incumbent LEC (*i.e.*, IXCs that offer access services to other carriers as well as to themselves) are also eligible to obtain interconnection pursuant to section 251(c)(2). For example, when an IXC interconnects at a local switch, bypassing the incumbent LECs' transport network, that IXC may offer access to the local switch in competition with the incumbent. In such a situation, the interconnection point may be considered a section 251(c)(2) interconnection point.

E. Definition of "Technically Feasible"

1. Background

192. In addition to specifying the purposes for which carriers may request interconnection, section 251(c)(2) obligates incumbent LECs to provide interconnection within their networks at any "technically feasible point."[400] Similarly, section 251(c)(3) obligates incumbent LECs to provide access to unbundled elements at any "technically feasible point." Thus our interpretation of the term "technically feasible" applies to both sections.

193. In the NPRM, we sought comment on a "dynamic" definition of "technically feasible" that would provide flexibility for negotiating parties and the states in determining interconnection and unbundling points as network technology evolves.[401] We requested comment on the extent to which network reliability concerns should be included in a technical feasibility analysis, and tentatively concluded that, if such concerns were involved, the incumbent LEC had the burden to support such a claim with detailed information.[402] We also sought comment on the role of other considerations, such as economic burden, in determining technical feasibility under sections 251(c)(2) and 251(c)(3).[403]

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[400] 47 U.S.C. § 251(c)(2)(B).

[401] NPRM at paras. 56-59, 87-88.

[402] *Id.* at paras. 56, 88.

[403] *Id.* at paras. 56-59, 87-88.

194. We also tentatively concluded that interconnection or access at a particular point in one LEC network evidences the technical feasibility of providing the same or similar interconnection or access in another, similarly structured LEC network.[404] Finally, we tentatively concluded that incumbent LECs have the burden of proving the technical infeasibility of providing interconnection or access at a particular point.[405]

2. Comments

195. Commenters offer a wide range of interpretations of the term "technically feasible." Many commenters urge the Commission to offer only broad guidelines with respect to technical feasibility and allow the parties and the states to determine the details.[406] Most BOCs and other LECs argue that "technically feasible" does not mean technically possible or imaginable, and that other factors should be considered in determining what points are technically feasible.[407] Other factors offered by the commenters include cost, network reliability and security, space limitations, the existence of operations support systems, quality of service provided, interoperability, field trials, performance standards, industry standards, the need for construction of new facilities, and inherent fairness.[408] USTA, SBC, and others allege that previous Commission orders have considered economic issues in technical feasibility analyses.[409] GVNW argues that small LECs should not be required to unbundle if it is economically unreasonable.[410] The Rural Telephone Coalition contends that the

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[404] *Id.* at paras. 57, 87.

[405] *Id.* at paras. 58, 87.

[406] *See, e.g.*, USTA comments at 11; Bell Atlantic comments at 15; U S West comments at 44; BellSouth reply at 18; California Commission comments at 19; Texas Commission comments at 11; Citizens Utilities comments at 8 (parties are in the best position to determine the technical requirements and abilities).

[407] *See, e.g.*, SBC comments at 25; BellSouth comments at 16; USTA comments at 11; U S West reply at 22.

[408] *See, e.g.*, NYNEX comments at 65-66; SBC reply at 17; Ameritech comments at 16; ALLTEL comments at 7-8; Roseville Tel. comments at 5-6; U S West reply at 22; Lincoln Tel. reply at 3; *see also* USTA comments at 10-12; Florida Commission comments at 13-14; DoD comments at 6 (network reliability must be considered in technical feasibility). GVNW believes that interconnection is technically feasible if: (1) the interconnection point is a normal LEC access point for provisioning of service to its customers; (2) the LEC maintains assignment records for the point; (3) LEC personnel access facilities at the point for interconnecting other LEC facilities; (4) cross-connecting the facility at the point does not expose the network to undue damage; and (5) the LEC and requesting carriers can demonstrate the technical proficiency of personnel assigned to work at the interconnect point. GVNW comments at 18-19.

[409] *See, e.g.*, USTA comments at 12 n.16; SBC comments at 16.

[410] GVNW comments at 21-22.

Commission should recognize the differences between small and large operations, high-volume and low-volume local networks, and urban and rural carriers and networks.[411] USTA also suggests that the statute only requires incumbent LECs to provide interconnection to their networks as they are configured presently and that it does not require incumbent LECs to take risky or unreasonable steps to construct new facilities or reconfigure their networks in response to competitor requests.[412]

196. Many potential competitors argue that the definition of "technical feasibility" should be extremely broad and dynamic, to encompass the effects of future technical changes.[413] Sprint contends that the Commission should use the plain meaning of the word "feasible" in defining technical feasibility. Sprint states that Webster's Dictionary defines "feasible" as "possible of realization" and any more restrictive reading would unduly restrict the availability of interconnection.[414] Many parties contend that incumbent LECs should have the burden of proving specific points are not technically feasible.[415] Time Warner claims that any point should be presumptively technically feasible and those claiming technical infeasibility should bear the burden of proof.[416] AT&T argues that existing industry standards for interconnection at a point evidences the technical feasibility of interconnection at such a point.[417] MCI argues that technically feasible points of interconnection may be either

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[411] Rural Tel. Coalition comments at 31.

[412] *See, e.g.*, USTA comments at 11; BellSouth comments at 16; SBC comments at 25; Lincoln Tel. reply at 3; Roseville Tel. comments at 5-6; Office of the Ohio Consumers' Counsel comments at 10; ALLTEL reply at 5-6.

[413] *See, e.g.*, MCI comments at 12-13; MFS comments at 15; Teleport comments at 25; Nortel comments at 7; Continental Cablevision comments at 20; NCTA comments at 32; Time Warner reply at 13 (all points should be presumptively technically feasible and those claiming technical infeasibility should bear the burden of proof); Colorado Commission comments at 18; Michigan Commission comments at 8-9; Attorneys General of Connecticut *et al.* reply at 4 n.2; Hyperion comments at 10; Independent Cable & Telecomm. Ass'n reply at 9.

[414] Sprint reply at 16; ACSI reply at 6.

[415] *See, e.g.*, MCI comments at 11; Continental Cablevision comments at 20; CompTel comments at 41; Sprint comments at 14; Cox comments at 42; AT&T reply at 11; DoJ comments at 19; California Commission comments at 19; Alabama Commission comments at 15; Ohio Commission comments at 25; Colorado Commission comments at 19.

[416] Time Warner reply at 13; MCI reply at 23 (incumbent LECs do not argue that interconnection points are not technically feasible but rather that the Commission reverse its tentative conclusion that the burden of proof falls on incumbent LECs to demonstrate technical infeasibility); Cable & Wireless comments at 13 (technical feasibility can be assessed by examining the type and quality of interconnection an incumbent LEC already provides to itself, its affiliates and co-carriers).

[417] AT&T comments at 33.

physical, for facilities and equipment, or logical, for software and databases.[418] Several parties ask the Commission to make clear that technical feasibility does not require that operations support systems for order processing, provisioning and installation, billing, and other support functions be in place in order to make a specific interconnection point technically feasible.[419] Several competing carriers also contend that economic factors should not be considered in determining technically feasibile points of interconnection and access to unbundled elements. They argue that if incumbent LECs are not required to expend any funds or resources to provide for technically feasible interconnection or access, competing carriers will be limited to the services currently offered by the incumbents.[420]

197. Some parties propose specific definitions of technical feasibility. For example, Sprint defines "technically feasible" as "possible to accomplish without a scientific or technological breakthrough, *i.e.*, without an advance in the state of the art."[421] MFS defines the term as "any point in an [incumbent LEC's] network where suitable transmission, cross-connect or switching facilities are present to permit the routing of traffic to and from another network."[422]

3. Discussion

198. We conclude that the term "technically feasible" refers solely to technical or operational concerns, rather than economic, space, or site considerations. We further conclude that the obligations imposed by sections 251(c)(2) and 251(c)(3) include modifications to incumbent LEC facilities to the extent necessary to accommodate interconnection or access to network elements. Specific, significant, and demonstrable network reliability concerns associated with providing interconnection or access at a particular point, however, will be regarded as relevant evidence that interconnection or access at that point is technically infeasible. We also conclude that preexisting interconnection or access at a particular point evidences the technical feasibility of interconnection or access at substantially similar points.

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[418] MCI comments at 12; IDCMA reply at 6-7.

[419] *See, e.g.*, MCI comments at 12, Sprint reply at 16-17; AT&T reply at 10 (the need for additional investment to make an arrangement available should not result in a determination of technical infeasibility); Time Warner reply at 15, 17; ACTA comments at 10;

[420] *See, e.g.*, AT&T comments at 14-20; MCI reply at 23-29; Sprint reply at 16; Time Warner reply at 16.

[421] Sprint reply at 15-16; Time Warner reply at 13 (any point of interconnection should be presumptively technically feasible).

[422] MFS comments at 15.

Finally, we conclude that incumbent LECs must prove to the appropriate state commission that a particular interconnection or access point is not technically feasibile.

199. We find that the 1996 Act bars consideration of costs in determining "technically feasible" points of interconnection or access. In the 1996 Act, Congress distinguished "technical" considerations from economic concerns. Section 251(f), for example, exempts certain rural LECs from "unduly economically burdensome" obligations imposed by section 251(c) even where satisfaction of such obligations is "technically feasible."[423] Similarly, section 254(h)(2)(A) treats "technically feasible" and "economically reasonable" as separate requirements.[424] Finally, we note that the House committee that considered H.R. 1555 (which was combined with Senate Bill S.652 to form the 1996 Act) dropped the term "economically reasonable" from its unbundling provision. The House committee explicitly addressed this substantive change, reporting that "this requirement could result in certain unbundled . . . elements . . . not being made available."[425] Thus, the deliberate and explained substantive omission of explicit economic requirements in sections 251(c)(2) and 251(c)(3) cannot be undone through an interpretation that such considerations are implicit in the term "technically feasible." Of course, a requesting carrier that wishes a "technically feasible" but expensive interconnection would, pursuant to section 252(d)(1), be required to bear the cost of that interconnection, including a reasonable profit.[426]

200. USTA and SBC cite the Commission's *900 Service* order[427] as support for the contention that costs must be considered in a technical feasibility analysis.[428] In that order, the Commission concluded that "[i]n defining 'technically feasible,' we balance both technical and economic considerations with a view toward providing [900] blocking capability to consumers without imposing undue economic burdens on LECs."[429] Our *900 Service* order,

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[423] 47 U.S.C. § 251(f)(1)(A).

[424] 47 U.S.C. § 254(h)(2)(A).

[425] H. Rep. 104-204, 71 (1995).

[426] *See* 47 U.S.C. § 252(d)(1); *see also infra*, Section VII (concluding that requesting carriers must pay incumbent LECs the cost of interconnection or unbundling).

[427] *Policies and Rules Concerning Interstate 900 Telecommunications Services*, Report and Order, 6 FCC Rcd 6166, 6174 (1991) *(900 Service)*.

[428] USTA comments at 12 n.16; SBC reply at 16.

[429] *900 Service* at 6174.

however, has little bearing on our interpretation of the term "technically feasible" in the 1996 Act. As stated above, the 1996 Act distinguishes technical considerations from the "undue economic burdens" considered in the *900 Service* order. Indeed, Congress used virtually the same language—"unduly economically burdensome"—in drawing the distinction.[430] If, as SBC contends, we are to presume that Congress was aware of the Commission's analysis of the technical feasibility of 900 call blocking,[431] the 1996 Act appears squarely to reject that view of technical feasibility. Moreover, unlike the costs of providing 900 call blocking, which we imposed largely on LECs in the *900 Service* order, as noted above, to the extent incumbent LECs incur costs to provide interconnection or access under sections 251(c)(2) or 251(c)(3), incumbent LECs may recover such costs from requesting carriers.

201. In addition to economic considerations, section 251(c)(6) distinguishes considerations of "space limitations" from those of "technical reasons," and thus, in general, we believe existing space or site restrictions should not be included within a technical feasibility analysis.[432] Of course, under section 251(c)(6) "space" restrictions are expressly considered along with "technical" considerations in determining whether an incumbent LEC must provide for physical collocation. Where physical collocation is not practical because of "space limitations," however, incumbent LECs must provide for virtual collocation.[433] Section 251 is silent as to whether an incumbent LEC's duty to provide for virtual collocation or other methods of interconnection or access to unbundled elements is dependent on space constraints. We conclude, as a practical matter, that space limitations at a particular network site, without any possibility of expansion, may render interconnection or access at that point infeasible, technically or otherwise. Where such expansion is possible, however, we conclude that, in light of the distinction drawn in section 251(c)(6), site restrictions do not represent a "technical" obstacle. Again, however, the requesting party would bear the cost of any necessary expansion. Nor do we believe the term "technical," when interpreted in accordance with its ordinary meaning as referring to engineering and operational concerns in the context of sections 251(c)(2) and 251(c)(3),[434] includes consideration of accounting or billing restrictions.

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[430] *See* 47 U.S.C. § 251(f)(1)(A).

[431] SBC reply at 16 ("Presumably Congress was aware of this FCC definition of the term "technically feasible" when Congress chose to use it in the 1996 Act.").

[432] 47 U.S.C. § 251(c)(6).

[433] *Id.*

[434] *See* Random House College Dictionary at 1349 ("6. pertaining to or connected with the mechanical or industrial arts and the applied sciences").

202. Several parties also attempt to draw a distinction between what is "feasible" under the terms of the statute, and what is "possible." The words "feasible" and "possible," however, are used synonymously. Feasible is defined as "capable of being accomplished or brought about; possible."[435] The statute itself provides a more meaningful distinction. Unlike the "technically *feasible*" terminology included in sections 251(c)(2) and 251(c)(3), section 251(c)(6) uses the term "*practical* for technical reasons" in determining the scope of an incumbent LEC's obligation to provide for physical collocation.[436] "Practical" is defined as "manifested in practice or action . . . not theoretical or ideal"[437] or "adapted or designed for actual use; useful," and connotes similarity to ordinary usage.[438] Thus, it is reasonable to interpret Congress's use of the term "feasible" in sections 251(c)(2) and 251(c)(3) as encompassing more than what is merely "practical" or similar to what is ordinarily done. That is, use of the term "feasible" implies that interconnecting or providing access to a LEC network element may be feasible at a particular point even if such interconnection or access requires a novel use of, or some modification to, incumbent LEC equipment. This interpretation is consistent with the fact that incumbent LEC networks were not designed to accommodate third-party interconnection or use of network elements at all or even most points within the network. If incumbent LECs were not required, at least to some extent, to adapt their facilities to interconnection or use by other carriers, the purposes of sections 251(c)(2) and 251(c)(3) would often be frustrated. For example, Congress intended to obligate the incumbent to accommodate the new entrant's network architecture by requiring the incumbent to provide interconnection "for the facilities and equipment" of the new entrant. Consistent with that intent, the incumbent must accept the novel use of, and modification to, its network facilities to accommodate the interconnector or to provide access to unbundled elements.

203. We also conclude, however, that legitimate threats to network reliability and security must be considered in evaluating the technical feasibility of interconnection or access to incumbent LEC networks. Negative network reliability effects are necessarily contrary to a finding of technical feasibility. Each carrier must be able to retain responsibility for the management, control, and performance of its own network. Thus, with regard to network reliability and security, to justify a refusal to provide interconnection or access at a point requested by another carrier, incumbent LECs must prove to the state commission, with clear

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[435] The American Heritage College Dictionary 499 (1993). Webster's Ninth New Collegiate Dictionary 453 (1989). Both "feasible" and "possible" refer to that which is "capable of being realized" *Id.* at 918.

[436] 47 U.S.C. § 251(c)(6) (emphasis added).

[437] Webster's at 923.

[438] Random House College Dictionary 1040 (rev. ed. 1984).

and convincing evidence, that specific and significant adverse impacts would result from the requested interconnection or access. The reports of the Commission's Network Reliability Council discuss network reliability considerations, and establish templates that list activities that need to occur when service providers connect their networks pursuant to defined interconnection specifications or when they are attempting to define a new network interface specification.[439]

204. We further conclude that successful interconnection or access to an unbundled element at a particular point in a network, using particular facilities, is substantial evidence that interconnection or access is technically feasible at that point, or at substantially similar points in networks employing substantially similar facilities. In comparing networks for this purpose, the substantial similarity of network facilities may be evidenced, for example, by their adherence to the same interface or protocol standards. We also conclude that previous successful interconnection at a particular point in a network at a particular level of quality constitutes substantial evidence that interconnection is technically feasible at that point, or at substantially similar points, at that level of quality. Although most parties agree with this conclusion, some LECs contend that such comparisons are all but impossible because of alleged variability in network technologies, even where the ultimate services offered by separate networks are the same. We believe that, if the facilities are substantially similar, the LECs' contention is adequately addressed.

205. Finally, because sections 251(c)(2) and 251(c)(3) impose duties upon incumbent LECs, we conclude that incumbent LECs must prove to the appropriate state commission that interconnection or access at a point is not technically feasible. Incumbent LECs possess the information necessary to assess the technical feasibility of interconnecting to particular LEC facilities. Further, incumbent LECs have a duty to make available to requesting carriers general information indicating the location and technical characteristics of incumbent LEC network facilities. Without access to such information, competing carriers would be unable to make rational network deployment decisions and could be forced to make inefficient use of their own and incumbent LEC facilities, with anticompetitive effects.

206. We have considered the economic impact of our rules in this section on small incumbent LECs. For example, the Rural Telephone Coalition argues that the Commission should set interconnection points in a flexible manner to recognize the differences between carriers and regions. We do not adopt the Rural Telephone Coalition's position because we believe that, in general, the Act does not permit incumbent LECs to deny interconnection or access to unbundled elements for any reason other than a showing that it is not technically feasible. We believe that this interpretation will advance the procompetitive goals of the

[439] *Network Reliability: A Report to the Nation* (1993, National Engineering Consortium); *Network Reliability: The Path Forward* (1996, Internet: http://www.fcc.gov/oet/nrc).

statute. We also note, however, that section 251(f) of the 1996 Act provides relief to certain small LECs from our regulations implementing section 251.

F. Technically Feasible Points of Interconnection

1. Background

207. In the NPRM, we requested comment on which points within an incumbent LEC's network constitute "technically feasible" points for purposes of section 251(c)(2).[440] Having defined the phrase "technically feasible" above, we now determine a minimum set of technically feasible points of interconnection.

2. Comments

208. Incumbent LECs claim that the specific points of interconnection should either be left to the negotiation process, or that the Commission should require interconnection only at core points, and leave all other points to the negotiation process.[441] For example, Ameritech claims that it is only technically feasible for competitors to interconnect at its end or tandem offices.[442] Bell Atlantic asserts that the trunk- and loop-side of the local switch, transport facilities, tandem facilities, and the signal transfer points (STPs) are the only technically feasible points for interconnection.[443] Potential competitors, on the other hand, argue that interconnection is technically feasible, and should be mandated by the Commission, at numerous points in the incumbent LEC's network.[444] AT&T, for example, argues that interconnection is technically feasible: (1) at the loop concentrator; (2) between the loop feeder element and the competitive provider's switch; (3) between the incumbent LEC's switch and the competitive provider's operator systems; (4) between a competitive provider's switch and a LEC's signaling A link; (5) between a competitive provider's signaling A link

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[440] NPRM at paras. 56-59.

[441] *See, e.g.*, USTA comments at 10-11; BellSouth comments at 15-19; NYNEX comments at 65 (points of interconnection should be left to negotiation); Ameritech comments at 13-14; PacTel comments at 21-22; Oregon Commission comments at 25-26.

[442] Ameritech comments at 13-14; Ohio Commission comments at 24.

[443] Bell Atlantic comments at 20-21; Lincoln Tel. comments at 5.

[444] ALTS comments at 18 (interconnection should be available at any technically feasible point regardless of the technical fabric of the network at the requested point); MCI comments at 12-13 (technically feasible points may be either physical, for facilities and equipment, or logical, for software and databases); Time Warner reply at 15 (interconnection should not be limited to "core requirements" because the statute mandates interconnection at any technically feasible point).

and an incumbent LEC's STP; (6) between a competitive provider's dedicated transport and an incumbent LEC's office; and, (7) between incumbent LEC and non-incumbent LEC STPs.[445] MFS argues that, regardless of the specific points listed by the Commission, states should be able to expand the list of technically feasible points.[446]

3. Discussion

209. We conclude that we should identify a minimum list of technically feasible points of interconnection that are critical to facilitating entry by competing local service providers. Section 251(c)(2) gives competing carriers the right to deliver traffic terminating on an incumbent LEC's network at any technically feasible point on that network, rather than obligating such carriers to transport traffic to less convenient or efficient interconnection points. Section 251(c)(2) lowers barriers to competitive entry for carriers that have not deployed ubiquitous networks by permitting them to select the points in an incumbent LEC's network at which they wish to deliver traffic. Moreover, because competing carriers must usually compensate incumbent LECs for the additional costs incurred by providing interconnection, competitors have an incentive to make economically efficient decisions about where to interconnect.[447]

210. We conclude that, at a minimum, incumbent LECs must provide interconnection at the line-side of a local switch (at, for example, the main distribution frame), the trunk-side of a local switch; the trunk interconnection points for a tandem switch; and central office cross-connect points in general. This requirement includes interconnection at those out-of-band signaling transfer points necessary to exchange traffic and access call related databases. All of these points of interconnection are used today by competing carriers, noncompeting carriers, or LECs themselves for the exchange of traffic, and thus we conclude that interconnection at such points is technically feasible.

211. A varied group of commenters, including Bell Atlantic and AT&T, agree that interconnection at the line-side of the switch is technically feasible.[448] Interconnection at this

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[445] Letter from Bruce Cox and Betsy Brady, AT&T, to Regina M. Keeney, Common Carrier Bureau, FCC, March 21, 1996, at 29-32 (AT&T March 21 Letter).

[446] MFS comments at 14.

[447] *See* Robert S. Pendyck and Daniel L. Rubinfeld, Microeconomics (2nd ed. 1992).

[448] *See, e.g.*, Bell Atlantic comments at 20-21; NYNEX comments at 65; BellSouth reply at 23; AT&T March 21 Letter at 30.

point is currently provided to some commercial mobile radio service (CMRS) carriers[449] and may be necessary for other competitors that have their own distribution plant, but seek to interconnect to the incumbent's switch. We also agree with numerous commenters that claim that interconnection at the trunk-side of a switch is technically feasible and should be available upon request.[450] Interconnection at this point is currently used by competing carriers to exchange traffic with incumbent LECs. Interconnection to tandem switching facilities is also currently used by IXCs and competing access providers, and is thus technically feasible. Finally, central office cross-connect points, which are designed to facilitate interconnection, are natural points of technically feasible interconnection to, for example, interoffice transmission facilities. There may be rare circumstances where there are true technical barriers to interconnection at the line- or trunk-side of the switch or at central office cross-connect points, however, the parties have not presented us with any such circumstances. Thus, incumbent LECs must prove to the state commissions that such points are not technically feasible interconnection points.

212. We also note that the points of access to unbundled elements discussed below may also serve as points of interconnection (*i.e.*, points in the network that may serve as places where potential competitors may wish to exchange traffic with the incumbent LEC other than for purposes of gaining access to unbundled elements), and thus we incorporate those points by reference here. Finally, as noted above, we have identified a minimum list of technically feasible interconnection points: (1) the line-side of a local switch; (2) the trunk-side of a local switch; (3) the trunk interconnection points for a tandem switch; (4) central office cross-connect points; (5) out-of-band signaling transfer points; and (6) the points of access to unbundled elements. In addition, we anticipate and encourage parties and the states, through negotiation and arbitration, to identify additional points of technically feasible interconnection. We believe that the experience of the parties and the states will benefit our ongoing review of interconnection.

G. Just, Reasonable, and Nondiscriminatory Rates, Terms, and Conditions of Interconnection

1. Background

213. Section 251(c)(2)(D) requires that incumbent LECs provide interconnection "on rates, terms, and conditions that are just, reasonable, and nondiscriminatory."[451] In the NPRM,

[449] AT&T comments in CC Docket No. 95-185 at 6 n.6 (Mar. 4, 1996).

[450] *See, e.g.*, Bell Atlantic comments at 20-21; BellSouth reply at 23; NYNEX comments at 65; Lincoln Tel. comments at 5.

[451] 47 U.S.C. §§ 251(c)(2)(D), 251(c)(3).

we sought comment on whether we should adopt national requirements governing the terms and conditions of providing interconnection. We also sought comment on how we should determine whether the terms and conditions for interconnection arrangements are just, reasonable, and nondiscriminatory, and how we should enforce such rules. In particular, we sought comment on whether we should adopt national guidelines governing installation, service, maintenance, and repair of the incumbent LEC's portion of interconnection facilities.[452]

2. Comments

214. MCI argues that incumbent LECs should not be permitted to set restrictions on the type of traffic that can be combined on a single trunk group unless signaling requirements dictate the need for separate trunk groups. Rather, MCI argues that incumbent LECs should be required to accept one-way and two-way trunk groups.[453] MCI also urges the Commission to require incumbents and competitors to select one point of interconnection (POI) on the other carrier's network at which to exchange traffic. MCI further requests that this POI be the location where the costs and responsibilities of the transporting carrier ends and the terminating carrier begins.[454] NEXTLINK argues that incumbent LECs should only be permitted to require earnest fees of new entrants if such fees are required of other incumbent LEC customers.[455]

215. Many incumbent LECs, state commissions, and others oppose explicit national rules regarding standards for just, reasonable, and nondiscriminatory terms of interconnection

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[452] We discuss the rates for interconnection below in Section VII.

[453] MCI comments at 40-41.

[454] Under MCI's proposal, new entrants would be considered co-carriers with incumbent LECs, and each carrier that seeks to interconnect with an incumbent LEC would be required to designate, for each local calling area, at least one point of interconnection (POI) on the other carrier's network. A carrier could designate more than one POI but could not be required to do so. Interconnection would result in the termination of a competing carrier's traffic at at least the same level of service quality that the incumbent LEC provides for terminating its own traffic, without any additional charge to the competing carrier to obtain that level of service. MCI comments at 40-46.

[455] NEXTLINK comments at 19.

and claim that these issues are best resolved through negotiation and arbitration.[456] Several commenters urge the Commission to adopt a rule that only requires that terms and conditions for interconnection points be nondiscriminatory.[457] BellSouth argues that longstanding nondiscrimination reporting requirements have never revealed a problem in the area of installation, maintenance, and repair.[458] Bell Atlantic contends that all arrangements provided by the incumbent LEC for a competitor should be made reciprocal, because new business buildings or residential developments may have only facilities owned by a new entrant. Absent a reciprocity requirement, Bell Atlantic contends that incumbent LECs could be at a competitive disadvantage in competing for those customers. Bell Atlantic also argues that reciprocal interconnection will put a check on potentially unrealistic unbundling requests.[459]

3. Discussion

216. We conclude that minimum national standards for just, reasonable, and nondiscriminatory terms and conditions of interconnection will be in the public interest and will provide guidance to the parties and the states in the arbitration process and thereafter. We believe that national standards will tend to offset the imbalance in bargaining power between incumbent LECs and competitors and encourage fair agreements in the marketplace between parties by setting minimum requirements that new entrants are guaranteed in arbitrations. Negotiations between an incumbent and a new entrant differ from commercial negotiations in a competitive market because new entrants are dependent solely on the incumbent for interconnection.

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[456] *See, e.g.*, Ameritech comments at 16-17; BellSouth comments at 20; USTA comments at 18; GTE comments at 21; SNET comments at 14; Alabama Commission comments at 15; California Commission comments at 20; Oregon Commission comments at 26-27; GVNW comments at 15; MECA comments at 25; Ohio Consumers' Counsel comments at 12 (an effective complaint procedure should be adopted rather than overly specific guidelines). The Ohio Commission and PacTel state that performance standards governing installation, maintenance and repair are unnecessary. PacTel contends that states and industry fora such as the Ordering and Billing Forum (OBF) can establish the necessary rules without Commission intervention. PacTel comments at 29; Ohio Commission comments at 26.

[457] *See, e.g.*, Bell Atlantic comments at 31; BellSouth comments at 20-21; SBC comments at 37; GTE reply at 11; California Commission comments at 20; District of Columbia Commission comments at 18-19; Ohio Consumers' Counsel comments at 12.

[458] BellSouth comments at 20-21; *see also* Bell Atlantic comments at 31 (provisioning interconnection and unbundled elements for new entrants is complicated and requires more work than provisioning simple dial tone; the Commission should not mandate that LECs provide interconnection and unbundled elements using the appropriate installation, service, and maintenance intervals that apply to LEC customers and services); Rural Tel. Coalition comments at 32-33 (service intervals for small and rural LECs with respect to provision of interconnection should only be equal to those which the LEC achieves for itself).

[459] Bell Atlantic comments at 32.

217. Section 202(a) of the Act states that "[i]t shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, . . . facilities, or services for or in connection with like communication service . . . by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person."[440] By comparison, section 251(c)(2) creates a duty for incumbent LECs "to provide . . . any requesting telecommunications carrier, interconnection with a LEC's network on rates, terms, and conditions that are just, reasonable, and nondiscriminatory."[441] The nondiscrimination requirement in section 251(c)(2) is not qualified by the "unjust or unreasonable" language of section 202(a). We therefore conclude that Congress did not intend that the term "nondiscriminatory" in the 1996 Act be synonymous with "unjust and unreasonable discrimination" used in the 1934 Act, but rather, intended a more stringent standard.

218. Given that the incumbent LEC will be providing interconnection to its competitors pursuant to the purpose of the 1996 Act, the LEC has the incentive to discriminate against its competitors by providing them less favorable terms and conditions of interconnection than it provides itself. Permitting such circumstances is inconsistent with the procompetitive purpose of the Act. Therefore, we reject for purposes of section 251, our historical interpretation of "nondiscriminatory," which we interpreted to mean a comparison between what the incumbent LEC provided other parties in a regulated monopoly environment. We believe that the term "nondiscriminatory," as used throughout section 251, applies to the terms and conditions an incumbent LEC imposes on third parties as well as on itself. In any event, by providing interconnection to a competitor in a manner less efficient than an incumbent LEC provides itself, the incumbent LEC violates the duty to be "just" and "reasonable" under section 251(c)(2)(D). Also, incumbent LECs may not discriminate against parties based upon the identity of the carrier (*i.e.*, whether the carrier is a CMRS provider, a CAP, or a competitive LEC). As long as a carrier meets the statutory requirements, as discussed in this section, it has a right to obtain interconnection with the incumbent LEC pursuant to section 251(c)(2).

219. We identify below specific terms and conditions for interconnection in discussing physical or virtual collocation (*i.e.*, two methods of interconnection).[442] We conclude here, however, that where a carrier requesting interconnection pursuant to section 251(c)(2) does not carry a sufficient amount of traffic to justify separate one-way trunks, an incumbent LEC must accommodate two-way trunking upon request where technically feasible. Refusing to

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[440] 47 U.S.C. § 202(a).

[441] 47 U.S.C. § 251(c)(2)(D).

[442] *See infra*, Section VI.

provide two-way trunking would raise costs for new entrants and create a barrier to entry. Thus, we conclude that if two-way trunking is technically feasible, it would not be just, reasonable, and nondiscriminatory for the incumbent LEC to refuse to provide it.

220. Finally, as discussed below,[463] we reject Bell Atlantic's suggestion that we impose reciprocal terms and conditions on incumbent LECs and requesting carriers pursuant to section 251(c)(2). Section 251(c)(2) does not impose on non-incumbent LECs the duty to provide interconnection. The obligations of LECs that are not incumbent LECs are generally governed by sections 251(a) and (b), not section 251(c). Also, the statute itself imposes different obligations on incumbent LECs and other LECs (*i.e.*, section 251(b) imposes obligations on all LECs while section 251(c) obligations are imposed only on incumbent LECs). We do note, however, that 251(c)(1) imposes upon a requesting telecommunications carrier a duty to negotiate the terms and conditions of interconnection agreements in good faith. We also conclude that MCI's POI proposal, permitting interconnecting carriers, both competitors and incumbent LECs, to designate points of interconnection on each other's networks, is at this time best addressed in negotiations and arbitrations between parties.[464] We believe that the record on this issue is not sufficiently persuasive to justify Commission action at this time. As market conditions evolve, we will continue to review and revise our rules as necessary.

H. Interconnection that is Equal in Quality

1. Background

221. Section 251(c)(2)(C) requires that the interconnection provided by an incumbent LEC be "at least equal in quality to that provided by the [incumbent LEC] to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection."[465] In the NPRM, we sought comment on how to determine whether interconnection is "equal in quality."

2. Comments

[463] *See infra*, Section XI.A.

[464] Of course, requesting carriers have the right to select points of interconnection at which to exchange traffic with an incumbent LEC under section 251(c)(2).

[465] 47 U.S.C. § 251(c)(2)(C).

222. MFS claims that the incumbent LEC should provide to everyone the highest grade service it makes available to anyone, including neighboring non-competing LECs.[466] MFS also claims that traffic exchange facilities between incumbent LECs and competitors should be designed to meet at least the same technical criteria and grade of service standards (*e.g.*, probability of blocking in peak hours and transmission standards) as used by the incumbent for the inter-office trunks used in its network.[467] Other parties claim that any criteria established by the Commission should not be overly detailed and quantitative or microscopic.[468] The Pennsylvania Commission suggests that "equal in quality" should mean interconnection that is virtually identical to that received by the incumbent LEC itself or its affiliate with no noticeable differences between the two to the end-user.[469] Nortel claims that the definition of "equal in quality" should recognize differences across technologies.[470]

223. Some parties argue that no national standards for "equal in quality" are necessary, and that this determination is best left to a case-by-case determination.[471] GTE claims that it should be acceptable for states to define equal in quality in terms of perception by the end user.[472]

3. Discussion

224. We conclude that the equal in quality standard of section 251(c)(2)(C) requires an incumbent LEC to provide interconnection between its network and [illegible] of a requesting carrier at a level of quality that is at least indistinguishable from that which the incumbent provides itself, a subsidiary, an affiliate, or any other party. We agree with MFS that this duty requires incumbent LECs to design interconnection facilities to meet the same technical

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[466] MFS comments at 17 (even if higher grade service is offered to a non-competing LEC, the incumbent LEC must offer this service to competitors); Intermedia comments at 4.

[467] MFS comments at 17.

[468] *See, e.g.*, Ameritech comments at 17; Pennsylvania Commission comments at 21; Ohio Consumers' Counsel comments at 13.

[469] Pennsylvania Commission comments at 21.

[470] Nortel comments at 9.

[471] *See, e.g.*, BellSouth comments at 22; USTA comments at 18; GTE comments at 22; Citizens Utilities comments at 11; Alabama Commission comments at 16; Ohio Consumers' Counsel comments at 13 (dispute resolution process should ultimately decide the success or failure of quality-oriented requirements).

[472] GTE comments at 22.

criteria and service standards, such as probability of blocking in peak hours and transmission standards, that are used within their own networks. Contrary to the view of some commenters, we further conclude that the equal in quality obligation imposed by section 251(c)(2) is not limited to the quality perceived by end users. The statutory language contains no such limitation, and creating such a limitation may allow incumbent LECs to discriminate against competitors in a manner imperceptible to end users, but which still provides incumbent LECs with advantages in the marketplace (*e.g.*, the imposition of disparate conditions between carriers on the pricing and ordering of services).

225. We also note that section 251(c)(2) requires interconnection that is "at least" equal in quality to that enjoyed by the incumbent LEC itself. This is a minimum requirement. Moreover, to the extent a carrier requests interconnection of superior or lesser quality than an incumbent LEC currently provides, the incumbent LEC is obligated to provide the requested interconnection arrangement if technically feasible. Requiring incumbent LECs to provide upon request higher quality interconnection than they provide themselves, subsidiaries, or affiliates will permit new entrants to compete with incumbent LECs by offering novel services that require superior interconnection quality. We also conclude that, as long as new entrants compensate incumbent LECs for the economic cost of the higher quality interconnection,[473] competition will be promoted.[474]

[473] *See infra*, Section VII.

[474] *See also* Section VII.E. (discussion of accommodation of interconnection).

V. ACCESS TO UNBUNDLED NETWORK ELEMENTS

A. Commission Authority to Identify Unbundled Network Elements

1. Background

226. Section 251(c)(3) imposes a duty on incumbent LECs to "provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252."[475] This section also requires incumbent LECs to provide these elements "in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service."[476]

227. Section 251(d)(1) provides that "the Commission shall complete all actions necessary to establish regulations to implement the requirements of" section 251 by August 8, 1996.[477] Section 251(d)(2) further provides that, "[i]n determining what network elements should be made available for purposes of subsection (c)(3), the Commission shall consider, at a minimum, whether (A) access to such network elements as are proprietary in nature is necessary; and (B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer."[478]

228. In the NPRM, we sought comment on our tentative conclusion that the 1996 Act requires the Commission to identify network elements that incumbent LECs are required to make available to requesting carriers on an unbundled basis under section 251(c)(3).[479]

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[475] 47 U.S.C. § 251(c)(3).

[476] *Id.*

[477] *Id.* at § 251(d)(1).

[478] *Id.* at § 251(d)(2).

[479] NPRM at para. 77.

2. Comments

229. The majority of parties who commented on this issue, including IXCs, potential local competitors, the Department of Justice, state commissions, incumbent LECs, cable interests, and NARUC, agree with our tentative conclusion that sections 251(d)(1) and 251(d)(2) obligate the Commission to identify network elements for purposes of subsection (c)(3).[480] BellSouth, in contrast, interprets section 251(c)(3) as requiring the Commission to identify network elements only when a state commission has failed to carry out its responsibilities under section 252, and the Commission assumes those responsibilities under section 252(e)(5).[481]

3. Discussion

230. We affirm our tentative conclusion in the NPRM that the 1996 Act requires the Commission to identify network elements that incumbent LECs must offer requesting carriers on an unbundled basis under section 251(c)(3). Section 251(d)(1) directs the Commission to establish rules implementing the requirements of section 251(c)(3). Further, section 251(d)(2) contemplates that, pursuant to this direction, the Commission will identify unbundled network elements. We conclude that neither the language in section 251(d), nor any other part of the 1996 Act, is reasonably susceptible to the interpretation advanced by BellSouth that our obligation to identify unbundled network elements arises only when we act under section 252(e)(5).

B. National Requirements for Unbundled Network Elements

1. Background

231. In the NPRM, we noted Congress's view that, when new entrants begin providing services in local telephone markets, it is unlikely they will own network facilities that completely duplicate those of incumbent LECs because of the significant investment and time required to build such facilities.[482] The statutory requirement imposed on incumbent LECs to provide access to unbundled network elements will permit new entrants to offer competing local services by purchasing from incumbents, at cost-based prices, access to

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[480] *See, e.g.*, AT&T comments at 3-16, reply at 16; MFS comments at 36; USTA comments at 20-22; Sprint comments at 21-22; Cable & Wireless comments at 17-19; Ameritech comments at 34; District of Columbia Commission comments at 21-22; ALTS comments at 24-26; NCTA comments at 35-40; DoJ comments at 8-15; TDS comments at 5-6; TCC comments at 11-13; Hyperion reply at 5; Minnesota Commission reply at 8; *accord* GTE comments at 24; NARUC comments at 32.

[481] BellSouth comments at 26-30.

[482] NPRM at para. 75 n.103 *citing* (Joint Explanatory Statement at 148).

elements which they do not already possess, unbundled from those elements that they do not need.[483]

232. It is possible that there will be sufficient demand in some local telephone markets to support the construction of competing local exchange facilities that duplicate most or even all of the elements of an incumbent LEC's network. In these markets new entrants will be able to use unbundled elements from the incumbent LEC to provide services until such time as they complete the construction of their own networks, and thus, no longer need to rely on the facilities of an incumbent to provide local exchange and exchange access services. It is also possible, however, that other local markets, now and even into the future, may not efficiently support duplication of all, or even some, of an incumbent LEC's facilities. Access to unbundled elements in these markets will promote efficient competition for local exchange services because, under the scheme set out in the 1996 Act, such access will allow new entrants to enter local markets by obtaining use of the incumbent LECs' facilities at prices that reflect the incumbents' economies of scale and scope.[484]

233. In the NPRM, we tentatively concluded that the Commission should identify a minimum number of elements that incumbent LECs must make available to requesting carriers on an unbundled basis.[485] We further tentatively concluded that section 252(e)(3) preserves a state's authority, during arbitration, to impose additional unbundling requirements beyond those we specify, as long as such requirements are consistent with the 1996 Act and our regulations.[486] Finally, we tentatively concluded that we have authority to identify additional or different unbundling requirements in the future, as we learn about changes in technology, the innovation of new services, and the necessities of competition.[487]

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[483] NPRM at paras. 75-76.

[484] For a further discussion of the differences between entry into local markets through access to unbundled elements and resale, *see infra*, Section V.H.

[485] NPRM at para. 77.

[486] NPRM at para. 78 and nn.105 & 106. Section 252(e) discusses a state commission's obligations regarding the approval or rejection of agreements between incumbent LECs and requesting telecommunications carriers for interconnection, services or network elements. Subparagraph (3) of this section specifically provides that a state commission is not prohibited "from establishing or enforcing other requirements of State law in its review of an agreement," as long as such requirements do not violate the terms of the statute. 47 U.S.C. § 252(e)(3). We further note that under section 252(f)(2) states may impose additional unbundling requirements during review of BOC statements of generally available terms and conditions. Section 252(f)(2) states that "(e)xcept as provided in section 253, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of such statement . . ." 47 U.S.C. § 252(f)(2).

[487] NPRM at para. 77.

2. Comments

234. A majority of the commenters addressing this issue support our tentative conclusion that we should identify a minimum list of network elements that incumbent LECs must offer upon request.[488] These commenters argue that, absent national rules, negotiations conducted under section 252 will not proceed as Congress intended, because incumbent LECs have no incentive to provide new entrants with facilities that will be used to compete against them.[489] They contend that a national list of required unbundled elements will hasten the development of local competition and decrease the costs of entry into local telephone markets.[490] For example, they argue that national unbundling requirements will allow carriers entering local markets on a regional or national scale to take advantage of economies of scale

[488] *See, e.g.*, AT&T comments at 3-18; MFS comments at 36; Sprint comments at 21-22; Time Warner comments at 44-45; Cable & Wireless comments at 17-19; MCI comments at 12-20; Continental comments at 16; Comcast comments at 5-9, 20-21; SCG comments at 1-4; NCTA comments at 35-39; LDDS comments at 16; TCC comments at 27; Frontier comments at 13; American Mobile Telecomm. Ass'n comments at 1-8; Omnipoint comments at 17-18; SBC comments at 4; NYNEX comments at 61-64; Ameritech comments at 34; U S West comments at 43-50; Ericsson comments at 2-3; District of Columbia Commission comments at 21; Connecticut Commission comments at 9; Ad Hoc Telecommunications Users Committee comments at 13-14; Citizens Utilities comments at 12; Missouri Commission comments at 7; Nortel comments at 9-11; Cincinnati Bell comments at 15; Ohio Consumers' Counsel comments at 17; North Carolina Commission comments at 21; Illinois Commission comments at 35-36; Washington Commission comments at 19; Municipal Utilities reply at 3-6; Joint Consumer Advocates reply at 7; Attorneys General reply at 6; ATSI reply at 8-9; *accord* Wyoming Commission reply at 23-25 (urging the Commission not to adopt a required list of unbundled elements more detailed than that adopted in Wyoming); *see also* Jones Intercable reply at 4-6 (the Commission should include in its national unbundling requirements a waiver procedure whereby incumbent LECs can demonstrate, in state mediations and arbitrations, their inability to meet a particular requirement in a particular situation); SBA comments at 14-15 (unbundling must go beyond three or four basic elements to maximize the ability of small competitors to fashion a competitive service offering); Hyperion comments at 7-8 (if we do not adopt national rules for unbundled elements small competitors could be hurt because they have fewer resources to negotiate agreements than incumbent LECs); TCA comments at 5-6 (rural incumbent LECs should only be required to offer four essential elements to requesting carriers because of differences between rural and urban areas, and in adopting unbundling requirements the Commission should ensure that rural LECs can meet their universal service obligations).

[489] AT&T comments at 3-12, reply at 9; Teleport comments at 5-10; DoJ comments at 8-15; Ad Hoc Telecommunications Users Committee comments at 17-21; Frontier comments at 14; TCC comments at 7-13; ACSI reply at 7 (if private negotiations were adequate there would be no need to create a statutory duty); *accord* PageNet reply at 5-6; Competition Policy Institute reply at 4-9; *see also* IDCMA reply at 8 (national unbundling requirements will facilitate the ability of new entrants to offer innovative services that would not be possible in the context of differing state requirements).

[490] *See, e.g.*, Continental comments at 16; Comcast comments at 20-22; DoJ comments at 8-15; Cable & Wireless comments at 17-19; TCC comments at 7-13; AT&T comments at 3-12; MCI comments at 4-6; Omnipoint comments at 17-18; ITIC comments at 2-5; Ind. Cable & Telecomm. Ass'n reply at 13; GST reply at 3-6; LDDS comments at 28; *accord, e.g.*, Ohio Commission comments at 31.

in network design,[491] diminish the likelihood of litigation over section 251(c)(3)'s requirements,[492] and provide the financial community with greater certainty as it assesses new entrants' business plans, thus enhancing the ability of new entrants to raise capital at affordable rates.[493]

235. Some commenters suggest that we interpret section 251(c)(3) in a way that maximizes unbundling by requiring incumbent LECs to provide all elements for which unbundling is technically feasible.[494] R. Koch argues that a detailed list of unbundled network elements will enable small entities to obtain the right combination of elements to allow them to offer specialized services.[495] Others suggest that we adopt national rules from which the states could deviate to address state-specific concerns. Parties contend that adopting such an approach (variously titled "safe harbors" or "preferred outcomes") would overcome the disincentives of incumbent LECs to provide network elements to competitors, and would allow states to pursue policies that promote competition more aggressively than the 1996 Act requires.[496] NTIA argues that minimum unbundling requirements would be underinclusive,

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[491] *See, e.g.*, NCTA comments at 35-39; DoJ comments at 8-15; AT&T comments at 3-18; MCI comments at 4-6; MCI reply at 32; SCG comments at 1-4; Comcast comments at 6; MFS comments at 36; Cable & Wireless comments at 17-19; Continental comments at 16; Omnipoint comments at 17-18; American Mobile Telcomm. Ass'n comments at 1-5; Ohio Commission comments at 30-31; Nortel comments at 9-11; IDCMA reply at 6-7; Attorneys General reply at 6.

[492] *See, e.g.*, DoJ comments at 8-15; MCI comments at 4-6; AT&T comments at 3-12; *accord* IDCMA reply at 4-6.

[493] MCI comments at 4-6; Continental comments at 16; ITIC comments at 2-5.

[494] DoJ comments at 19-20; *accord* Nextel comments at 9; Ad Hoc Telecommunications Users Committee reply at 6; ACTA comments at 18-19 (arguing that the Commission should require incumbent LECs to unbundle all network elements with exceptions handled through a waiver procedure if the LEC can show that such unbundling is anticompetitive or otherwise not in the public interest); *see also* ASCI comments at 32 (incumbent LECs should be required to provide elements that are not required by the Commission or the States).

[495] R. Koch comments at 2.

[496] *See, e.g.*, Teleport comments at 5-10, 33-34; ALTS comments at 2-4; PacTel comments at 40-44 (the Commission should identify a list of unbundled network elements that are sufficient but not mandatory to comply with section 251); PacTel reply at 2; TRACER reply at 5-6; *see also* Texas Commission comments at 14; Florida Commission comments at 16-17 (the Commission should identify categories rather than specific elements); Pennsylvania Commission reply at 8-21 (the Commission should adopt minimum requirements only where necessary; such requirements should be broad enough to accommodate variations among states because of local technical, demographic and geographic differences); Colorado Commission comments at 25 (the Commission should adopt recommendations for required network elements, and allow the states to identify them and experiment); Rural Tel. Coalition reply at 5 (the Commission should provide guidance to the states rather than imposing detailed unbundling requirements, which would not be consistent with the deregulatory objectives of the 1996 Act); Competition Policy Institute reply at 9; Alaska Tel. Ass'n comments 2-3.

but detailed unbundling rules would provide insufficient flexibility to the states. NTIA thus recommends that the Commission require incumbent LECs to unbundle five different network elements, and mandate that the states require further unbundling consistent with local conditions.[497]

236. BellSouth, U S West, SNET and COMAV argue against the Commission's identification of a minimum list of required unbundled network elements. These parties contend that the provision of unbundled elements should be left entirely to parties in voluntary negotiations in order to accommodate state variations and to avoid requests for elements that competitors do not need, but nevertheless request in an effort to raise incumbent LECs' costs. These parties contend that national unbundling requirements would: dampen technological development because minimum requirements would be set at the lowest common denominator, retard the development of competition by complicating the regulatory review process, and curtail the incentives of incumbent LECs to develop new technologies and services.[498] Maine Commission, *et al.*, Colorado Independent Telephone Association, Home Telephone Company, the Rural Telephone Coalition, and Illinois Independent Telephone Association argue that national unbundling requirements would be unworkable because of technological, demographic and geographic variations among states. They contend that such rules would be particularly harmful to rural areas, and rural incumbent LECs, and that states must have flexibility to determine unbundling requirements that address state-specific concerns.[499]

237. GVNW and the Minnesota Independent Coalition argue that national unbundling requirements imposed on small incumbent LECs should differ from those imposed on large, urban incumbent LECs because of differences in networks and operational procedures.[500] The Rural Telephone Coalition contends that unbundling requirements for small and rural LECs should be limited "to those instances where it is technically feasible, specifically needed by a competitor and economically reasonable."[501]

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[497] NTIA reply at 7-14.

[498] BellSouth comments at 16-19, 30-34; SNET comments at 18-24; U S West comments, Harris/Yao Report at 17; *see also* USTA reply at 10-13 (to encourage facilities-based competition the Commission should implement section 251(c)(3) in a way that provides parties with maximum flexibility); COMAV comments at 20 (because there is no clear definition of a network element, parties should be left to negotiate for what they want).

[499] Maine Commission, *et al.* comments at 2-10; Colorado Ind. Tel. Ass'n comments at 2; Home Tel. comments at 1-2; Illinois Ind. Tel. Ass'n comments at 1-2; *accord* Pennsylvania Commission reply at 15-16; Rural Tel. Coalition comments at 31-33.

[500] GVNW comments at 4-15; Minn. Ind. Coalition comments at 6-7.

[501] Rural Tel. Coalition comments at 31-33; *see also* GVNW comments at 21.

238. A broad range of parties support our tentative conclusion that states may impose additional unbundling requirements beyond those we specify as long as such requirements are consistent with the 1996 Act and our regulations.[502] A number of parties, including IXCs, state commissions, cable operators, CAPs, and new entrants, support our tentative conclusion that the Commission can establish additional or different unbundling requirements in the future as services, technology, and the needs of competing carriers evolve.[503] The Connecticut and Wyoming Commissions, in contrast, oppose this tentative conclusion. They argue that states should consider future unbundling requirements because they are more familiar with local networks and thus, will be able to address feasibility issues more efficiently.[504]

239. Yet another group of commenters, including incumbent LECs and state commissions, contend that future unbundling requirements should be determined by parties through voluntary negotiations.[505] Some argue that such negotiations should proceed under a Commission-mandated bona fide request (BFR) process.[506] USTA suggests that this process should include, for example, requirements regarding the timeliness of LEC responses to

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[502] *See, e.g.*, TCC comments at 11-13, 34; NARUC comments at 32; Texas Commission comments at 15-16; Cable & Wireless comments at 17-19; MCI comments at 12-20; AT&T comments at 12-18; District of Columbia Commission comments at 21; ALTS comments at 24-26; USTA comments at 23; Colorado Commission comments at 24; Sprint comments at 21-22; ACSI comments at 32-34; CompTel comments at 32; Alabama Commission comments at 18; Oregon Commission comments at 24; LDDS comments at 28; GCI comments at 11; Municipal Utilities comments at 28; Ohio Consumers' Counsel comments at 17; Telecommunications Resellers Ass'n comments at 32; TIA comments at 9; TDS comments at 13-14; California Commission comments at 26; Illinois Commission comments at 35-36; Washington Commission comments at 19; Citizens Utilities comments at 12; Nortel comments at 10; Wyoming Commission comments at 23-25; *accord* Ohio Commission comments at 30-31 (it must be clear in whatever forum a BOC request for interexchange authority is reviewed that BOCs must comply with the state unbundling requirements).

[503] AT&T comments at 15-18; Texas Commission comments at 14-15; MCI comments at 12-20; Continental comments at 19; ALTS comments at 24-26; Pennsylvania Commission comments at 23; LDDS comments at 28; North Carolina Commission comments at 22; SBC comments at 4, 31; Oregon Commission comments at 2; Cable & Wireless comments at 17-19; Comcast comments at 19-21; *accord* CompTel comments at 40 (Commission should establish expedited procedures to permit carriers to request that the Commission identify additional elements); Sprint comments at 21-22 (future unbundling requirements can be identified both by the Commission and the states); NCTA comments at 37-38 (Commission should not leave to negotiations the identification of additional unbundled elements); TCC comments at 34 (unless the Commission states that it can adopt further unbundling requirements in the future, incumbent LECs will claim they need only provide the elements originally identified by the Commission).

[504] Connecticut Commission comments at 9; Wyoming Commission comments at 23-25.

[505] *See, e.g.*, Ameritech comments at 34-35; NYNEX comments at 61-64; Bell Atlantic comments at 15-20; ACSI comments at 33; USTA comments at ii; Ohio Commission comments at 32; GTE comments at 28 (impossible to determine in advance every element for which it is technically feasible to unbundle because such a determination must consider the service for which the element will be used and other issues); SBC reply at 18-19; New Hampshire Commission, *et al.* reply at 23.

[506] *See, e.g.*, Ameritech comments at 34-35; ASCI comments at 33; Ohio Commission comments at 32; SBC reply at 18-19.

requests, and commitments by requesting carriers to purchase requested elements and bear the cost of developmental efforts.[507] Bell Atlantic and SBC argue that a BFR process would clarify the duties of incumbent LECs and requesting carriers so that neither engage in gamesmanship,[508] prohibit sham requests intended to delay BOC entry into the in-region, interLATA market,[509] assist arbitrations by requiring the development of a record before the arbitrations commence,[510] and eliminate waste caused by regulatory requirements to unbundle "theoretical network components."[511]

240. A number of potential local competitors oppose identification of unbundled elements in the future by means of voluntary negotiations and a BFR process. In addition, they oppose the criteria offered by a number of incumbent LECs that would be used to identify future unbundling requirements in the context of the BFR process.[512] For example, AT&T argues that the factors in the BFR process proposed by USTA would impose anticompetitive reciprocity requirements and delays.[513] MCI and Sprint oppose USTA's proposal because it would require new entrants to commit to purchasing elements before they know the terms, including prices, under which the LEC will provide such elements.[514] MCI contends that, in a BFR process, LECs should be required to provide an up-to-date inventory of facilities with all information necessary to determine technical feasibility. Conversely, Sprint argues that it is reasonable to ask new entrants to provide technical information and projected demand quantities.[515]

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[507] USTA comments at 14-16.

[508] Both Bell Atlantic and SBC assert that they have developed items for carriers that were never actually ordered. Bell Atlantic comments at 17-20; SBC reply at 18-19.

[509] Bell Atlantic comments at 17-20.

[510] Bell Atlantic comments at 17-20; Bell Atlantic reply at 7.

[511] Bell Atlantic comments at 17-20; Bell Atlantic reply at 7.

[512] CompTel comments at 41; AT&T reply at 16; MCI reply at 23-30; LDDS reply at 11-12; ALTS reply at 32-34; Sprint reply at 18; Hyperion reply at 5-6; *see also* CFA/CU reply at 22.

[513] AT&T reply at 16.

[514] MCI reply at 23-30; Sprint reply at 18.

[515] MCI reply at 23-30; Sprint reply at 18.

3. Discussion

241 We adopt our tentative conclusion and identify a minimum list of unbundled network elements that incumbent LECs must make available to new entrants upon request. We believe the procompetitive goals of section 251(c)(3) will best be achieved through the adoption of such a list. As discussed above,[516] we believe that negotiations and arbitrations will best promote efficient, rapid, and widespread new entry if we establish certain minimum national unbundling requirements. As the Department of Justice argues, there is "no basis in economic theory or in experience to expect incumbent monopolists to quickly negotiate arrangements to facilitate disciplining entry by would-be competitors, absent clear legal requirements to do so."[517] Ad Hoc Telecommunications Users Committee notes that "[h]istorically, the [incumbent LECs] have had strong incentives to resist, and have actively resisted, efforts to open their networks to users, competitors, or new technology-driven applications of network technology."[518]

242. National requirements for unbundled elements will allow new entrants, including small entities, seeking to enter local markets on a national or regional scale to take advantage of economies of scale in network design. If fifty states were to establish different unbundling requirements, new entrants, including small entities, could be denied the benefits of scale economies in obtaining access to unbundled elements. National requirements will also: reduce the number of issues states must consider in arbitrations, thereby facilitating the states' ability to conduct such proceedings; reduce the likelihood of litigation regarding the requirements of section 251(c)(3) and the costs associated with such litigation; and provide financial markets with greater certainty in assessing new entrants' business plans, thus enhancing the ability of new entrants, including small entities, to raise capital. In addition, to the extent the Commission assumes a state's arbitration authority under section 252(e)(5), national requirements for unbundled elements will help the Commission to conclude such proceedings expeditiously.[519]

243. We reject the alternative option of developing an exhaustive list of required unbundled elements, to which states could not add additional elements, on the grounds that

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[516] *See supra*, Section V.B.

[517] DoJ comments at 8-15; *accord* Ad Hoc Telecommunications Users Committee comments at 17-21 (incumbent monopolists in the telecommunications industry have a long history of resisting the facilitation of competition, noting experiences with customer premises equipment (CPE) interconnection, local exchange access for long distance carriers, and the FCC's *Computer II* and *Computer III* proceedings).

[518] Ad Hoc Telecommunications Users Committee comments at 17; *see also infra*, Section VII.

[519] *See supra*, Sections II.A, II.B.

such a list would not necessarily accommodate changes in technology, and it would not provide states the flexibility they need to deal with local conditions.

244. We also reject the proposal advanced by several parties that we should adopt non-binding national guidelines for unbundled elements that states would not be required to enforce. The parties asserting that differences between incumbent LEC networks militate against the adoption of national standards provide few, if any, specific examples of what those differences are. In addition, they fail to articulate persuasively why those differences are significant enough to weigh against the adoption of national requirements.[520] Accordingly, and as previously discussed,[521] we conclude that any differences that may exist among states are not sufficiently great to overcome the procompetitive benefits that would result from establishing a minimum set of binding national rules.[522] Moreover, we believe the authority granted the states in section 252(e)(3), as well as our existing rules which set forth a process by which incumbent LECs can request a waiver of the requirements we adopt here, will provide the necessary flexibility in our rules to permit states and parties to accommodate any truly unique state conditions that might exist.[523] Accordingly, we adopt our tentative conclusion that states may impose additional unbundling requirements pursuant to section 252(e)(3), as long as such requirements are consistent with the 1996 Act and our regulations.

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[520] The Florida Commission argues that we should not require incumbent LECs to offer a 4-wire ISDN loop as an unbundled element because some incumbents in Florida do not offer ISDN. Florida Commission comments at 16-17. Our rules accommodate the concern raised by the Florida Commission because they require requesting carriers to pay for the costs of obtaining access to unbundled network elements. Accordingly, if a requesting carrier seeks a 4-wire ISDN loop from an incumbent LEC that does not employ such an element, the requesting carrier will have to pay for it pursuant to our pricing rules. *See infra*, Section VII. Maine Commission *et. al.* argues generally that embedded networks have evolved over time and most network architectures are different. *See* Maine Commission *et. al.* comments at 2-4. They do not explain, however, why national rules could not accommodate such differences. PacTel argues that local loops may be made of copper or fiber optics, or they may be digital or analog, and thus, the Commission cannot determine the elements that should be unbundled without dictating network technologies. PacTel comments at 42-44. We do not believe that the adoption of national rules identifying a minimum list of unbundled network elements will lead to regulation determining network architectures. To the contrary, our rules will provide new entrants with the opportunity to obtain access to a number of different variants of a particular element, and thus they will facilitate the ability of the market to dictate network architectures. For example, in this order we identify a number of different types of local loops as network elements. *See infra*, Section V.J. Incumbent LECs will be required to provision such elements only if they are requested by new entrants. It is unlikely that new entrants will request and pay for elements unless they believe that there is likely to be some market demand for the services that can be provided over such elements.

[521] *See supra*, Sections II.A & II.B.

[522] *See* DoJ comments at 8-15 (the differences between states are not significant enough to "militate against" national requirements); AT&T comments at 14-18 (there are no conditions unique to one state, hence, all variations can be accommodated in national rules that include a waiver process for unusual conditions.)

[523] We further observed in the NPRM that under the voluntary negotiation paradigm set out in section 252, parties to such negotiations can agree to provide unbundled network elements that differ from those identified by the Commission. *See* NPRM at para. 78 (*citing* 47 U.S.C. § 252(a)).

This conclusion is consistent with the statement in section 252(e)(3) that "nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement."[524]

245. We find the arguments presented by parties opposing national rules for unbundled elements unpersuasive especially in light of the 1996 Act's strong procompetitive goals. For example, in light of the incumbent LECs' disincentives to negotiate with potential competitors, we believe national rules will promote competition by making the bargaining strength of potential competitors, including small entities, more equal. We are not persuaded that national rules will discourage incumbent LECs from developing new technologies and services; to the contrary, based on our experience in other telecommunications markets, we believe that competition will stimulate innovation by incumbent LECs. We also believe that any failure of incumbent LECs to develop new technologies or services would have a less significant adverse effect on competition in local exchange markets than a failure to adopt national rules. Nor is it likely that new entrants will seek unnecessary elements merely to raise incumbents' costs because such new entrants must pay the costs associated with unbundling. In addition, the pricing standard of section 252(d)(1)(B), which allows incumbent LECs to receive not only their costs but also a reasonable profit on the provision of unbundled elements, should further alleviate concerns regarding sham requests.[525]

246. We adopt our tentative conclusion that, in addition to identifying unbundled network elements that incumbent LECs must make available now, we have authority to identify additional, or perhaps different, unbundling requirements that would apply to incumbent LECs in the future. The rapid pace and ever changing nature of technological advancement in the telecommunications industry makes it essential that we retain the ability to revise our rules as circumstances change.[526] Otherwise, our rules might impede technological change and frustrate the 1996 Act's overriding goal of bringing the benefits of competition to consumers of local phone services. For the same reasons that we believe we should adopt national unbundling requirements, as discussed above,[527] we reject the proposal that future unbundling requirements should be determined solely by the parties to voluntary negotiations.

247. Finally, we have considered the economic impact of our rules in this section on small incumbent LECs. For example, we have considered the argument advanced by the

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[524] 47 U.S.C. § 252(e)(3).

[525] *See infra*, Section VII.

[526] *See* 47 U.S.C. § 254(c)(1).

[527] *See also supra*, Sections II.A, II.B.

Rural Telephone Coalition that national unbundling requirements would be unworkable because of technological, demographic and geographic variations between states. We do not adopt the Rural Telephone Coalition's position, however, because we believe that the minimum list we adopt can be applied to a broad range of networks across geographic regions and any differences between incumbent LEC networks in different states are not sufficiently great to overcome the procompetitive benefits of a minimum list of required unbundled network elements. We have also considered the argument advanced by GVNW that unbundling requirements imposed on small incumbent LECs should differ from those imposed on large, urban incumbent LECs because of differences in networks and operational procedures. We reject GVNW's proposal for two reasons. First, some small incumbent LECs may not experience any problems complying with our unbundling rules. Second, we note that section 251(f) of the 1996 Act provides relief to certain small LECs from our regulations implementing section 251.

248. Although we have concluded in this proceeding that we can best achieve the procompetitive aims of the 1996 Act by adopting minimum national unbundling requirements for arbitrated agreements, the 1996 Act envisions that the states will administer those requirements through approval of negotiated agreements and arbitrations.[528] Through arbitrations and review of negotiated agreements the states will add to their significant expertise on issues relating to the provision of access to unbundled network elements. We encourage state commissions to take an active role in evaluating the success or difficulties in implementing any of our requirements. The Commission intends to draw on the expertise developed by the states when we review and revise our rules as necessary.

C. Network Elements

1. Background

249. Section 3(29) of the Communications Act defines the term "network element" to mean both "a facility or equipment used in the provision of a telecommunications service" and "features, functions, and capabilities that are provided by means of such facility or equipment."[529] Such features, functions, and capabilities include "subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service."[530] The Joint Explanatory Statement explains that "[t]he term 'network element' was included to describe

[528] 47 U.S.C. § 252.

[529] 47 U.S.C. § 153(29).

[530] *Id.*

the facilities, such as local loops, equipment, such as switching, and the features, functions, and capabilities that a local exchange carrier must provide for certain purposes under other sections of the conference agreement."[531]

250. In the NPRM, we noted that we could identify "network elements" in two ways. First, we could identify a single "network element," and then further subdivide it into additional "elements." Alternatively, we could provide that, once we identify a particular "network element," it cannot be further subdivided. In the NPRM, we asked for comment on these two approaches.[532]

251. We observed in the NPRM that the statutory definition of a "network element" draws a distinction between a "facility or equipment used in the provision of a telecommunications service," and the "service" itself.[533] We asked for comment on the meaning of this distinction in general, with respect to requirements for unbundling, and in connection with specific unbundled elements. We noted that the definition of a network element, *i.e.*, a facility, function, or capability, is not dependent on the particular types of services that are provided by means of the element (*e.g.*, interstate access, intrastate local exchange), and asked whether a carrier purchasing access to an element is obligated, pursuant to the definition, to provide all services typically carried or provided by that element.[534]

2. Comments

252. A number of parties, including potential local competitors and state commissions, support the adoption of a flexible method for identifying network elements. They argue that a flexible method is necessary to accommodate future changes in technology.[535] NYNEX, the Texas Public Utility Counsel, and GVNW contend that, to accommodate such changes, we

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[531] Joint Explanatory Statement at 116.

[532] NPRM at para. 83.

[533] NPRM at para. 51, (*citing* 47 U.S.C. § 153(29)).

[534] NPRM at para. 84.

[535] District of Columbia Commission comments at 21-22; MFS comments at 36; Cable & Wireless comments at 17-19; Ericsson comments at 3; Alabama Commission comments at 19; ACSI comments at 30; Ohio Commission comments at 33; Florida Commission comments at 18; Hyperion comments at 18; GST comments at 16; LDDS comments at 29; Ohio Consumers' Counsel comments at 18; Nextel comments at 8; Time Warner comments at 44-45 (the Commission should identify elements in a way that gives parties maximum flexibility); *but see* Ad Hoc Telecommunications Users Committee comments at 15-16 (define elements narrowly to give maximum flexibility to offer innovative services).

should not define elements in rigid terms, or by specific technologies, but rather by general function.[536]

253. In contrast, PacTel argues that the Commission should not require the unbundling of elements beyond those noted in other parts of the statute, and thus we need not develop a flexible method for identifying network elements.[537] BellSouth contends that, while flexibility is preferable, parties should be able to decide "whatever level of granularity makes sense for them" in voluntary negotiations.[538]

254. A number of parties assert that we should define a network element by its functionality and capabilities, and not as separate services.[539] MCI asserts that elements can be used to provide a number of different services and thus are not service-specific. MCI further argues that elements should include all of their embedded features and functionalities so carriers can use them to provide both existing services that are already offered by incumbent LECs, and new ones that currently are not.[540] GTE contends that incumbent LECs use a wide variety of databases, functions and capabilities in their networks, but the definition of a network element is limited to those databases, functions and capabilities that are employed in the transmission, routing, or other provision of a telecommunications service. Thus, GTE would exclude from the definition features used in conjunction with, but not in the actual provision of, a telecommunications service as well as features used to provide information or other non-telecommunications services.[541]

255. AT&T asserts that vertical features (*i.e.*, custom calling or Custom Local Area Signaling Services ("CLASS")) are network elements because they constitute a function or a capability and are not by nature a jurisdictionally distinct service that can only be provided on

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[536] NYNEX comments at 61-64; GVNW comments at 17-18; Texas Public Utility Counsel comments at 8-9.

[537] PacTel comments at 44-45; *see also* MECA comments at 28 (the Commission should not define network elements flexibly); COMAV comments at 20 (because a network element cannot be defined, the parties should decide what facilities they want during negotiations).

[538] BellSouth comments at 30-31.

[539] BellSouth comments at 30-31,62; MFS comments at 36-37, 65-66; Cable & Wireless comments at 26-27; MCI comments at 27-28; Lincoln Tel. comments at 7; GST comments at 6; Sprint comments at 22-23; Illinois Commission comments at 36-37; *see also* Intermedia comments at 12-13 (the Commission should not draw artificial distinctions between facilities and services as an unbundled element is not useful if it cannot support an end-to-end service).

[540] MCI comments at 27-28; *accord* Sprint comments at 22-23.

[541] GTE comments at 25-27; GTE reply at 16.

either an inter- or intra-state basis.[542] A number of incumbent LECs argue in opposition that vertical features are not physical elements of the incumbent LEC networks, but are retail services. They further argue that, if we allow new entrants to purchase such features as unbundled elements, we would nullify section 251(c)(4).[543] Ameritech also contends that vertical features are often priced significantly above cost, and for this reason carriers should not be allowed to obtain such services as unbundled elements.[544] Sprint claims that electronic interfaces (*e.g.*, administrative databases) used for the provision of unbundled elements can be considered network elements themselves.[545] A number of incumbent LECs, however, variously argue that such administrative databases, operator services, directory assistance, or electronic gateways are not network elements because new entrants do not need access to their features and functions to provide a telecommunications service. Moreover, these parties dispute claims that their features and functions are physical elements of the incumbents' networks. These parties characterize them as services. They further contend that it is not technically feasible or would be prohibitively expensive to provide access to such databases or electronic gateways and that requiring incumbent LECs to provision them as unbundled elements would both risk the security of those systems and reveal proprietary information.[546]

256. Commenters set forth a variety of views on the issue of whether the services or facility distinction requires carriers using an unbundled element to offer all services provided with that element. CompTel and MECA contend that the statute imposes such a requirement.[547] Sprint argues that a carrier purchasing an unbundled switch and loop must provide local exchange and exchange access services.[548] USTA and the Department of Justice contend that carriers must purchase exclusive access to an unbundled loop, and thus, must

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[542] AT&T reply at 15-16.

[543] Ameritech reply at 24 n.38; PacTel reply at 25; Bell Atlantic reply at 6; USTA comments at 23-26; GTE comments at 25-26. Section 251(c)(4) provides that incumbent LECs have the duty "to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers that are not telecommunications carriers." 47 U.S.C. § 251(c)(4). For a further discussion of the relationship between sections 251(c)(3) and 251(c)(4), *see infra*, Section V.H.

[544] Ameritech reply at 24 n.38.

[545] Sprint reply at 26.

[546] Ameritech reply at 19-20; U S West reply at 27; USTA reply at 17-18; NYNEX reply at 33-34 (while electronic gateways are not network elements, it is reasonable to request access to them); PacTel reply at 21-22; BellSouth reply at 24-30.

[547] Comptel comments at 24; MECA comments at 31.

[548] Sprint comments at 22-23.

provide all services carried over it.[549] The Department of Justice notes that this interpretation is required by practicality, and is consistent with industry practice at the time the 1996 Act was adopted.[550] The Department of Justice also notes that a local loop is a nontraffic sensitive facility, and thus it would be difficult to apportion the cost of such a facility among a number of different users.[551]

257. In contrast, a number of potential local competitors, as well as the Ohio and Oregon Commissions, contend that, according to the language of the 1996 Act, a carrier is not required to offer all services that an element makes possible. These parties variously argue that such a requirement would be unenforceable and anticompetitive, would stifle creativity in service offerings, and is contrary to the market-based policies inherent in the 1996 Act.[552]

3. Discussion

258. We adopt the concept of unbundled elements as physical facilities of the network, together with the features, functions, and capabilities associated with those facilities. Carriers requesting use of unbundled elements within the incumbent LEC's network seek in effect to purchase the right to obtain exclusive access to an entire facility, or use of some feature, function or capability of that element. For some elements, especially the loop, the requesting carrier will purchase exclusive access to the element for a specific period, such as on a monthly basis. Carriers seeking other elements, especially shared facilities such as common transport, are essentially purchasing access to a functionality of the incumbent's facilities on a minute-by-minute basis. This concept of network elements, as discussed *infra* at section V.G., does not alter the incumbent LEC's physical control or ability or duty to repair and maintain network elements.

259. We conclude that we should identify a particular facility or capability, for example, as a single network element, but allow ourselves and the states (where appropriate) the discretion to further identify, within that single facility or capability, additional required network elements. Thus, for example, in this proceeding, we identify the local loop as a

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[549] USTA comments at 56-66; DoJ comments at 35-47.

[550] DoJ comments at 35-47.

[551] DoJ comments at 35-47.

[552] MCI comments at 27-28; ACTA comments at 17; LDDS comments at 30; MFS comments at 36-37,65-66; Cable & Wireless comments at 26-27; Frontier comments at 9; Ohio Commission comments at 33; Oregon Commission comments at 27; *accord* Citizens Utilities comments at 9.

single network element.[553] We also ask the states to evaluate, on a case-by-case basis, whether to require access to subloop elements, which can be facilities or capabilities within the local loop.[554] We agree with those commenters that argue that identifying a particular facility or capability as single network element, but allowing such elements to be further subdivided into additional elements, will allow our rules (as well as the states) to accommodate changes in technology, and thus better serve the interests of new entrants and incumbent LECs, and the procompetitive purposes of the 1996 Act.[555] We are not persuaded by PacTel's argument that it is unnecessary for our rules to permit the identification of additional elements, beyond those specifically referenced in parts of the 1996 Act, because our rules must conform to the definition of a network element, and they must accommodate changes in technology. Nor are we persuaded by BellSouth that identification of network elements should be left solely to the parties. We reject this approach for the same reasons that led us to adopt national unbundling requirements.[556] Finally, we agree with NYNEX and others that we should not identify elements in rigid terms, but rather by function.

260. We agree with MCI and MFS that the definition of the term network element includes physical facilities, such as a loop, switch, or other node, as well as logical features, functions, and capabilities that are provided by, for example, software located in a physical facility such as a switch.[557] We further agree with MCI that the embedded features and functions within a network element are part of the characteristics of that element and may not be removed from it. Accordingly, incumbent LECs must provide network elements along with all of their features and functions, so that new entrants may offer services that compete with those offered by incumbents as well as new services.

261. The only limitation that the statute imposes on the definition of a network element is that it must be "used in the provision of a telecommunications service."[558] Incumbent LECs provide telecommunications services not only through network facilities that serve as the basis for a particular service, or that accomplish physical delivery, but also through information (such as billing information) that enables incumbents to offer services on

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[553] *See infra*, Section V.J.

[554] *Id.*

[555] *See, e.g.*, District of Columbia Commission comments at 21-22; MFS comments at 36.

[556] *See supra*, Sections II.A, II.B, V.B.

[557] MCI comments at 27-28; MFS comments at 36-37.

[558] 47 U.S.C. § 153(29).

a commercial basis to consumers. Our interpretation of the term "provision" finds support in the definition of the term "network element." That definition provides that the type of information that may constitute a feature or function includes information "used in the transmission, routing or other provision of a telecommunications service."[559] Since "transmission" and "routing" refer to physical delivery, the phrase "or other provision of a telecommunications service" goes beyond mere physical delivery.

262. We conclude that the definition of the term "network element" broadly includes all "facilit[ies] or equipment used in the provision of a telecommunications service," and all "features, functions, and capabilities that are provided by means of such facility or equipment, including subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service."[560] This definition thus includes, but is not limited to, transport trunks, call-related databases, software used in such databases, and all other unbundled elements that we identify in this proceeding.[561] The definition also includes information that incumbent LECs use to provide telecommunications functions commercially, such as information required for pre-ordering,[562] ordering, provisioning,[563] billing, and maintenance and repair services. This interpretation of the definition of the term "network element" will serve to guide both the Commission and the states in evaluating further unbundling requirements beyond those we identify in this proceeding.

263. We disagree with those incumbent LECs which argue that features that are sold directly to end users as retail services, such as vertical features, cannot be considered elements within incumbent LEC networks.[564] If we were to conclude that any functionality sold directly to end users as a service, such as call forwarding or caller ID, cannot be defined as a network element, then incumbent LECs could provide local service to end users by selling them unbundled loops and switch elements, and thereby entirely evade the unbundling

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[559] *Id.*

[560] *Id.*

[561] *See infra*, V.J.

[562] *See infra*, Section V.J.5, for a definition of pre-ordering services.

[563] The term "provisioning" includes installation.

[564] *See infra*, Section V.J, discussing vertical features and noting that the Illinois Commission has rejected arguments that vertical features cannot be incorporated into network elements.

requirement in section 251(c)(3).[565] We are confident that Congress did not intend such a result. We further reject Ameritech's argument that we should not permit carriers to use unbundled elements to provide services that are priced above cost at retail. We agree with those parties that argue that competition will not develop if we find that supracompetitive pricing is protected by the 1996 Act.[566]

264. Moreover, we agree with those commenters that argue that network elements are defined by facilities or their functionalities or capabilities, and thus, cannot be defined as specific services. A single network element could be used to provide many different services. For example, a local loop can be used to provision inter- and intrastate exchange access services, as well as local exchange services. We conclude, consistent with the findings of the Ohio and Oregon Commissions, that the plain language of section 251(c)(3) does not obligate carriers purchasing access to network elements to provide all services that an unbundled element is capable of providing or that are typically offered over that element.[567] Section 251(c)(3) does not impose any service-related restrictions or requirements on requesting carriers in connection with the use of unbundled elements.

D. Access to Network Elements

1. Background

265. In the NPRM, we observed that section 251(c)(3) requires incumbent LECs to provide "access" to network elements "on an unbundled basis."[568] We interpreted these terms to mean that incumbent LECs must provide carriers with the functionality of a particular element, separate from the functionality of other elements, and must charge a separate fee for each element. We sought comment on this interpretation and any alternative interpretations.[569]

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[565] *See, e.g.*, CompTel reply at 20-22.

[566] *See, e.g.*, DoJ reply at 23-31; CompTel reply at 13-22. For a discussion of the argument that allowing new entrants to purchase vertical features as unbundled elements would nullify section 251(c)(4), *see infra*, Section V.H.

[567] Ohio Commission comments at 33; Oregon Commission comments at 27.

[568] 47 U.S.C. § 251(c)(3).

[569] NPRM at para. 86.

2. Comments

266. A number of parties agree with our interpretation that the phrase "access to network elements on an unbundled basis" means that incumbent LECs must provide access to the functionality of different elements on a separate basis, and must charge separate fees.[570] In contrast, PacTel argues that the 1996 Act does not require the provision of an element's functionality, but merely requires incumbent LECs to provide elements in a way that allows carriers to combine them and offer a telecommunications service. PacTel nevertheless acknowledges that agreements will likely allow for the provision of an element's functionality.[571]

267. Bell Atlantic and USTA argue that "access" to unbundled elements can only be achieved by interconnecting, under the terms of section 251(c)(2), a requesting carrier's facilities to the facilities of the incumbent LEC at a particular point.[572]

3. Discussion

268. We conclude that we should adopt our proposed interpretation that the terms "access" to network elements "on an unbundled basis" mean that incumbent LECs must provide the facility or functionality of a particular element to requesting carriers, separate from the facility or functionality of other elements, for a separate fee. We further conclude that a telecommunications carrier purchasing access to an unbundled network facility is entitled to exclusive use of that facility for a period of time, or when purchasing access to a feature, function, or capability of a facility, a telecommunications carrier is entitled to use of that feature, function, or capability for a period of time. The specified period may vary depending on the terms of the agreement between the incumbent LEC and the requesting carrier. The ability of other carriers to obtain access to a network element for some period of time does not relieve the incumbent LEC of the duty to maintain, repair, or replace the unbundled network element.[573] We reject PacTel's interpretation of the terms quoted above

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[570] BellSouth comments at 34; MFS comments at 41; Cable & Wireless comments at 26-27; MCI comments at 12-20; Ericsson comments at 4; District of Columbia Commission comments at 22; Nextel comments at 8; USTA comments at 26; Colorado Commission comments at 27; Pennsylvania Commission comments at 24-25; GTE comments at 27; Florida Commission comments at 19; GST comments at 19.

[571] PacTel comments at 44-47.

[572] Bell Atlantic comments at 13; USTA comments at 62-63; *see also* GTE comments at 74-79; Letter from Antoinette Cook Bush, Counsel for Ameritech, to William F. Caton, Secretary, FCC, July 10, 1996; *cf.* DoJ comments at 45 (the requirement in section 251(c)(2) that carriers must offer either local exchange or exchange access services does not apply to the carriers offering services using unbundled elements).

[573] We clarify that title to unbundled network elements will not shift to requesting carriers.

because it is inconsistent with our definition of the term network element (*i.e.*, an element includes all features and functions embedded in it). Moreover, to the extent that PacTel's argument suggests that the 1996 Act does not require unbundled elements to be provisioned in a way that would make them useful, we find that its statutory interpretation is inconsistent with the statute's goal of providing new entrants with realistic means of competing against incumbents.

269. We further conclude that "access" to an unbundled element refers to the means by which requesting carriers obtain an element's functionality in order to provide a telecommunications service. Just as section 251(c)(2) requires "interconnection . . . at any technically feasible point," section 251(c)(3) requires "access . . . at any technically feasible point."[574] We conclude, based on the terms of sections 251(c)(2), 251(c)(3), and 251(c)(6), that an incumbent LEC's duty to provide "access" constitutes a duty to provide a connection to a network element independent of any duty imposed by subsection (c)(2). Thus, such "access" must be provided under the rates, terms, and conditions that apply to unbundled elements.

270. Specifically, section 251(c)(6) provides that incumbent LECs must provide "physical collocation of equipment necessary for interconnection *or* access to unbundled network elements."[575] The use of the term "or" in this phrase means that interconnection is different from "access" to unbundled elements. The text of sections 251(c)(2) and (c)(3) leads to the same conclusion. Section 251(c)(2) requires that interconnection be provided for "the transmission and routing of telephone exchange service and exchange access."[576] Section 251(c)(3), in contrast, requires the provision of access to unbundled elements to allow requesting carriers to provide "a telecommunications service."[577] The term "telecommunications service" by definition includes a broader range of services than the terms "telephone exchange service and exchange access."[578] Subsection (c)(3), therefore, allows unbundled elements to be used for a broader range of services than subsection (c)(2) allows for interconnection. If we were to conclude that "access" to unbundled elements under subsection (c)(3) could only be achieved by means of interconnection under subsection (c)(2),

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[574] 47 U.S.C. §§ 251(c)(2), 251(c)(3).

[575] 47 U.S.C. § 251(c)(6) (emphasis added).

[576] 47 U.S.C. § 251(c)(2).

[577] 47 U.S.C. § 251(c)(3).

[578] *See* 47 U.S.C. § 153(16),(46),(47).

we would be limiting, in effect, the uses to which unbundled elements may be put, contrary to the plain language of section 251(c)(3) and standard canons of statutory construction.[579]

E. Standards Necessary to Identify Unbundled Network Elements

1. Background

271. In the NPRM, we raised a number of issues concerning the meaning of technical feasibility in connection with unbundled elements.[580] We also sought comment on the extent to which the Commission should consider the standards set forth in section 251(d)(2) in identifying required unbundled elements, and on how we ought to interpret these standards.[581] Subsection (d)(2) provides that "(i)n determining what network elements should be made available for purposes of subsection (c)(3), the Commission shall consider, at a minimum" the following two standards, "whether (A) access to such network elements as are proprietary in nature is necessary; and (B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer."[582] We further asked about the relationship between the latter standard and the requirement in section 251(c)(3) that carriers be able to use unbundled elements to provide a telecommunications service.[583]

2. Comments

272. Commenters raised two issues in interpreting the standard relating to whether access to proprietary elements is necessary. The first issue relates to whether incumbent LECs are required to provide proprietary information contained in network elements (*e.g.*, Customer Premises Network Information contained in databases); and the second to whether incumbent LECs are required to provide network elements which are proprietary (*e.g.*, elements with proprietary protocols.) As to the first issue, Ameritech, SBC, BellSouth, PacTel, Texas Statewide Telephone Cooperative, Inc. and the Wyoming Commission argue that the Commission should protect proprietary information contained in incumbent LECs'

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[579] *See, e.g.*, DoJ comments at 35-47.

[580] NPRM at paras. 87-88. *See supra*, Section IV.D. for a discussion of these issues.

[581] NPRM at para. 88.

[582] 47 U.S.C. § 251(d)(2).

[583] NPRM at para. 90.

networks.[584] BellSouth and PacTel further argue that we should prohibit access to elements containing proprietary information unless new entrants meet a heavy burden demonstrating need.[585]

273. As to the second issue, a few incumbent LECs argue generally that the Commission should require unbundling of proprietary network elements only under certain limited circumstances.[586] USTA argues that, if we do not grant incumbent LECs the ability to deny their competitors access to proprietary elements, we will stifle the incumbents' incentives to provide innovative services and thereby inhibit competition.[587] PacTel contends that we should not require unbundling of elements with proprietary protocols unless a new entrant demonstrates a heavy burden of need.[588] Ameritech and GTE assert that we should require unbundling of proprietary elements only when the failure to do so would prevent a carrier from offering a service.[589] GTE adds that, if an element is available from other sources, unbundling should not be mandated. Moreover, according to GTE, if incumbent LECs do make proprietary elements available, they should be compensated for the use of their intellectual property.[590] In contrast, the Consumer Federation of America asserts that, if we define proprietary elements broadly and require new entrants to demonstrate need before they may obtain them, we would significantly inhibit new entry.[591]

274. Most BOCs and GTE contend that the general obligation imposed by section 251(c)(3) is limited by section 251(d)(2)'s standard of whether the failure to provide access to network elements would impair the ability of carriers to offer a service. They argue that this standard requires incumbent LECs to provide unbundled elements only where the failure to do

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[584] Ameritech comments at 34; SBC comments at 36-37; Texas Statewide Telephone Cooperative, Inc. comments at 5-6; BellSouth comments at 35; PacTel comments at 40-44; Wyoming Commission at 24-26.

[585] BellSouth comments at 35; PacTel comments at 40-44.

[586] Ameritech comments at 34-35, reply at 11; BellSouth comments at 35; PacTel comments at 40-44; GTE comments at 30-31; GTE reply at 16; *see also* USTA comments at 27-28.

[587] USTA comments at 27-28.

[588] PacTel comments at 40-44, reply at 16-17; *see also* BellSouth comments at 35.

[589] Ameritech comments at 34-35; Ameritech reply at 11; GTE comments at 30-31; GTE reply at 16.

[590] GTE comments at 30-31.

[591] CFA/CU reply at 25; *see also* Letter from Bruce K. Cox, Government Affairs Director, AT&T to William F. Caton, Secretary, FCC, July 11, 1996 (AT&T July 11 *Ex Parte*).

so would prohibit a carrier from providing a service.[592] Commenters offer two different standards by which we may determine whether a carrier may require an incumbent LEC to provide an unbundled element in order for the carrier to offer a service. First, GTE, PacTel and BellSouth argue that unbundling is not required if a carrier can obtain, or provide itself, the requested element on reasonable terms and conditions.[593] The burden of meeting this standard, according to GTE, falls on the requesting carrier.[594] If a carrier fails to meet this standard, but continues to request an element, BellSouth claims, that carrier must meet a heavier burden.[595] Second, PacTel and Ameritech argue that, if a carrier can offer a service by purchasing the underlying service from the incumbent LEC and reselling it, pursuant to section 251(c)(4), the carrier is not impaired in its ability to offer the service. Thus, they argue, new entrants cannot use unbundled elements exclusively to offer the same services that new entrants can obtain from an incumbent LEC under the resale provision.[596]

275. The Department of Justice and Comptel reject the BOCs' argument that the general obligation imposed by section 251(c)(3) is limited by consideration of whether the failure to provide access to an element would impair a carrier's ability to offer a service. They argue that the term "impair" does not mean "prevent," and that we should interpret this standard to mean that a carrier's ability to provide a service is impaired if obtaining an element from a third party is more costly than obtaining that same element from the incumbent. They also dispute the incumbent LECs' argument that the "impair" language in this standard means that new entrants cannot exclusively use unbundled elements to provide the same or similar retail services that an incumbent offers. They argue that, if similarity is enough to prevent the use of unbundled elements, then section 251(c)(3) would be nullified. They further contend that, under the BOCs' theory, incumbents could prevent new entry through the use of unbundled elements by offering unbundled loops, switching, and other elements as retail services.[597] CompTel also argues that this standard refers back to the first standard in section 251(d)(2) and means that incumbents must provide proprietary elements

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[592] BellSouth comments at 31-35; GTE comments at 30-31, GTE reply 16-17; Ameritech comments at 25-33; PacTel comments at 40-44, reply at 16-17; SBC comments at 36-37.

[593] GTE comments at 30-31; PacTel comments at 40-44, reply at 17 n.38; BellSouth comments at 35.

[594] GTE reply at 17.

[595] BellSouth comments at 35.

[596] BellSouth comments at 31-33; Ameritech comments at 25-31; *see infra*, Section V.H, for a further discussion of the relationship between sections 251(c)(3) and 251(c)(4).

[597] *See, e.g.*, DoJ comments at 48-51, reply at 23-31; CompTel reply at 13-22; *see also*, AT&T reply at 13-20.

only if the failure to do so would prevent a requesting carrier from offering a telecommunications service.[598]

276. AT&T argues that the plain language of section 251(c)(3) means that incumbent LECs must provide unbundled elements that new entrants request, and that the factors in section 251(d)(2) are minimum considerations and not threshold requirements.[599] BellSouth and SBC agree that the "at minimum" language in section 251(d)(2) means the Commission can consider other factors not enumerated in the statute in determining what elements incumbent LECs must offer to requesting carriers.[600] Similarly, several commenters suggest that, in determining which elements must be offered, we should consider a number of additional factors, including, for example, whether there is a demonstrable market demand for a particular element.[601]

3. Discussion

277. Sections 251(c)(3) and 251(d)(2) set forth standards the Commission must consider in identifying unbundled network elements that incumbent LECs must make available in connection with arbitrations before state commissions and BOC statements of generally available terms and conditions. These standards guide the unbundling requirements we issue today as well as any different or additional unbundling requirements we may issue in the future. Similarly, the states must follow our interpretation of these standards to the extent they impose additional unbundling requirements during arbitrations or subsequent rulemaking proceedings.

278. Section 251(c)(3) requires incumbent LECs to provide requesting carriers with "nondiscriminatory access to network elements on an unbundled basis at any technically feasible point."[602] We find that this clause imposes on an incumbent LEC the duty to provide all network elements for which it is technically feasible to provide access on an unbundled basis. Because section 251(d)(1) requires us to "establish regulations to implement the

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[598] CompTel comments at 24-25; *see also* AT&T July 11 *Ex Parte*.

[599] *See* AT&T reply at 13-20.

[600] BellSouth comments at 17, 26; SBC comments at 18.

[601] *See, e.g.*, SBC comments at 25-37, 84-99; NYNEX comments at 61-64; Ameritech comments at 34; USTA comments at 23; *see also* Texas Public Utility Counsel comments at 9-11; CBT comments at 15; Nortel comments at 6; U S West comments at 45-47; ASCI comments at 32.

[602] 47 U.S.C. § 251(c)(3).

requirements of" section 251(c)(3), we conclude that we have authority to establish regulations that are coextensive with the duty section 251(c)(3) imposes on incumbent LECs.

279. Section 251(d)(2), however, sets forth standards that do not depend on technical feasibility. More specifically, section 251(d)(2) provides that, in identifying unbundled elements, the Commission shall "consider, at a minimum," whether access to proprietary elements is necessary (the "proprietary standard"), and whether requesting carriers' ability to provide services would be impaired if the desired elements were not provided by an incumbent LEC (the "impairment standard.") Thus, section 251(d)(2) gives us the authority to decline to require incumbent LECs to provide access to unbundled network elements at technically feasible points if, for example, we were to conclude that access to a particular proprietary element is not necessary. To give effect to both sections 251(c)(3) and 251(d)(2), we conclude that the proprietary and impairment standards in section 251(d)(2) grant us the authority to refrain from requiring incumbent LECs to provide all network elements for which it is technically feasible to provide access on an unbundled basis. The authority we derive from section 251(d)(2) is limited, however, by our interpretation of these standards, and this section, as set forth below.

280. We agree with BellSouth, SBC, and others that the plain import of the "at minimum" language in section 251(d)(2) requires us, in identifying unbundled network elements, to "consider" the standards enumerated there, as well as other standards we believe are consistent with the objectives of the 1996 Act. We conclude that the word "consider" means we must weigh the standards enumerated in section 251(d)(2) in evaluating whether to require the unbundling of a particular element.

281. We further conclude that, in evaluating whether to impose additional unbundling requirements during the arbitration process, states must apply our definition of technical feasibility, discussed above in section IV.D. A determination of technical feasibility would then create a presumption in favor of requiring an incumbent LEC to provide the element. If providing access to an unbundled element is technically feasible, a state must then consider the standards set forth in section 251(d)(2), as we interpret them below. Similarly, the Commission will apply this analysis where we must arbitrate specific unbundling issues, under section 252(e)(5), and in future rulemaking proceedings that may consider additional or possibly different unbundling requirements.

282. Section 251(d)(2)(A) requires the Commission and the states to consider whether access to proprietary elements is "necessary." "Necessary" means, in this context, that an element is a prerequisite for competition. We believe that, in some instances, it will be "necessary" for new entrants to obtain access to proprietary elements (*e.g.*, elements with proprietary protocols or elements containing proprietary information), because without such

elements, their ability to compete would be significantly impaired or thwarted.[603] Thus, as an initial matter, we decline to adopt a general rule, as suggested by some incumbents, that would prohibit access to such elements, or make access available only upon a carrier demonstrating a heavy burden of need. We acknowledge that prohibiting incumbents from refusing access to proprietary elements could reduce their incentives to offer innovative services. We are not persuaded, however, that this is a sufficient reason to prohibit generally the unbundling of proprietary elements, because the threat to competition from any such prohibition would far exceed any costs to consumers resulting from reduced innovation by the incumbent LEC.[604] Moreover, the procompetitive effects of our conclusion generally will stimulate innovation in the market, offsetting any hypothetical reduction in innovation by the incumbent LECs.

283. We further conclude that, to the extent new entrants seek additional elements beyond those we identify herein, section 251(d)(2)(A) allows the Commission and the states to require the unbundling of such elements unless the incumbent can prove to a state commission that: (1) the element is proprietary, or contains proprietary information that will be revealed if the element is provided on an unbundled basis; and (2) a new entrant could offer the same proposed telecommunications service through the use of other, nonproprietary unbundled elements within the incumbent's network. We believe this interpretation of section 251(d)(2)(A) will best advance the procompetitive purposes of the 1996 Act. It allows new entrants to obtain proprietary elements from incumbent LECs where they are necessary to offer a telecommunications service, and, at the same time, it gives incumbents the opportunity to argue, before the states or the Commission, against unbundling proprietary elements where a new entrant could offer the same service using other unbundled elements in the incumbent's network. We decline to adopt the interpretation of section 251(d)(2)(A) advanced by some incumbents that incumbent LECs need not provide proprietary elements if requesting carriers can obtain the requested proprietary element from a source other than the incumbent. Requiring new entrants to duplicate unnecessarily even a part of the incumbent's network could generate delay and higher costs for new entrants, and thereby impede entry by competing local providers and delay competition, contrary to the goals of the 1996 Act.

284. We further conclude that, to the extent new entrants do not need access to all the proprietary information contained within an element in order to provide a telecommunications service, the Commission and the states may take action to protect the proprietary information.

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[603] As noted *supra*, Section V.E.2, a number of commenters argue that section 251(d)(2)(A) requires us to protect proprietary information, such as CPNI information, contained in network elements. We intend to treat issues regarding CPNI in our rulemaking proceeding on CPNI information. *Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, CC Docket No. 96-115, Notice of Proposed Rulemaking, FCC 96-221 (rel. May 17, 1996).

[604] In this proceeding, for example, we are requiring incumbent LECs to provide the local switching element which includes vertical features that some carriers contend are proprietary. *See infra*, Section V.J.

For example, to provide a telecommunications service, a new entrant might need access to information about a particular customer that is in an incumbent LEC database. The database to which the new entrant requires access, however, may contain proprietary information about all of the incumbent LECs' customers. In this circumstance, the new entrant should not have access to proprietary information about the incumbent LEC's other customers where it is not necessary to provide service to the new entrant's particular customer. Accordingly, we believe the Commission and the states have the authority to protect the confidentiality of proprietary information in an unbundled network element, such as a database, where that information is not necessary to enable a new entrant to offer a telecommunications service to its particular customer.

285. Section 251(d)(2)(B) requires us to consider whether the failure to provide access to an element would "impair" the ability of a new entrant to provide a service it seeks to offer. The term "impair" means "to make or cause to become worse; diminish in value."[605] We believe, generally, that an entrant's ability to offer a telecommunications service is "diminished in value" if the quality of the service the entrant can offer, absent access to the requested element, declines and/or the cost of providing the service rises. We believe we must consider this standard by evaluating whether a carrier could offer a service using other unbundled elements within an incumbent LEC's network. Accordingly, we interpret the "impairment" standard as requiring the Commission and the states, when evaluating unbundling requirements beyond those identified in our minimum list, to consider whether the failure of an incumbent to provide access to a network element would decrease the quality, or increase the financial or administrative cost of the service a requesting carrier seeks to offer, compared with providing that service over other unbundled elements in the incumbent LEC's network.

286. We decline to adopt the interpretation of the "impairment" standard advanced by most BOCs and GTE. Under their interpretation, incumbent LECs must provide unbundled elements only when the failure to do so would prevent a carrier from offering a service. We also reject the related interpretations that carriers are not impaired in their ability to provide a service if they can obtain elements from another source, or if they can provide the proposed service by purchasing the service at wholesale rates from a LEC. In general, and as discussed above, section 251(c)(3) imposes on incumbent LECs the obligation to offer on an unbundled basis all network elements for which it is technically feasible to provide access. We believe the plain language of section 251(d)(2), and the standards articulated there, give us the discretion to limit the general obligation imposed by subsection 251(c)(3), but they do not require us to do so. The standards set forth in section 251(d)(2) are minimum considerations that the Commission shall take into account in evaluating unbundling requirements. Accordingly, we conclude that the statute does not require us to interpret the "impairment"

[605] *See* Random House College Dictionary 665 (rev. ed. 1984).

standard in a way that would significantly diminish the obligation imposed by section 251(c)(3).

287. The interpretation advanced by most of the BOCs and GTE, described above, means that, if a requesting carrier could obtain an element from a source other than the incumbent, then the incumbent need not provide the element. We agree with the reasoning advanced by some of the commenters that this interpretation would nullify section 251(c)(3) because, in theory, any new entrant could provide all of the elements in the incumbents' networks. Congress made it possible for competitors to enter local markets through the purchase of unbundled elements because it recognized that duplication of an incumbent's network could delay entry, and could be inefficient and unnecessary.[606] The interpretation proffered by the BOCs and GTE would inhibit new entry and thus restrict the potential for meaningful competition, which would undermine the procompetitive goals of the 1996 Act. As a practical matter, if it is more efficient and less costly for new entrants to obtain network elements from a source other than an incumbent LEC, new entrants will likely pursue the more efficient and less costly approach. Additionally, as discussed above at section IV.C, we believe that allowing incumbent LECs to deny access to unbundled elements on the grounds that an element is equivalent to a service available at resale would lead to impractical results, because incumbents could completely avoid section 251(c)(3)'s unbundling obligations by offering unbundled elements to end users as retail services.[607]

288. Finally, we decline at this time to adopt any of the additional criteria proposed by commenters. We conclude that none of the additional factors suggested by commenters enhances our ability to identify unbundled network elements consistent with the procompetitive goals of the 1996 Act.[608] These additional considerations would limit unbundling requirements or make it administratively more difficult for new entrants to obtain additional unbundled elements beyond those identified in our minimum list of required elements. For example, we believe that the proposal that new entrants must provide detailed estimates regarding projected market demand is not necessary for incumbent LECs to efficiently plan for network growth.

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[606] *See* LDDS comments at 37, reply at 14-15.

[607] *See infra*, Section V.H, for a further discussion on the relationship between sections 251(c)(3) and 251(c)(4).

[608] *See, e.g.*, Texas Public Utility Counsel comments at 9-11; Cincinnati Bell comments at 15; Nortel comments at 6 (the diversion of research and development efforts to facilities that new entrants do not really want will stifle innovation); SBC comments at 25-37, 84-99.

F. Provision of a Telecommunications Service Using Unbundled Network Elements

1. Background

289. Section 251(c)(3) provides that an incumbent LEC must provide access to "unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide" a telecommunications service.[609] In the NPRM, we sought comment on the meaning of this requirement.

2. Comments

290. The Illinois Commission and Texas Public Utility Counsel, as well as a number of potential local competitors, argue that incumbent LECs cannot limit the nature of requests for required elements, restrict the sale of those elements or the manner in which carriers use them,[610] impose requirements on the use of unbundled elements, or require the purchase of elements that carriers do not need.[611] The Texas Public Utility Counsel contends that carriers may combine unbundled elements with any technically-compatible equipment.[612] AT&T argues that incumbent LECs should be prohibited from separating elements that are ordered in combination, or from varying the definition of an unbundled element based on the services a carrier seeks to offer (absent the consent of the requesting carrier). AT&T and Comptel also argue that, in order to enable new entrants to offer competing services, incumbent LECs must perform the functions necessary to combine elements, and they must do so in any technically feasible manner requested by a new entrant.[613] According to Comptel, incumbent LECs must provide the operational and back office systems necessary for requesting carriers to purchase and combine network elements, otherwise the new entrants' ability to compete will be

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[609] 47 U.S.C. § 251(c)(3).

[610] Illinois Commission comments at 36-38; CompTel reply at 21; Cable & Wireless reply at 20; LDDS comments at 40 (the statute grants carriers the right to use unbundled elements to offer any telecommunications service); *accord* GCI reply at 11.

[611] LDDS comments at 40; AT&T comments at 27; Cable & Wireless reply at 20; Texas Public Utility Counsel comments at 8-9; *see also* NCTA comments at 40-41 (new entrants must have access to elements that are necessary to provide a telecommunications service).

[612] Texas Public Utility Counsel comments at 8-9.

[613] AT&T comments at 27; CompTel reply at 23-24; *see also* MCI comments at 23.

impaired.[614] Sprint contends that this provision requires incumbents to offer different facilities and services in connection with a particular element, depending on the service a requesting carrier seeks to offer.[615] The Florida Commission argues, however, that, if a new entrant needs a particular variation of an element to offer a service, that element should be treated as distinct. This means, for example, that, if a requesting carrier seeks a local loop with a specific kind of conditioning, that loop should be treated as a distinct element from loops with other kinds of conditioning.[616]

291. NYNEX contends that incumbent LECs are not obligated to connect unbundled elements either to each other or to new entrants' facilities, and that the text of section 251(c)(3) requires requesting carriers to do the combining.[617] BellSouth argues that section 251(c)(3) requires requesting carriers to identify network elements with sufficient specificity so that their characteristics and appropriate uses can be defined. BellSouth contends that section 251(c)(3) prohibits carriers from requesting elements to provide cable or information services.[618]

3. Discussion

292. Under section 251(c)(3), incumbent LECs must provide access to "unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide" a telecommunications service.[619] We agree with the Illinois Commission, the Texas Public Utility Counsel, and others that this language bars incumbent LECs from imposing limitations, restrictions, or requirements on requests for, or the sale or use of, unbundled elements that would impair the ability of requesting carriers to offer telecommunications services in the manner they intend. For example, incumbent LECs may not restrict the types of telecommunications services requesting carriers may offer through unbundled elements, nor may they restrict requesting carriers from combining elements with

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[614] CompTel comments at 38. Back office systems include the administrative means by which incumbent LECs commercially provision telecommunications services to consumers. Thus, they include the means by which incumbent LECs accept orders for services, respond to requests for repairs, etc.

[615] Sprint comments at 30.

[616] Florida Commission comments at 22.

[617] NYNEX reply at 19.

[618] BellSouth comments at 36; *see also* PacTel reply at 16-17.

[619] 47 U.S.C. § 251(c)(3).

any technically compatible equipment the requesting carriers own. We also conclude that section 251(c)(3) requires incumbent LECs to provide requesting carriers with all of the functionalities of a particular element, so that requesting carriers can provide any telecommunications services that can be offered by means of the element. We believe this interpretation provides new entrants with the requisite ability to use unbundled elements flexibly to respond to market forces, and thus is consistent with the procompetitive goals of the 1996 Act.

293. We agree with AT&T and Comptel that the quoted text in section 251(c)(3) bars incumbent LECs from separating elements that are ordered in combination, unless a requesting carrier specifically asks that such elements be separated. We also conclude that the quoted text requires incumbent LECs, if necessary, to perform the functions necessary to combine requested elements in any technically feasible manner either with other elements from the incumbent's network, or with elements possessed by new entrants, subject to the technical feasibility restrictions discussed below. We adopt these conclusions for two reasons. First, in practice it would be impossible for new entrants that lack facilities and information about the incumbent's network to combine unbundled elements from the incumbents' network without the assistance of the incumbent. If we adopted NYNEX's proposal, we believe requesting carriers would be seriously and unfairly inhibited in their ability to use unbundled elements to enter local markets. We therefore reject NYNEX's contention that the statute requires requesting carriers, rather than incumbents, to combine elements. We do not believe it is possible that Congress, having created the opportunity to enter local telephone markets through the use of unbundled elements, intended to undermine that opportunity by imposing technical obligations on requesting carriers that they might not be able to readily meet.

294. Second, given the practical difficulties of requiring requesting carriers to combine elements that are part of the incumbent LEC's network, we conclude that section 251(c)(3) should be read to require incumbent LECs to combine elements requested by carriers. More specifically, section 251(c)(3) provides that incumbent LECs must provide unbundled elements "in a manner that allows requesting carriers to combine them" to provide a telecommunications service. We believe this phrase means that incumbents must provide unbundled elements in a way that *enables* requesting carriers to combine them to provide a service. The phrase "allows requesting carriers to combine them," does not impose the obligation of physically combining elements exclusively on requesting carriers. Rather, it permits a requesting carrier to combine the elements if the carrier is reasonably able to do so. If the carrier is unable to combine the elements, the incumbent must do so.[620]

[620] In this context, we conclude that the term "combine" means connecting two or more unbundled network elements in a manner that would allow a requesting carrier to offer the telecommunications service it seeks to offer.

295. Our conclusion that incumbent LECs must combine unbundled elements when so requested is consistent with the method we have adopted to identify unbundled network elements. Under our method, incumbents must provide, as a single, combined element, facilities that could comprise more than one element. This means, for example, that, if the states require incumbent LECs to provision subloop elements, incumbent LECs must still provision a local loop as a single, combined element when so requested, because we identify local loops as a single element in this proceeding.[621]

296. We decline to adopt the view proffered by some parties that incumbents must combine network elements in any technically feasible manner requested. This proposal necessarily means that carriers could request incumbent LECs to combine elements that are not ordinarily combined in the incumbent's network. We are concerned that, in some instances, this could potentially affect the reliability and security of the incumbent's network, and the ability of other carriers to obtain interconnection, or request and use unbundled elements. Accordingly, incumbent LECs are required to perform the functions necessary to combine those elements that are ordinarily combined within their network, in the manner in which they are typically combined. Incumbent LECs are also required to perform the functions necessary to combine elements, even if they are not ordinarily combined in that manner, or they are not ordinarily combined in the incumbent's network, provided that such combination is technically feasible,[622] and such combination would not undermine the ability of other carriers to access unbundled elements or interconnect with the incumbent LEC's network. Incumbent LECs must prove to state commissions that a request to combine particular elements in a particular manner is not technically feasible, or that the request would undermine the ability of other carriers to access unbundled elements and interconnect because they have the information to support such a claim.

297. We agree with Sprint and the Florida Commission, respectively, that in some cases incumbent LECs may be required to provision a particular element in different ways, depending on the service a requesting carrier seeks to offer; and, in other instances, where a new entrant needs a particular variant of an element to offer a service, that element should be treated as distinct from other variants of the element. This means, for example, that we will treat local loops with a particular type of conditioning[623] as distinct elements that are different

[621] *See infra*, Section V.J.

[622] As discussed in Section IV, effects on network reliability and security are factors to be considered in determining technical feasibility.

[623] For an explanation of what conditioning of a local loop means *see infra*, Section V.J.1.

from loops with other types of conditioning.[624] As discussed below, we agree with CompTel that incumbent LECs must provide the operational and support systems necessary for requesting carriers to purchase and combine network elements. Incumbent LECs use these systems to provide services to their own end users, and new entrants similarly must have access to them to provide telecommunications services using unbundled elements.[625] Finally, we agree with BellSouth that requesting carriers must specify to incumbent LECs the network elements they seek before they can obtain such elements on an unbundled basis. We do not believe, however, that it will always be possible for new entrants to do this either before negotiations (or arbitrations) begin, or before they end, because new entrants will likely lack knowledge about the facilities and capabilities of a particular incumbent LEC's network. We further believe that incumbent LECs must work with new entrants to identify the elements the new entrants will need to offer a particular service in the manner the new entrants intend.

G. Nondiscriminatory Access to Unbundled Network Elements and Just, Reasonable and Nondiscriminatory Terms and Conditions for the Provision of Unbundled Network Elements

1. Background

298. Section 251(c)(3) requires incumbent LECs to provide requesting carriers "nondiscriminatory access to network elements on an unbundled basis . . . on rates, terms, and conditions that are just, reasonable, and nondiscriminatory."[626] In the NPRM, we sought comment on whether we should adopt minimum national requirements governing the terms and conditions for the provision of unbundled network elements. We further asked what rules could ensure that the terms and conditions for access to unbundled network elements are just, reasonable and nondiscriminatory, and how we should enforce such rules. In particular, we sought comment on whether we should adopt uniform national rules governing provisioning, service, maintenance, technical standards and nondiscrimination safeguards in connection with the provision of unbundled network elements. We also asked whether we should consider any of the terms and conditions applicable to the provision of access to unbundled elements in evaluating BOC applications to provide in-region interLATA services under section 271(b).[627]

2. Comments

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[624] Florida Commission comments at 22.

[625] Incumbent LEC back-office systems are discussed in Section V.J.

[626] 47 U.S.C. § 251(c)(3).

[627] NPRM at paras. 79, 89.

299. The Florida, Illinois and Washington Commissions, as well as a number of potential competitors, argue that we should adopt national standards governing the terms and conditions for the provision of unbundled elements to ensure that new entrants obtain nondiscriminatory access to elements. These parties contend that incumbent LECs have the incentive and ability to delay the provisioning of unbundled elements, to provide lower quality services to new entrants, and engage in other anticompetitive tactics. They further argue that it would be a tremendous barrier to entry if new entrants had to negotiate the terms and conditions for the provision of unbundled elements on a state by state basis, especially in light of the incumbent LECs' superior bargaining power. Accordingly, they argue that we should establish requirements mandating nondiscriminatory performance for ordering, installation, provisioning, maintenance, repair and billing.[628] Cable & Wireless argues that access to unbundled network elements on a nondiscriminatory basis will assist small carriers in entering local exchange markets because small carriers cannot afford the capital necessary to build competing infrastructure.[629]

300. The parties arguing for national standards governing the terms and conditions for the provision of unbundled elements disagree, however, on the types of requirements we should establish. Teleport and Intermedia Communications argue that incumbent LECs should be required to provide installation, service and maintenance for new entrants pursuant to the same standards they do for themselves.[630] NCTA, MCI, and Cable & Wireless argue that we should adopt specific standards, including time limits, for implementation of requests for unbundled elements.[631] MCI, AT&T, Frontier and the Washington and Texas Commissions further argue that incumbents should be required to provide access to unbundled elements that

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[628] MFS comments at 16-17, 41; AT&T comments at 33-39; AT&T reply at 21-22; TCC comments at 54-60; Cable & Wireless comments at 36-37; MCI comments at 20-27; Ericsson comments at 3; Continental comments at 19; Comcast comments at 24-25; Intermedia comments at 3-13; Florida Commission comments at 21; Illinois Commission comments at 40; Washington Commission comments at 21-22; Sprint comments at 17-19; GST comments at 17; Teleport reply at 26-29; Nextel comments at 9-10; NCTA comments at 44-46; Colorado Commission comments at 27 (some general terms and conditions would be useful); Texas Commission comments at 15-16.

[629] Cable & Wireless comments at 23; *see also* SBA comments at 14-15 (the Commission should establish terms and conditions for the provision of unbundled elements, for otherwise, the provision of unbundled elements to smaller competitors would be rendered useless).

[630] Teleport comments at 25, 33-34, reply at 26-29; Intermedia comments at 3-13.

[631] NCTA comments at 44-46; MCI comments at 24-30; Cable & Wireless comments at 36-37; *see also* Intermedia comments at 3-6.

is equal in quality to what the incumbents provide themselves.[632] PageNet argues that the "equal-in-quality" standard does not mean that treatment should be identical where different technology is used, but that the quality should be the same.[633] Time Warner and Continental argue that we should subject incumbents to reasonable provisioning standards.[634] The District of Columbia Commission argues that we should adopt a general rule that the incumbent must offer the same services under the same terms and conditions to all similarly situated customers.[635] Finally, Lincoln Tel. argues that the Commission should adopt the terms and conditions established in our Expanded Interconnection and Open Network Architecture proceedings.[636]

301. A number of incumbents, including Bell Atlantic, SBC, GVNW and NYNEX, contend that we should not set specific rules, including time limits, for installation, service, maintenance and repair because incumbent LECs have different operational and administrative systems, and are subject to different state standards.[637] GVNW further notes that specific intervals would impose an uneconomic burden on rural LECs because it would force them to purchase excess capacity in advance.[638] The Washington and Florida Commissions, as well as SBC, GVNW, NYNEX, and AT&T, argue that we should adopt a general nondiscrimination standard and require incumbent LECs to provide network elements to new entrants according to the same installation, service, and maintenance intervals that apply to LEC customers and services. The Florida Commission observes that state requirements vary by state, and therefore states are in the best position to evaluate disputes relating to installation, service and

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[632] MCI comments at 23; AT&T comments at 33-39 (the Commission has imposed similar requirements in other instances where the BOCs provide competitive services that rely on monopoly inputs controlled by the BOCs); Texas Commission comments at 15-16; Washington Commission comments at 21; Frontier comments at 18; *accord* MFS comments at 17, 41; *see also* ACSI comments at 51; Ohio commission comments at 31.

[633] PageNet comments at 6-9.

[634] Time Warner comments at 44-45; Continental comments at 20.

[635] District of Columbia Commission comments at 19-22.

[636] Lincoln Tel. comments at 9.

[637] Bell Atlantic comments at 31; SBC comments at 37-38; GVNW comments at 17; NYNEX reply at 32-33; *see also* Colorado Commission comments at 24-27 (certain technical standards may not be economically reasonable in all areas because of differences in technology, demography and geography).

[638] GVNW comments at 17.

maintenance intervals.[639] NYNEX explains that implementation of such a general standard will vary based on technology, service offering, and geographic area, and therefore states and negotiating parties are in the best position to determine specific implementation responsibilities.[640] TCC argues that we should adopt a general standard prohibiting incumbents from favoring their own retail operations and that consumers should not be able to perceive a difference between services provided by incumbents and those provided by new entrants.[641] Bell Atlantic contends that, while we should adopt a general nondiscrimination standard, this standard should not incorporate the standards that apply to LEC customers and services because many unbundled elements are new services with which incumbent LECs have no experience.[642] The Pennsylvania Commission argues that the terms and conditions adopted herein should accommodate local variations.[643]

302. A number of potential competitors argue that, to achieve nondiscriminatory provision of unbundled elements, incumbent LECs must be required to provide pre-ordering, ordering, provisioning, billing, and maintenance and repair, and other services on a "real time" basis, which can only be done through the use of electronic ordering interfaces.[644] CompTel argues that incumbents provide these types of services to themselves by automated means and therefore they should be available to competing providers through automation.[645] AT&T contends that manual interfaces for the provision of unbundled elements would cause overwhelming delays that would inhibit the ability of new entrants to compete.[646] AT&T further argues that we should establish national standards for gateways that would interface with incumbent LEC electronic ordering systems. According to AT&T, the Commission

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[639] Washington Commission comments at 21-22; Florida Commission comments at 21; SBC comments at 37-38; AT&T comments at 33-39; AT&T reply at 21-22; NYNEX reply at 32-33; *accord* TCC comments at 54-60; Intermedia comments at 3-13.

[640] NYNEX reply at 32-33.

[641] TCC comments at 54-60.

[642] Bell Atlantic comments at 31.

[643] Pennsylvania Commission comments at 25.

[644] Sprint comments at 17-22; Teleport reply at 26-29; AT&T comments at 33-39; AT&T reply at 21-22; TCC comments at 54-60; MCI comments at 23. *See infra*, Section V.J.5, summarizing the Electronic Communications Implementation Committee's definition of an electronic interface.

[645] CompTel reply at 23-24.

[646] AT&T comments at 33-39, reply at 21-22.

should oversee the development of such gateways and incumbent LECs should be required to provide electronic ordering systems with the same level of quality that they provide in such systems for themselves.[647] AT&T, MCI, and Sprint argue that we should establish deadlines for the development of electronic interface systems, and a deadline for implementation of such systems.[648] TCC argues that incumbents should not delay provision of unbundled elements until automated interfaces are developed.[649] Lincoln Tel. contends, however, that we should not require small and medium size incumbent LECs to provide electronic ordering interfaces.[650]

303. Some potential competitors argue that we should impose additional terms and conditions for the provision of unbundled elements, including all test and turn-up procedures, nondiscriminatory access to incumbent LEC databases, around-the-clock provisioning support, and processes that would make it as easy and transparent for a customer to switch local carriers as it currently is to switch long distance carriers. These parties argue that we should require incumbents to continue to participate in cooperative industry practices, such as the Centralized Message Distribution System, and that new entrants should have access to such systems.[651] Sprint and NCTA contend that, because incumbent LECs can obtain access to a new entrant's CPNI, through access to signaling and databases, we should prohibit incumbent LECs from using a new entrant's proprietary information for marketing purposes.[652] MFS argues that we should set minimum technical standards in connection with the provision of unbundled elements, and thus we should require incumbent LECs to offer new entrants any type of loop facilities (*e.g.*, loop upgrades and conditioning) and transmission capabilities available within its network.[653] MCI contends we should adopt national technical standards in connection with the means to combine elements and access to information and that such technical standards should meet Bellcore and ANSI requirements. MCI further contends that,

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[647] AT&T comments at 33-39; *accord* TCC comments at 54-60.

[648] AT&T comments at 33-39; Sprint comments at 17-22 (the Commission should direct the industry to develop standards for electronic bonding within 12 months, and should require incumbents to implement these standards within 12 months); MCI comments at 20-27; MCI reply at 28-30.

[649] TCC comments at 54-60.

[650] Lincoln Tel. comments at 9.

[651] *See, e.g.*, MCI comments at 23; AT&T comments at 33-39; Continental comments at 23.

[652] Sprint comments at 17-22; NCTA comments at 43.

[653] MFS reply at 18-19.

to overcome incumbent LEC incentives to engage in dilatory tactics, the Commission should require incumbent LECs to implement the terms and conditions for the provision of unbundled elements within six months after the end of negotiations or arbitrations. MCI contends that this requirement will hasten the development of the technical standards and operational support systems that are necessary to provide unbundled elements in a nondiscriminatory manner.[654] AT&T argues that the terms and conditions for pre-ordering, ordering, provisioning, billing, and maintenance and repair should be the same under sections 251(c)(3) and 251(c)(4).[655]

304. PacTel and USTA argue that we should not establish national standards for installation, service, and maintenance and repair in connection with the provision of unbundled elements. PacTel contends that we should merely establish guidelines. USTA argues that the 1996 Act does not authorize the Commission to establish such standards, and the advantages of rules for the provision of unbundled elements are more than offset by the impingement on voluntary negotiations.[656] USTA and the California Commission further argue that we should not adopt technical standards to insure interoperability between networks because this function is performed by standards bodies, and the differences in operational and administrative systems between LEC networks result in different provisioning and service intervals. They further argue that any requirements on technical standards would hinder efficiency.[657] PacTel argues that there is very little opportunity for discrimination against competing providers because few elements are dedicated to specific new entrants. PacTel further contends that we should not establish rules to insure nondiscriminatory provision of network elements because such rules will encourage litigation and the 1996 Act is self-effectuating. PacTel argues that we should consider claims of discrimination on a case-by-case basis through adjudication of complaints.[658] Both PacTel and USTA argue that the terms and conditions for the provision of unbundled elements should be resolved by private parties,

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[654] MCI comments at 20-27; MCI reply at 28-30.

[655] AT&T comments at 33-39.

[656] PacTel comments at 40-44; USTA comments at 21-22; *see also* GTE comments at 24.

[657] USTA comments at 21-22; California Commission comments at 26-28; *see also* Colorado Commission comments at 27 (national technical standards are a laudable goal but should be carefully considered because of differences between incumbent LEC networks); Oregon commission comments at 24.

[658] PacTel comments at 30, 50-52; *accord* GVNW comments at 23-24 (requiring incumbent LECs to provide equivalent service is a negative incentives approach; the FCC will achieve nondiscriminatory provision of unbundled elements if it insures that incumbents are adequately compensated for such services).

the states, and industry fora.[659] The California Commission argues that the states are best situated to determine the terms and conditions for the provision of unbundled elements because they can best accommodate unique circumstances. The California Commission also argues that the Commission can determine whether the terms and conditions for the provision of unbundled elements are appropriate when the Commission evaluates BOC section 271 applications.[660]

305. Teleport argues that we must impose some method of enforcing terms and conditions applicable to unbundled elements, otherwise such regulations will not achieve their desired effect.[661] Thus, Teleport and a number of other potential competitors argue that we should impose penalties on incumbent LECs who fail to meet our standards.[662] MFS and NCTA argue that new entrants should be entitled to damages, and NCTA further contends that new entrants should be entitled to a reduction in rates for violations of our rules.[663] AT&T and Intermedia Communications argue that incumbents should be required to file reports demonstrating compliance with the terms and conditions established herein.[664] AT&T and others specifically request that the Commission require each incumbent LEC to file quarterly reports identifying the time intervals under which the incumbents have performed ordering, provisioning, and maintenance functions for competitors and for the incumbents' end-user customers.[665] MCI and Cable & Wireless argue that we should maintain oversight of the process by which incumbent LECs implement requests for unbundled elements.[666] PacTel opposes the imposition of penalties for failure to meet performance standards on the grounds that this will foster litigation and unwarranted claims of breach.[667]

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[659] PacTel comments at 30, 40-44; USTA comments at 21-22.

[660] California Commission comments at 26-28; *see also* Oregon commission comments at 27.

[661] Teleport reply at 26-29.

[662] Teleport comments at 25-34, reply at 26-29; MCI comments at 20, reply at 28-30; NCTA comments at 44-46; Comcast comments at 24-25; Continental comments at 20.

[663] MFS comments at 16-17, 41; NCTA comments at 45-46.

[664] AT&T comments at 33-39; Intermedia comments at 3-6.

[665] *See, e.g.*, AT&T comments at 38; GCI comments at 9; Intermedia comments at 4-5; ACTA comments at 15.

[666] MCI comments at 21-27; Cable & Wireless comments at 36-37.

[667] Pactel comments at 30.

306. A number of potential entrants argue that the Commission should condition BOC entry into the in-region long distance market on fulfillment of the terms and conditions for the provision of unbundled elements.[668] Teleport argues that once the BOCs get into the in-region long distance market they will have no incentive to provide competitors with nondiscriminatory access to unbundled network elements.[669] PacTel, however, argues that we should conclude that the checklist in section 271 is satisfied if an incumbent LEC is providing unbundled elements as required by the Commission and states, and we should not consider the terms and conditions for the provision of unbundled elements in evaluating section 271 applications.[670]

3. Discussion

307. We agree with those commenters, including the Florida, Illinois and Washington Commissions, that to achieve the procompetitive goals of the 1996 Act, it is necessary to establish rules that define the obligations of incumbent LECs to provide nondiscriminatory access to unbundled network elements, and to provide such elements on terms and conditions that are just, reasonable and nondiscriminatory.[671] As discussed above at sections II.A, II.B and V.B, we believe that incumbent LECs have little incentive to facilitate the ability of new entrants, including small entities, to compete against them and, thus, have little incentive to provision unbundled elements in a manner that would provide efficient competitors with a meaningful opportunity to compete. We are also cognizant of the fact that incumbent LECs have the incentive and the ability to engage in many kinds of discrimination. For example, incumbent LECs could potentially delay providing access to unbundled network elements, or they could provide them to new entrants at a degraded level of quality.

308. Consistent with arguments advanced by the Florida and Washington Commissions, incumbent LECs, and potential competitors, and as more fully discussed in the specific sections below, we adopt general, national rules defining "nondiscriminatory access" to unbundled network elements, and "just, reasonable, and nondiscriminatory" terms and conditions for the provision of such elements. We have chosen this approach, rather than

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[668] MCI comments at 21-27; Teleport comments at 25-34 (arguing that it is already experiencing service quality problems); Cable & Wireless comments at 36-37; TCC comments at 54-60; CompTel comments at 23-24; LDDS comments at 27.

[669] Teleport comments at 25-35.

[670] PacTel comments at 40-44.

[671] *See infra*, Section VII, for a discussion of just, reasonable and nondiscriminatory rates for unbundled network elements.

allowing states exclusively to consider these issues, because we believe that some national rules regarding nondiscriminatory access will reduce the costs of entry and speed the development of competition.[672]

309. We conclude, for example, that national rules defining the 1996 Act's requirements regarding nondiscriminatory access to, and provision of, unbundled elements will reduce costs associated with potential litigation over these issues, and will enable states to conduct arbitrations more quickly by reducing the number of issues they must consider. Such rules will also facilitate the ability of the Commission to conduct arbitrations, should we assume a state's responsibilities under section 252(e)(5). We conclude further that such rules will create some uniformity across states in connection with the terms under which new entrants may obtain access to network elements, thus facilitating the ability of potential competitors, including small entities, to enter local markets on a regional or national scale. Accordingly, for all of these reasons, we reject the arguments of PacTel and USTA that we should not adopt national rules relating to incumbent LEC obligations to provide access to, and provision, unbundled elements in a nondiscriminatory manner.

310. The record compiled in this proceeding supports the adoption of uniform general rules that rely on states to develop more specific requirements in arbitrations and other state proceedings. More significantly, however, we agree with the California and Florida Commissions that the states are best situated to issue specific rules because of their existing knowledge regarding incumbent LEC networks, capabilities, and performance standards in their separate jurisdictions and because of the role they will play in conducting mediations, arbitrations, and approving agreements. We expect that the states will implement the general nondiscrimination rules set forth herein by adopting, *inter alia*, specific rules determining the timing in which incumbent LECs must provision certain elements, and any other specific conditions they deem necessary to provide new entrants, including small competitors, with a meaningful opportunity to compete in local exchange markets. The states will continue to gain expertise in connection with issues relating to just, reasonable, and nondiscriminatory access and provision of unbundled network elements. We expect to turn to the states, and rely on the expertise they develop in this area, when we review and revise our rules as necessary.

311. We agree with those commenters that argue that incumbent LECs should be required to fulfill some type of reporting requirement to ensure that they provision unbundled elements in a nondiscriminatory manner. We believe the record is insufficient at this time to adopt such requirements, and we may reexamine this issue in the future. We encourage the

[672] *See supra*, Section V.B.

states, however, to adopt reporting requirements.[673] We decline to address whether the Commission should consider any of the terms and conditions adopted here in evaluating BOC applications to provide in-region long distance services. We will consider this issue, as it arises, when we evaluate individual BOC applications.

a. Nondiscriminatory Access to Unbundled Network Elements

312. We conclude that the obligation to provide "nondiscriminatory access to network elements on an unbundled basis"[674] refers to both the physical or logical connection to the element and the element itself. In considering how to implement this obligation in a manner that would achieve the 1996 Act's goal of promoting local exchange competition, we recognize that new entrants, including small entities, would be denied a meaningful opportunity to compete if the quality of the access to unbundled elements provided by incumbent LECs, as well as the quality of the elements themselves, were lower than what the incumbent LECs provide to themselves. Thus, we conclude it would be insufficient to define the obligation of incumbent LECs to provide "nondiscriminatory access" to mean that the quality of the access and unbundled elements incumbent LECs provide to all requesting carriers is the same. As discussed above with respect to interconnection,[675] an incumbent LEC could potentially act in a nondiscriminatory manner in providing access or elements to all requesting carriers, while providing preferential access or elements to itself. Accordingly, we conclude that the phrase "nondiscriminatory access" in section 251(c)(3) means at least two things: first, the quality of an unbundled network element that an incumbent LEC provides, as well as the access provided to that element, must be equal between all carriers requesting access to that element; second, where technically feasible, the access and unbundled network element provided by an incumbent LEC must be at least equal-in-quality to that which the incumbent LEC provides to itself.[676]

313. We believe that Congress set forth a "nondiscriminatory access" requirement in section 251(c)(3), rather then an absolute equal-in-quality requirement, such as that set forth in section 251(c)(2)(C), because, in rare circumstances, it may be technically infeasible for incumbent LECs to provide requesting carriers with unbundled elements, and access to such

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[673] We address issues regarding enforcement of the rules we adopt in this Section, regarding nondiscriminatory access to, and just, reasonable and nondiscriminatory terms and conditions for the provision of unbundled network elements, at *supra*, in Section II.E.

[674] 47 U.S.C. § 251(c)(3).

[675] *See supra*, Sections IV.G, IV.H.

[676] We note that providing access or elements of lesser quality than that enjoyed by the incumbent LEC would also constitute an "unjust" or "unreasonable" term or condition.

elements, that are equal-in-quality to what the incumbent LECs provide themselves. According to some commenters, this problem arises in connection with one variant of one of the unbundled network elements we identify in this order. These commenters argue that a carrier purchasing access to a 1AESS local switch may not be able to receive, for example, the full measure of customized routing features that such a switch may afford the incumbent.[677] In the rare circumstances where it is technically infeasible for an incumbent LEC to provision access or elements that are equal-in-quality, we believe disparate access would not be inconsistent with the nondiscrimination requirement. Accordingly, we require incumbent LECs to provide access and unbundled elements that are at least equal-in-quality to what the incumbent LECs provide themselves, and allow for an exception to this requirement only where it is technically infeasible to meet.[678] We expect incumbent LECs to fulfill this requirement in nearly all instances where they provision unbundled elements because we believe the technical infeasibility problem will arise rarely. We further conclude, however, that the incumbent LEC must prove to a state commission that it is technically infeasible to provide access to unbundled elements, or the unbundled elements themselves, at the same level of quality that the incumbent LEC provides to itself.

314. Our conclusion that an incumbent LEC must provide unbundled elements, as well as access to them, that is "at least" equal in quality to that which the incumbent provides itself, does not excuse incumbent LECs from providing, when requested and where technically feasible, access or unbundled elements of higher quality.[679] As we discuss below,[680] we do not believe that this obligation is unduly burdensome to incumbent LECs because the 1996 Act requires a requesting carrier to pay the costs of unbundling, and thus incumbent LECs will be fully compensated for any efforts they make to increase the quality of access or elements within their own network.[681] Moreover, to the extent this obligation allows new entrants, including small entities, to offer services that are different from those offered by the

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[677] *See infra*, Section V.J, discussing commenters' arguments regarding the possible technical limitations of such switches.

[678] The exception described here does not excuse incumbent LECs from the obligation to modify elements within their networks to allow requesting carriers to obtain access to such elements where this is technically feasible. *See supra*, Section IV.D.

[679] An incumbent LEC, in accommodating a carrier's request for a particular unbundled element, may ultimately provision an element that is higher in quality than what the incumbent provides to itself. *See infra*, Section V.J.1.

[680] *See infra*, Section V.J. We require, for example, that incumbent LECs provide local loops conditioned to enable the provision of digital services (where technically feasible) even if the incumbent does not itself provide such digital services.

[681] *See infra*, Section VII.

incumbent, we believe it is consistent with Congress's goal to promote local exchange competition. We note that, to the extent an incumbent LEC provides an element with a superior level of quality to a particular carrier, the incumbent LEC must provide all other requesting carriers with the same opportunity to obtain that element with the equivalent higher level of quality. We further note that where a requesting carrier specifically requests access or unbundled elements that are lower in quality to what the incumbent LECs provide themselves, incumbent LECs may offer such inferior quality if it is technically feasible. Finally, we conclude that the incumbent LEC must prove to a state commission that it is technically infeasible to provide access to unbundled elements, or the unbundled elements themselves, at a level of quality that is superior to or lower than what the incumbent LEC provides to itself.

b. Just, Reasonable and Nondiscriminatory Terms and Conditions for the Provision of Unbundled Network Elements

315. The duty to provide unbundled network elements on "terms, and conditions that are just, reasonable, and nondiscriminatory" means, at a minimum, that whatever those terms and conditions are, they must be offered equally to all requesting carriers, and where applicable, they must be equal to the terms and conditions under which the incumbent LEC provisions such elements to itself.[682] We also conclude that, because section 251(c)(3) includes the terms "just" and "reasonable," this duty encompasses more than the obligation to treat carriers equally. Interpreting these terms in light of the 1996 Act's goal of promoting local exchange competition, and the benefits inherent in such competition, we conclude that these terms require incumbent LECs to provide unbundled elements under terms and conditions that would provide an efficient competitor with a meaningful opportunity to compete. Such terms and conditions should serve to promote fair and efficient competition. This means, for example, that incumbent LECs may not provision unbundled elements that are inferior in quality to what the incumbent provides itself because this would likely deny an efficient competitor a meaningful opportunity to compete. We reach this conclusion because providing new entrants, including small entities, with a meaningful opportunity to compete is a necessary precondition to obtaining the benefits that the opening of local exchange markets to competition is designed to achieve.

316. As is more fully discussed below,[683] to enable new entrants, including small entities, to share the economies of scale, scope, and density within the incumbent LECs' networks, we conclude that incumbent LECs must provide carriers purchasing access to

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[682] *See supras*, Sections IV.G, IV.H.

[683] *See infra*, Section V.J.

unbundled network elements with the pre-ordering, ordering, provisioning,[684] maintenance and repair, and billing functions of the incumbent LECs operations support systems. Moreover, the incumbent must provide access to these functions under the same terms and conditions that they provide these services to themselves or their customers. We discuss specific terms and conditions applicable to the unbundled elements identified in this order below, in Section V.J.

H. The Relationship Between Sections 251(c)(3) and 251(c)(4)

1. Background

317. Section 251(c)(4) provides that incumbent LECs must offer "for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers that are not telecommunications carriers."[685] In the NPRM, we asked for comment on the relationship between this provision and section 251(c)(3). Specifically, we asked whether carriers can order and combine network elements to offer the same services that incumbent LECs offer for resale under section 251(c)(4). We observed that different pricing standards under section 252(d) apply to unbundled elements under section 251(c)(3) and resold services under section 251(c)(4), and that section 251(c)(3) contemplates the purchase of unseparated facilities (*i.e.*, facilities that can be used for either inter- or intrastate services) while subsection (c)(4) does not necessarily contemplate this. We asked for comment on the implications or significance of these differences.[686]

2. Comments

318. A number of commenters, including incumbent LECs and CAPs, argue that, in order to distinguish section 251(c)(4) from section 251(c)(3), the Commission must conclude that new entrants can only obtain access to unbundled elements if they own or possess some local exchange facilities that they plan to use in combination with unbundled elements to provide a local service.[687] According to NYNEX, the 1996 Act contemplates that new

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[684] The term "provisioning" includes installation.

[685] 47 U.S.C. § 251(c)(4).

[686] NPRM at para. 85.

[687] MFS comments at 36-40, 65-66; BellSouth comments at 31-33; Teleport comments at 39-42; Bell Atlantic comments at 14, reply at 5-6; Ameritech comments at 25-31; USTA comments at 23-26, reply at 10; TDS comments at 15-16; PacTel comments at 40-45; GTE reply at 17-18; SBC reply at 11; *accord* Pennsylvania Commission comments at 24; NYNEX comments at 29-39 (the FCC should state that new entrants can obtain unbundled elements to provide a service that is sold at resale only if they can self-provide, at a minimum, one of the elements used to provide the service).

entrants will enter local telephone markets either through section 251(c)(3) or section 251(c)(4). The former is designed for entrants with some of their own facilities, and would allow them to supplement their networks; the latter is designed for new entrants that do not possess any facilities.[688] MFS and Bell Atlantic concur and cite the legislative history to the 1996 Act.[689]

319. In support of this interpretation, some commenters cite the language of section 251(c)(3). Bell Atlantic contends that the phrase referring to unbundling at "any technically feasible point" means new entrants must have some of their own facilities to connect to that "point."[690] NYNEX argues that the phrase "such telecommunications service" excludes services provided by incumbents, and thus new entrants can only use unbundled elements to provide services that incumbents do not offer.[691]

320. Other commenters supporting this interpretation, including incumbent LECs and CAPs, contend that we must interpret the 1996 Act in a way that gives meaning to each provision. Accordingly, they argue that we cannot allow carriers to use unbundled elements exclusively to provide services that are available at resale, because to do so would make section 251(c)(4), and its associated pricing provision, section 252(d)(3), meaningless.[692] They assert that Congress established a more favorable pricing standard for unbundled elements than resold services to encourage facilities-based entry. They argue that Congress, recognizing that facilities-based carriers incur greater risks than resellers and are a more potent competitive force, created a statutory incentive to build competing facilities by

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[688] NYNEX reply at 16-19 (the language of the 1996 Act and the legislative history show that resale takes precedence over the unbundling provision); *accord* MFS reply at 20-22 (unbundled elements are not meant as an alternative to wholesale services for pure resellers).

[689] MFS comments at 37-40; Bell Atlantic comments at 12-14 (*citing* Joint Explanatory Statement at 148, which provides that, because of the significant investment required to duplicate an incumbent's network, new entrants will require access to elements in the incumbents' networks to supplement the facilities owned by the new entrants); *see also* Ameritech comments at 25-31 (Congress intended unbundled elements to be used by carriers that have some of their own facilities because the provision allows carriers to purchase only the elements they need); NYNEX reply at 16-19 (there is no evidence in the 1996 Act or the legislative history indicating that Congress intended to allow carriers to use unbundled elements an alternative way to resell services); USTA comments at 59-66.

[690] Bell Atlantic comments at 12-14. *See also* USTA comments at 59-66.

[691] NYNEX reply at 16-19.

[692] MFS comments at 36-40, 65-66; BellSouth comments at 31-33; NYNEX reply at 16-19; Bell Atlantic comments at 12-14; Bell Atlantic reply at 5-6; *accord* Teleport comments at 39-43 (specific provisions prevail over general ones, and thus, if carriers use unbundled elements to replicate a wholesale service offering, the specific provision dictating the price for wholesale services should be applied rather than the general one for unbundled elements); GTE reply at 17 (the Commission should not deprive incumbent LECs of their compensatory return on resold services).

providing carriers who use unbundled elements with the opportunity to achieve higher profits. According to these commenters, if we allow carriers that merely resell services to obtain the financial benefits of unbundled elements, we would reward them though they have incurred little risk, and we would discourage them from building competing facilities.[693] BellSouth and Ameritech argue that the language of section 251(d)(2)(B) further supports this view because, if carriers can offer a service for resale, then such carriers are not "impaired in their ability to offer a service."[694]

321. Ameritech, NYNEX, and MFS argue that allowing carriers to provide the equivalent of a resold service exclusively through the use of unbundled elements would eviscerate the joint marketing restriction in section 271(e)(1) because there is no comparable restriction in this provision against the joint marketing of services provided through unbundled elements.[695] BellSouth and Ameritech further contend that this view is consistent with the terms of section 251(c)(4)(B), which allows states to prohibit resellers from offering a service to a category of consumers different than the category of consumers the incumbent LEC offers that service to. They contend that, if we allowed requesting carriers to offer resold services exclusively through unbundled elements, then such carriers could evade any possible prohibition on the sale of such services and the authority to impose such limitations on resale is reserved to the states.[696]

322. Finally, a number of incumbent LECs and MFS argue that new entrants should not be allowed to provide services available for resale exclusively through the use of unbundled elements because such entrants could underprice: facilities-based competitors, that must recover joint and common costs, and incumbent LECs, that charge above-cost prices for some services to support universal service obligations. If new entrants could underprice incumbent LECs, they assert, then the ability of the LECs to recover their costs and meet their universal service obligations would be diminished. They also contend that allowing the exclusive use of unbundled elements would lead to arbitrage based on the pricing standards for sections 251(c)(3) and 251(c)(4). They further contend that, if resold services are priced

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[693] MFS comments at 37-40, reply at 20-23; Teleport comments at 39-43; NYNEX comments at 29-39; USTA comments at 23-26, reply at 8-10; Bell Atlantic comments at 12-14.

[694] BellSouth comments at 31-33; Ameritech comments at 25-31. For a further discussion of this argument *see supra*, Section V.E.

[695] Ameritech comments at 25-31, reply at 24; NYNEX reply at 16-19; MFS comments at 37-40 (further arguing that the prohibition against joint marketing through the use of resold services evidences Congress's preference for facilities-based competition).

[696] BellSouth comments at 31-33; Ameritech comments at 25-31.

below cost, this will discourage facilities-based entry through the purchase of unbundled elements.[697]

323. The Department of Justice and a number of potential competitors, including AT&T, Cable & Wireless, ALTS and LDDS, reject the view that, to give effect to section 251(c)(4), we must limit access to unbundled elements to those carriers who own some local exchange facilities. They argue that the 1996 Act allows carriers to use recombined network elements exclusively to provide services that are similar or identical to those offered by incumbent LECs for resale. To support this view they contend that the plain language of section 251(c)(3) does not contain any requirement that carriers must own some of their own local exchange facilities before they can purchase and use unbundled elements to provide a telecommunications service. According to these commenters, if we were to impose such a requirement, we would be reading into the 1996 Act a limitation on access to unbundled elements that is not stated anywhere within the statute.[698]

324. The parties which oppose conditioning access to unbundled elements on ownership of local exchange facilities also contend that sections 251(c)(3) and 251(c)(4) offer carriers different opportunities, and thus the rules of statutory construction do not require us to read use restrictions into section 251(c)(3) to distinguish and give meaning to section 251(c)(4).[699] AT&T, the Department of Justice, and others argue, for example, that carriers offering services through resale are limited to the precise service that the incumbent is providing. In contrast, these parties assert that carriers exclusively using unbundled elements can offer different and new services, or the same services with higher quality. In addition, these parties note that, under section 251(c)(3), carriers purchasing an unbundled element can provide all services which that element is typically used to provide, but under section

[697] Ameritech comments at 25-31, reply at 22; Bell Atlantic comments at 12-14, reply at 6; USTA comments at 23-26, reply at 8-10; MFS comments at 37-40, reply at 20-23; *accord* ALLTEL reply at 7; NYNEX comments at 29-39, reply at 16-19; Teleport comments at 39-43, PacTel reply at 25.

[698] AT&T comments at 28-31, reply at 12-20; TCC comments at 27-35; Cable & Wireless comments at 26-27, reply at 20-22; DoJ comments at 48-51, reply at 23-31; Sprint reply at 24-26; LDDS reply at 25-27; ALTS reply at 24-26; *but see* GTE reply at 17-18 (new entrants have just as much opportunity to offer new services through resale as they do through unbundled elements, with resold services new entrants can add value and develop new price plans).

[699] AT&T comments at 28-31, reply at 13-20; LDDS reply at 25-28; TCC comments at 27-35; CompTel reply at 13-22; DoJ comments at 48-51, reply at 23-31 (carriers will likely use resale to purchase services that incumbents price below cost, otherwise these services would never experience competition); Sprint comments at 24-26; Cable & Wireless comments at 20-22; MCI comments at 27-28 (carriers purchasing unbundled elements are not purchasing services, hence they are not the same thing as services available for resale).

251(c)(4), carriers purchasing services available for resale can only provide the service they purchase.[700]

325. Some of the commenters opposing restrictions on access to unbundled elements further argue that allowing carriers to use unbundled elements exclusively to provide the same or similar services that are sold at resale would reduce barriers to entry, and thus promote facilities-based competition. They explain that entrants using unbundled elements will incur lower costs, and will be able to offer more services than carriers who purchase services for resale. They further contend that this means that new entrants using unbundled elements will earn higher revenues, and will have more funds to build competing facilities, than carriers purchasing services available for resale. They also contend that a requirement that carriers own some facilities to purchase unbundled elements would impede entry into the access market and restrict competition for all local services to areas where construction of duplicate facilities is economically justified and has already occurred. Congress, they argue, did not intend to encourage the build out of competing facilities where it is not efficient and the reason Congress included the unbundling provision in the 1996 Act is because most areas only have one network.[701]

326. Some of the commenters who oppose restricting access to unbundled elements to those carriers who own some local exchange facilities also argue that any such restriction would be administratively burdensome and difficult to enforce. They contend, for example, that we would need to specify certain minimum facilities that carriers would need to own to obtain access to unbundled elements. They contend that, if we did not specify such minimum facilities, but merely required ownership or possession of a single facility (or any facility), then the requirement in general would have no practical significance.[702] The Department of Justice contends that we would need to determine whether carriers must own or possess a local exchange facility that is used for each consumer to whom they provide service.[703] In determining the relationship between sections 251(c)(3) and 251(c)(4), the Illinois Commission asks us to consider whether our interpretation would advance competition, reduce

[700] AT&T comments at 28-31, reply at 13-20; LDDS reply at 25-28; TCC comments at 27-35; CompTel reply at 13-22; DoJ comments at 48-51, reply at 23-31; Sprint comments at 24-26; Cable & Wireless comments at 20-22; MCI comments at 27-28.

[701] AT&T comments at 28-31, reply at 13-20; CompTel reply at 13-22; TCC comments at 27-35; DOJ comments at 48-51, reply at 23-31.

[702] DoJ comments at 48-51, reply at 23-31; AT&T reply at 13-20; Cable & Wireless reply at 20-22; LDDS reply at 25-30.

[703] DoJ comments at 48-51, reply at 23-31.

regulation, preserve and advance universal service, remove statutory, regulatory and economic impediments to new entry, and provide states with flexibility.[704]

327. Finally, NYNEX argues that carriers should not be permitted to offer services to consumers by combining unbundled elements and resold services because the different rates for unbundled elements and resale of services would allow for arbitrage.[705] Comptel and Sprint counter, however, that the 1996 Act does not prohibit the combined use of unbundled elements and resold services. Comptel further contends that Congress intended to provide new entrants with maximum flexibility in connection with opportunities to enter local telephone markets and thus it would be contrary to Congressional intent, as well as anticompetitive, if we prohibited carriers from using a combination of unbundled elements and services available for resale.[706]

3. Discussion

328. The language of section 251(c)(3) is cast exclusively in terms of obligations imposed on incumbent LECs, and it does not discuss, reference, or suggest a limitation or requirement in connection with the right of new entrants to obtain access to unbundled elements. We conclude, therefore, that Congress did not intend section 251(c)(3) to be read to contain any requirement that carriers must own or control some of their own local exchange facilities before they can purchase and use unbundled elements to provide a telecommunications service. We note that the Illinois Commission has reached the same conclusion.[707]

329. We reject the arguments advanced by Bell Atlantic and NYNEX that the language of section 251(c)(3) requires carriers seeking access to unbundled elements to own some local exchange facilities, and that this serves to distinguish section 251(c)(3) from section 251(c)(4). The "at any technically feasible point" language in section 251(c)(3) refers to points in an incumbent LEC's network where new entrants may obtain access to elements. It does not, however, require that new entrants interconnect local exchange facilities which they own or control at that technically feasible access point. If we were to conclude otherwise, then new entrants would be prohibited from requesting two network elements that

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[704] Illinois Commission comments at 38.

[705] NYNEX comments at 38-39.

[706] CompTel reply at 20-22; Sprint comments at 23-28.

[707] AT&T Communications of Illinois, Inc. *et. al.*, Petition for a Total Local Exchange Wholesale Service Tariff from Illinois Bell Telephone Company, Nos. 95-0458 and 95-0531 (consol.) at 63-65 (Illinois Commission June 26, 1996).

are connected to each other because the new entrant would be required to connect a single network element to a facility of its own. The 1996 Act, however, does not impose any limitations on carriers' ability to obtain access to unbundled network elements. Moreover, we conclude that Congress did not intend to limit access to unbundled elements in this manner because such a limit would seriously inhibit the ability of potential competitors to enter local markets through the use of unbundled elements, and thus would retard the development of local exchange competition. We also reject NYNEX's argument that the phrase "such telecommunications service" excludes services provided by the incumbent. This interpretation is inconsistent with the 1996 Act's definition of a telecommunications service, which includes all telecommunications services provided by an incumbent.

330. We also reject the argument that language in the Joint Explanatory Statement requires us to conclude that carriers must own facilities to obtain access to unbundled elements. Congress may have recognized that carriers that own some of their own facilities will more likely benefit by entering local markets through unbundled elements rather than resale, but this consideration does not imply that carriers must own their own facilities to obtain access to unbundled elements.[708]

331. We are not persuaded that, in order to give meaning and effect to section 251(c)(4), we must require new entrants to own some local exchange facilities in order to obtain access to unbundled elements. We disagree with the premise that no carrier would consider entering local markets under the terms of section 251(c)(4) if it could use recombined network elements solely to offer the same or similar services that incumbents offer for resale. We believe that sections 251(c)(3) and 251(c)(4) present different opportunities, risks, and costs in connection with entry into local telephone markets, and that these differences will influence the entry strategies of potential competitors. We therefore find that it is unnecessary to impose a limitation on the ability of carriers to enter local markets under the terms of section 251(c)(3) in order to ensure that section 251(c)(4) retains functional validity as a means to enter local phone markets.

332. The principal distinction between sections 251(c)(3) and 251(c)(4), in terms of the opportunities each section presents to new entrants, is that carriers using solely unbundled elements, compared with carriers purchasing services for resale, will have greater opportunities to offer services that are different from those offered by incumbents. More specifically, carriers reselling incumbent LEC services are limited to offering the same service an incumbent offers at retail. This means that resellers cannot offer services or products that incumbents do not offer. The only means by which a reseller can distinguish the services it offers from those of an incumbent is through price, billing services, marketing efforts, and to some extent, customer service. The ability of a reseller to differentiate its products based on

[708] *See* Joint Explanatory Statement at 148.

price is limited, however, by the margin between the retail and wholesale price of the product.

333. In contrast, a carrier offering services solely by recombining unbundled elements can offer services that differ from those offered by an incumbent. For example, some incumbent LECs have capabilities within their networks, such as the ability to offer Centrex, which they do not use to offer services to consumers. Carriers purchasing access to unbundled elements can offer such services. Additionally, carriers using unbundled elements can bundle services that incumbent LECs sell as distinct tariff offerings, as well as services that incumbent LECs have the capability to offer, but do not, and can market them as a bundle with a single price. The ability to package and market services in ways that differ from the incumbent's existing service offerings increases the requesting carrier's ability to compete against the incumbent and is likely to benefit consumers.[709] Additionally, carriers solely using unbundled network elements can offer exchange access services. These services, however, are not available for resale under section 251(c)(4) of the 1996 Act.[710]

334. If a carrier taking unbundled elements may have greater competitive opportunities than carriers offering services available for resale, they also face greater risks. A carrier purchasing unbundled elements must pay for the cost of that facility, pursuant to the terms and conditions agreed to in negotiations or ordered by states in arbitrations.[711] It thus faces the risk that end-user customers will not demand a sufficient number of services using that facility for the carrier to recoup its cost. (Many network elements can be used to provide a number of different services.) A carrier that resells an incumbent LEC's services does not face the same risk. This distinction in the risk borne by carriers entering local markets through resale as opposed to unbundled elements is likely to influence the entry strategies of various potential competitors. Some new entrants will be unable or unwilling to bear the financial risks of entry by means of unbundled elements and will choose to enter local markets under the terms of section 251(c)(4) irrespective of the fact that they can obtain access to unbundled elements without owning any of their own facilities.[712] Moreover, some markets may never support new entry through the use of unbundled elements because new entrants seeking to offer services in such markets will be unable to stimulate sufficient demand to recoup their investment in unbundled elements. Accordingly, in these markets

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[709] *See* AT&T comments at 25-31.

[710] *See infra*, Section VII; *see also* Letter from Bernard J. Ebbers, President LDDS WorldCom, to Rachelle B. Chong, Commissioner, Federal Communications Commission, July 11, 1996.

[711] *See infra*, Section VII, describing the terms under which new entrants will pay for the cost of unbundled elements.

[712] *See, e.g.*, AT&T reply at 13-20.

carriers will enter through the resale of incumbent LEC services, irrespective of the fact that they could enter exclusively through the use of unbundled elements.[713]

335. We are not persuaded by the argument set forth by Ameritech, NYNEX, and MFS that allowing carriers to use solely recombined network elements would eviscerate the joint marketing restriction in section 271(e)(1).[714] It is true that the terms of section 271(e) do not restrict joint marketing through the use of unbundled elements pursuant to section 251(c)(3). As discussed above, differences in opportunities and risk will cause some new entrants to consider entering local telephone markets through resale of incumbent LEC services, even if they could enter solely through the use of unbundled elements. Thus, we conclude that section 271(e)(1) will impose a meaningful limitation on joint marketing.

336. We note, moreover, that the 1996 Act does not prohibit all forms of joint marketing. For example, it does not prohibit carriers who own local exchange facilities from jointly marketing local and interexchange service. Nor does it prohibit joint marketing by carriers who provide local exchange service through a combination of local facilities which they own or possess, and unbundled elements. Because the 1996 Act does not prohibit all forms of joint marketing, we see no principled basis for reading into section 271(e)(1) a further limitation on the ability of carriers to jointly market local and long distance services without concluding that this section prohibits all forms of joint marketing. In other words, we see no basis upon which we could conclude that section 271(e)(1) restricts joint marketing of long distance services, and local services provided solely through the use of unbundled network elements, without also concluding that the section restricts the ability of carriers to jointly market long distance services and local services that are provided through a combination of a carriers' own facilities and unbundled network elements.[715] Moreover, we do not believe that we have the discretion to read into the 1996 Act a restriction on competition which is not required by the plain language of any of its sections.

337. We also reject the argument advanced by BellSouth and Ameritech that allowing carriers to use solely unbundled elements to provide services available through resale would allow carriers to evade a possible prohibition, which is reserved to the discretion of the states,

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[713] *See, e.g.*, Comptel reply at 13-16.

[714] Section 271(e)(1) provides that "[u]ntil a Bell operating company is authorized pursuant to subsection (d) to provide interLATA services in an in-region State, or until 36 months have passed since the date of enactment . . . a telecommunications carrier that serves greater than 5 percent of the Nation's presubscribed access lines may not jointly market in such State telephone exchange service obtained from such company pursuant to section 251(c)(4) with interLATA services." 47 U.S.C. § 271(e)(1).

[715] *See also* AT&T reply at 14-15 (the added risk of unbundled elements also means that new entrants are not circumventing section 271's joint marketing restriction because the additional risk justifies allowing carriers more flexibility to jointly market services); LDDS reply at 28-30.

on the sale of certain services to certain categories of consumers. Under section 251(c)(4)(B) states are permitted to restrict resellers from offering certain services to certain consumers, in the same manner that states restric. incumbent LECs.[716] For example, states that prohibit incumbent LECs from selling to business consumers residential services priced below cost have the ability to restrict resellers from selling such services to business consumers.

338. We do not believe, however, that carriers using solely unbundled elements to provide local exchange services will be able to evade any potential restrictions states may impose under section 251(c)(4)(B). In this section Congress granted the states the discretion to impose certain limited restrictions on the sale of services available for resale. It did not, however, grant states, in section 251(c)(3), the same discretion to impose similar restrictions on the use of unbundled elements. Accordingly, we are not persuaded that allowing carriers to use solely unbundled elements to provide services that incumbent LECs offer for resale would allow competing carriers to evade a possible marketing restriction that Congress intended to reserve to the discretion of the states.

339. We agree with those commenters who argue that it would be administratively impossible to impose a requirement that carriers must own some of their own local exchange facilities in order to obtain access to unbundled elements, and they must use these facilities, in combination with unbundled elements, for the purpose of providing local services. We conclude that it would not be possible to identify the elements carriers must own without creating incentives to build inefficient network architectures that respond not to marketplace factors, but to regulation. We further conclude that such a requirement could delay possible innovation. These effects would diminish competition for local telephone services, and thus any local exchange facilities requirement would be inconsistent with the 1996 Act's goals of promoting competition. Moreover, if we imposed a facilities ownership requirement that attempted to avoid these competitive pitfalls, it would likely be so easy to meet it would ultimately be meaningless.

340. We reject the argument that requiring carriers to own some local exchange facilities would promote competition for local exchange services, or that we should impose such a requirement for other policy reasons. To the contrary, we conclude that allowing carriers to use unbundled elements as they wish, subject only to the maintenance of the key elements of the access charge regime, described below at section VII, will lead to more efficient competition in local phone markets. If we were to limit access to unbundled network elements to those markets where carriers already own, or could efficiently build, some local exchange facilities, we would limit the ability of carriers to enter local markets under the pricing standard for unbundled elements to those markets that could efficiently support duplication of some or all of the incumbent LECs' networks. We believe that such a result could diminish competition, and that allowing new entrants to take full advantage of

[716] 47 U.S.C. § 251(c)(4)(B).

incumbent LECs' scale and scope economies will promote more rapid and efficient entry and will result in more robust competition.

341. Finally, we conclude that a new entrant may offer services to one group of consumers using unbundled network elements, and it may offer services to a separate group of consumers by reselling an incumbent LEC's services. With the exception noted in Section VII, *infra*, we do not address the issue of whether the 1996 Act permits a new entrant to offer services to the same set of consumers through a combination of unbundled elements and services available for resale.

I. Provision of Interexchange Services Through The Use of Unbundled Network Elements

1. Background

342. In the NPRM, we tentatively concluded that interexchange carriers are telecommunications carriers, and thus such carriers are entitled to access to unbundled elements under the terms of section 251(c)(3). We also tentatively concluded that carriers may request unbundled elements for purposes of originating and terminating toll services, in addition to any other services they seek to provide, because section 251(c)(3) provides that carriers may request unbundled elements to provide a "telecommunications service," and interexchange services are a telecommunications service.[717]

343. In the NPRM, we sought comment on whether the 1996 Act permits carriers to use unbundled elements to provide exchange access services only, or whether carriers seeking to provide exchange access services using unbundled elements must provide local exchange service as well. We premised the latter view on the definition of the term "network element," as a facility and not a service, and on the pricing standard under section 252(d)(1) that requires network elements to be priced based on economic costs (rather than jurisdictionally separated costs.)[718] We also sought comment on whether allowing carriers to purchase unbundled elements to provide exchange access services exclusively would be inconsistent with the terms of sections 251(i) and 251(g) and, further, whether this would result in a fundamental jurisdictional shift of the administration of interstate access charges to state jurisdictions.[719]

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[717] NPRM at paras. 159, 163.

[718] *See supra*, Section V.C. and *infra*, Section VII.

[719] NPRM at para. 164.

344. Finally, in the NPRM, we tentatively concluded that, if carriers purchase unbundled elements to provide exchange access services to themselves, irrespective of whether they provide such services alone or in connection with local exchange services, incumbent LECs cannot assess Part 69 access charges in addition to charges for the cost of the unbundled elements. We based this tentative conclusion on the view that the imposition of access charges in addition to cost-based charges for unbundled elements would depart from the statutory mandate of cost-based pricing of elements.[720]

2. Comments

345. A number of potential competitors, as well as the Department of Justice, the Illinois and Ohio Commissions, NYNEX, and USTA, agree with our tentative conclusions that interexchange carriers may obtain access to unbundled elements, and that carriers may purchase unbundled elements for the purpose of originating and terminating interexchange services because such services are a type of telecommunications service.[721] Some of these commenters support our tentative interpretation of the 1996 Act by arguing that section 251(c)(3) requires incumbent LECs to provide access to network elements without regard to the types of services carriers seek to offer, or the jurisdictional nature of such services. They contend that new entrants are paying the full cost for an element and thus are entitled to recover their costs by offering any services that use the element.[722] Others argue that, by its plain terms, the 1996 Act does not allow incumbent LECs to limit the types of services any carrier can offer in connection with the sale of unbundled elements.[723]

346. The Department of Justice and AT&T also contend that there are substantial economies of scope in the provision of local exchange and exchange access services, and that new entrants will need the revenue streams from both services to support the high cost of

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[720] NPRM at para. 165.

[721] NYNEX comments at 20-22; TCC comments at 27-35; Sprint comments at 67-70, reply at 32-34; Cable & Wireless comments at 27-32, reply at 20; MCI comments at 77-83; COMAV comments at 31; DoJ comments at 35-47; CompTel comments at 27,65; Frontier comments at 11, reply at 8-11; Illinois Commission at 51-52; Ohio Commission comments at 57-58; AT&T reply at 23-24; LDDS reply at 36-38; Excel comments at 4; TCC comments at 28; USTA comments at 59-66; *see also* Texas Public Utility Counsel comments at 39-40 (competition will push access rates to cost so the Commission should not put effort into protecting access charges); Citizens Utilities comments at 22.

[722] *See, e.g.*, DoJ comments at 35-47; AT&T reply at 23-24; TCC comments at 27-35; LDDS reply at 36-38 (because carriers pay the full unseparated cost of a network element, they are entitled to provide the full range of services over those elements); Excel comments at 4; TCC comments at 28; Frontier reply at 24-26.

[723] *See, e.g.*, DoJ comments at 35-47; Illinois Commission comments at 51-52; MCI comments at 77-84.

constructing competing local exchange facilities.[724] The Department of Justice and Comptel further assert that, if incumbent LECs are allowed to maintain market power over exchange access services then, when the BOCs are allowed into in-region long distance markets, the BOCs will be able to underprice other competitors in the sale of long distance services, and in the sale of bundled local and long distance services, and thus could undermine current competitive conditions in the long distance market.[725]

347. The commenters which support our tentative conclusion that carriers may use unbundled elements to provide interexchange services disagree, however, on whether requesting carriers can use unbundled elements solely to provide interexchange services or whether they must provide other services, including local services, as well. AT&T, MCI, Cable & Wireless, and GCI argue that the ability to provide exchange access services is a function of the loop, and the plain language of the 1996 Act does not permit incumbent LECs to deny requesting carriers the ability to obtain that functionality alone.[726] Sprint and the Department of Justice, however, contend that, while the 1996 Act does not prohibit carriers purchasing unbundled elements from offering only exchange access services, as a practical matter, any carrier purchasing access to a local loop will have to offer both local exchange and exchange access services.[727] The Department of Justice bases its contention on the assumption that the Commission will require carriers purchasing access to a local loop to take exclusive control of that loop. The Department of Justice explains that such a requirement is consistent with section 252's method for pricing network elements and with industry practice at the time the 1996 Act was adopted.[728] Sprint bases its contention on the view that allowing carriers to obtain access to local loops in order to provide only a single service is inconsistent with the idea that a network element is a facility and not a service.[729] The Department of

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[724] DoJ comments at 35-47; AT&T reply at 23-24.

[725] CompTel comments at 19-27; DoJ comments at 35-47.

[726] AT&T reply at 23-24; Cable & Wireless comments at 27-32; MCI comments at 77-84 (defining a local loop as a single network element is inconsistent with the 1996 Act's definition of a network element which states that a functionality can be a network element); GCI comments at 11; *see also* ACTA comments at 17; Excel comments at 4.

[727] Sprint comments at 67-70, reply at 34-36; DoJ comments at 35-47; *see also* LDDS reply at 37; *cf.* Citizens Utilities at 22 (it is unlikely that IXCs will purchase unbundled elements to provide solely exchange access services, because in the future they will market services through "one stop shopping," where they will offer local and long distance services as a bundled product); MFS comments at 65-66 (to meet market demand carriers will have to offer the services customers demand, and it is unlikely they will want only interexchange services).

[728] DoJ comments at 35-47.

[729] Sprint comments at 67-70.

Justice and Sprint thus argue that any carrier purchasing exclusive access to a local loop would have to provide all services demanded by the customer to whom that loop is dedicated. If a customer desires to receive both local exchange and exchange access services, then the carrier purchasing access to that customer's loop would have to provide both of these services.[730] Sprint observes, in contrast, that if a customer has two local loops dedicated to its premises a carrier could purchase access to one of the loops merely to provide exchange access services, because the customer could receive local exchange service from another carrier over the other local loop.[731]

348. In contrast, NYNEX, USTA, the Ohio Commission, and Puerto Rico Telephone argue that the 1996 Act does not impose any obligation on incumbent LECs to provide access to unbundled elements solely to allow carriers to provide originating and terminating exchange access services. They argue that carriers purchasing access to local loops in order to provide exchange access services must also provide local exchange services as well.[732] USTA supports its contention by arguing that, in order to obtain "access to" unbundled network elements, a carrier must "interconnect" to them under the terms of section 251(c)(2), but that carriers are eligible for interconnection under section 251(c)(2) only if they offer both local exchange and exchange access services. Accordingly, USTA asserts that carriers that interconnect to unbundled elements must offer both of these services.[733] NYNEX argues that sections 251(g) and (i), and the legislative history to the 1996 Act, make clear that Congress did not intend for section 251 to supplant the existing access charge regime, and that carriers thus can not obtain unbundled local loops merely to offer exchange access services. Carriers seeking access to unbundled loops must take the entire functionality of this element, and thus will have to offer both local exchange and exchange access services.[734] Puerto Rico Telephone further argues that the subsidies built into access charge prices enable incumbent LECs to meet their universal service obligations, and that a premature elimination of this contribution would cause massive increases in local service rates.[735]

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[730] Sprint comments at 67-70; DoJ comments at 35-47; *accord* LDDS reply at 37.

[731] Sprint comments at 67-70.

[732] NYNEX comments at 6, 21-22; USTA comments at 59-66; Ohio Commission comments at 57-58; Puerto Rico Tel. comments at 11-14.

[733] USTA comments at 56-66.

[734] NYNEX comments at 6, 20-22; *see also* USTA comments at 56-66 (concurring with NYNEX's reasoning).

[735] Puerto Rico Tel. comments at 11-14; *see also* USTA reply comments at 6-8; SBC comments at 77-82 (allowing carriers to use unbundled elements to provide themselves exchange access will result in arbitrage between the price of unbundled network elements and access charges); PacTel reply at 35-36.

349. Disputing our tentative conclusion, a number of incumbent LECs contend that the 1996 Act prohibits interexchange carriers from purchasing unbundled elements to provide exchange access services to themselves and thus avoid payment of access charges to incumbent LECs.[736] Bell Atlantic contends that carriers purchasing unbundled elements from an incumbent LEC must pay access charges for toll calls completed on that incumbent LEC's network. Thus, for example, if a carrier purchases an unbundled loop, and completes toll calls using its own switch and the unbundled loop, it must pay the incumbent LEC from which it purchased the loop both the cost of the loop and the carrier common line charge associated with it.[737]

350. The commenters opposing interexchange carriers' use of unbundled elements to provide interexchange services offer a number of arguments to support their view. For example, they argue that section 251(g) means that incumbent LECs must offer exchange access services under the same terms that they did prior to the passage of the 1996 Act, and the "receipt of compensation" phrase in this section means that interexchange carriers must continue to pay current access charges until they are reformed in an access charge rulemaking proceeding.[738] They also argue that the express language of section 251(i) makes clear that the Commission's section 201 authority to regulate interstate access charges is not overridden by section 251(c)(3). They assert that, if we interpret section 251(c)(3) as allowing carriers to use unbundled elements to provide interexchange services, then our section 201 authority to regulate interstate access charges would be limited, in violation of section 251(i).[739] They further argue that allowing carriers to use unbundled elements to provide exchange access services to themselves, and interexchange services to end users, would be "inconsistent" with the purposes of section 251, which was designed to promote competition for local telephone

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[736] BellSouth comments at 30-31, 60-63, reply at 45-46; Bell Atlantic comments at 8-12; Texas Statewide Tel. Cooperative, Inc. comments at 16-17; PacTel comments at 78-80; ALLTEL reply at 6-7; Rural Tel. Coalition reply at 7-11; Ameritech comments at 26, reply at 25; SBC comments at 77-82; PacTel reply at 36; U S West comments at 59-64, reply at 6-8; *see also* NECA comments at 3-6; GTE comments at 74-79 (carriers using unbundled network elements to originate and terminate toll services should be required to charge their interexchange affiliate the same access prices they charge unaffiliated carriers).

[737] Bell Atlantic comments at 8-12.

[738] *See, e.g.*, BellSouth comments at 63-64; Texas Statewide Tel. Cooperative, Inc. comments at 16-17; Bell Atlantic comments at 8-12; Time Warner comments at 60-63; PacTel comments at 78-80, reply at 36; NECA comments at 3-6, reply at 5; SBC comments at 77-82; *see also* USTA comments at 5-8; GTE comments at 74-79; U S West comments at 61; ALLTEL reply at 6-7; Rural Tel. Coalition reply at 7-11.

[739] BellSouth comments at 63-64; USTA comments at 59-66; NYNEX comments at 9-21; Bell Atlantic comments at 8-12; Time Warner comments at 60-63; Puerto Rico Tel. comments at 10-14; Texas Statewide Tel. Cooperative, Inc. comments at 16-17; NECA reply at 5; GTE comments at 74-79; Rural Tel. Coalition reply at 7-11.

services and was not intended as a means to evade access charges.[740] They further argue that such an interpretation would transfer control of interstate access charges to the states.[741]

351. SBC, PacTel and GTE argue that the Senate version of the 1996 Act (which was amended by the Conference Committee) makes clear that section 251 was not intended to supplant the existing access charge regime.[742] PacTel further argues that section 251(c)(3) allows carriers to obtain unbundled elements to "offer" telecommunications services, but not to receive exchange access services.[743] Time Warner contends that none of the provisions of the 1996 Act displace section 201, which grants the Commission authority to establish access charges.[744] NECA contends that the Commission may not change the separations rules that allocate costs between interstate and intrastate jurisdictions without a recommendation from the Joint Board and that it cannot modify or repeal interstate access charge rules without a formal rulemaking. Accordingly, NECA concludes, carriers must still pay interstate access charges.[745] NECA also argues that, because carriers could offer long distance services without using unbundled elements, under the "impairment" standard in section 251(d)(2), incumbent LECs need not provide unbundled elements to enable carriers to offer interexchange services.[746]

352. SBC also argues that allowing carriers to use unbundled elements to provide interexchange services will decrease the incentives for new entrants to invest in competing facilities. As a result, SBC concludes consumers are not likely to benefit because new

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[740] BellSouth comments at 63-64, reply at 45-46; Bell Atlantic reply at 4-6; Texas Statewide Tel. Cooperative, Inc. comments at 16-17; Ameritech reply at 25-26; SBC comments at 77-82 (the terms of section 251 relate only to interconnection between carriers offering local exchange services); Bell Atlantic comments at 8-12; Bay Springs, *et al.* comments at 16; *see also* Minnesota Ind. Coalition comments at 34-38 (interexchange service is not an incumbent LEC exchange service and thus IXCs should not be allowed to circumvent access charges).

[741] BellSouth comments at 63-64; NYNEX comments at 9-21; U S West comments at 59-66; GTE comments at 74-79; PacTel reply at 36; *see also* Rural Tel. Coalition reply at 7-11.

[742] SBC comments at 77-82; GTE comments at 74-79; PacTel comments at 78-80; *see also* NECA comments at 3-6.

[743] PacTel comments at 78-80.

[744] Time Warner comments at 60-63.

[745] NECA comments at 3-6, reply at 3-7.

[746] NECA reply at 5-6.

entrants will price exchange access services just below the levels charged by incumbent LECs.[747] SBC and NECA contend that section 251(d)(3) preserves the authority of states over intrastate access charges.[748] Bell Atlantic contends that Congress could not have intended to overturn the existing access charge regime without expressly stating this.[749] Finally, Bell Atlantic and Ameritech argue that it would be inappropriate to allow carriers to use unbundled elements to provide interexchange services because this would amount to a flash cut reform of access charges before universal service issues are addressed. They reason that, since interstate access charges subsidize local service prices, to allow access pricing to be circumvented would prevent incumbent LECs from meeting their universal service obligations and would, thus, jeopardize current local phone rates.[750] The Rural Telephone Coalition agrees and notes, in particular, that rural ratepayers could be subject to higher local service rates if interexchange carriers are allowed, before proceedings regarding access reform and universal service are completed, to bypass access charges through the purchase of unbundled elements.[751]

353. A number of potential competitors dispute the incumbent LECs' arguments. MCI and the Department of Justice contend that section 251(g) means that the exchange access rules applicable to incumbent LECs before the 1996 Act was passed continue to apply until the Commission issues "superseding regulations." Citing the Joint Explanatory Statement, they assert that the "superseding regulations" referred to are the regulations that the Commission must issue to implement the requirements of section 251. They argue that if section 251 did not affect some change in the rules on access charges, then the "receipt of compensation" language in section 251(g) would be unnecessary.[752]

354. With respect to section 251(i), Cable & Wireless contends that this section merely preserves the Commission's authority under section 201. According to Cable &

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[747] SBC reply at 9-11.

[748] SBC comments at 77-82; NECA comments at 3-6; *see also* NYNEX comments at 9-21 (allowing carriers to use unbundled elements to provide exchange access services to themselves would preempt state access charge policies).

[749] Bell Atlantic comments at 8-12;

[750] Bell Atlantic comments at 8-12, reply at 4-6; Ameritech reply at 24-26 (prices for exchange access services should be rebalanced through a direct examination of universal service issues); *see also* USTA comments at 61.

[751] Rural Tel. Coalition reply at 8.

[752] DoJ comments at 52-53; MCI comments at 77-84. *But cf.* GTE reply at 39-40 (the argument that section 251(g) serves to preserve existing access charges until the Commission adopts regulations implementing section 251 deprives section 251(g) of any meaning because there is no need to preserve existing access charges).

Wireless, this means that carriers can obtain originating and terminating access either by purchasing unbundled network elements under section 251(c)(3) or pursuant to access charge tariffs.[753] MCI argues that section 251(i) preserves the Commission's authority to regulate interstate access charges where incumbent LECs are still providing these services (rather then where new entrants are using unbundled elements.)[754] MCI also argues that allowing carriers to use unbundled elements to provide originating and terminating toll services would not deprive the Commission of authority to set prices for exchange access services because in this proceeding the Commission will direct the states on how to set prices for unbundled elements.[755]

355. LDDS denies that the language of the Senate (as well as House) versions of the 1996 Act indicate that section 251 was not intended to supplant the existing access charge structure, and points to the fact that the language in these bills supporting this argument was not included in the final bill as amended by the Conference Committee.[756] MCI and LDDS argue, respectively, that allowing carriers to use unbundled elements to provide exchange access services is not inconsistent with Congress' intent in writing section 251 because Congress intended for the 1996 Act to create a single set of rules governing relationships between carriers,[757] and the 1996 Act is also about eliminating inefficient pricing in telecommunications services, including inefficient pricing of current access charges.[758] Frontier contends that the statutorily-mandated rates that incumbent LECs may charge for unbundled elements will not be the same as the rates they charge for exchange access services. Frontier argues, however, that the correct response to this is not to limit the purposes for which unbundled elements may be used, but to reform access charge prices to reflect costs.[759] Finally, the Ohio Commission and a number of potential local competitors agree with our tentative conclusion that incumbent LECs cannot assess part 69 access charges

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[753] Cable & Wireless comments at 26-32 (arguing same point in connection with section 251(g)); *see also* CompTel comments at 66.

[754] MCI comments at 77-83.

[755] *Id.*

[756] LDDS reply at 32.

[757] MCI comments at 77-83.

[758] LDDS reply at 30-32.

[759] Frontier reply at 9-11.

on top of prices for unbundled network elements because this would allow incumbent LECs to recover fees in excess of costs, in violation of the pricing standards in section 252.[760]

3. Discussion

356. We confirm our tentative conclusion in the NPRM that section 251(c)(3) permits interexchange carriers and all other requesting telecommunications carriers, to purchase unbundled elements for the purpose of offering exchange access services, or for the purpose of providing exchange access services to themselves in order to provide interexchange services to consumers.[761] Although we conclude below that we have discretion under the 1934 Act, as amended by the 1996 Act, to adopt a limited, transitional plan to address public policy concerns raised by the bypass of access charges via unbundled elements, we believe that our interpretation of section 251(c)(3) in the NPRM is compelled by the plain language of the 1996 Act. As we observed in the NPRM, section 251(c)(3) provides that requesting telecommunications carriers may seek access to unbundled elements to provide a "telecommunications service," and exchange access and interexchange services are telecommunications services. Moreover, section 251(c)(3) does not impose restrictions on the ability of requesting carriers "to combine such elements in order to provide such telecommunications service[s]."[762] Thus, we find that there is no statutory basis upon which we could reach a different conclusion for the long term.

357. We also confirm our conclusion in the NPRM that, for the reasons discussed below in section V.J, carriers purchase rights to exclusive use of unbundled loop elements, and thus, as the Department of Justice and Sprint observe, such carriers, as a practical matter, will have to provide whatever services are requested by the customers to whom those loops are dedicated. This means, for example, that, if there is a single loop dedicated to the premises of a particular customer and that customer requests both local and long distance service, then any interexchange carrier purchasing access to that customer's loop will have to offer both local and long distance services. That is, interexchange carriers purchasing unbundled loops will most often not be able to provide solely interexchange services over those loops.

358. We reject the argument advanced by a number of incumbent LECs that section 251(i) demonstrates that requesting carriers using unbundled elements must continue to pay

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[760] Ohio Commission comments at 58; TCC comments at 27-35; Sprint comments at 67-70; MCI comments at 73; DoJ comments at 35-47,52-53; CompTel comments at 39; Excel comments at 4; AT&T reply at 23-24; LDDS reply at 36-38.

[761] *See* NPRM at paras. 159-65.

[762] 47 U.S.C. § 251(c)(3).

access charges. Section 251(i) provides that nothing in section 251 "shall be construed to limit or otherwise affect the Commission's authority under section 201."[763] We conclude, however, that our authority to set rates for these services is not limited or affected by the ability of carriers to obtain unbundled elements for the purpose of providing interexchange services. Our authority to regulate interstate access charges remains unchanged by the 1996 Act. What has potentially changed is the volume of access services, in contrast to the number of unbundled elements, interexchange carriers are likely to demand and incumbent LECs are likely to provide. When interexchange carriers purchase unbundled elements from incumbents, they are not purchasing exchange access "services." They are purchasing a different product, and that product is the right to exclusive access or use of an entire element. Along this same line of reasoning, we reject the argument that our conclusion would place the administration of interstate access charges under the authority of the states. When states set prices for unbundled elements, they will be setting prices for a different product than "interstate exchange access services." Our exchange access rules remain in effect and will still apply where incumbent LECs retain local customers and continue to offer exchange access services to interexchange carriers who do not purchase unbundled elements, and also where new entrants resell local service.[764]

359. We also reject the incumbent LECs' arguments that language contained in bills that were not enacted, or legislative history connected to such bills, demonstrates that carriers cannot purchase access to unbundled elements to provide exchange access services to themselves, for the purpose of providing long distance services to consumers. The incumbent LECs are arguing in effect, that we should read into the current statute a limitation on the ability of carriers to use unbundled network elements, despite the fact that no such limitation survived the Conference Committee's amendments to the 1996 Act. We conclude, however, that the language of section 251(c)(3), which provides that telecommunications carriers may purchase unbundled elements in order to provide a telecommunications service[765] is not ambiguous. Accordingly, we must interpret it pursuant to its plain meaning and not by referencing earlier versions of the statute that were ultimately not adopted by Congress.

360. Moreover, we do not believe that the Joint Explanatory Statement, which describes the House and Senate versions of the statute, and the 1996 Act as enacted, compels a different conclusion. The Joint Explanatory Statement states that the statute incorporates provisions from the Senate Bill and the House Amendment in connection with the

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[763] 47 U.S.C. § 251(i).

[764] The application of our exchange access rules in the circumstances described will continue beyond the transition period described at *infra*, Section VII.

[765] 47 U.S.C. § 251(c)(3).

interconnection model adopted in section 251.[766] It notes that the provision in the Senate Bill relating to interconnection did not apply to interconnection arrangements between local and long distance carriers for the purpose of providing long distance services.[767] The text of section 251 of the Senate Bill is consistent with this comment because it states that a local exchange carrier must offer interconnection to other carriers to allow such carriers to provide telephone exchange or exchange access services.[768] The Joint Explanatory Statement, however, does not describe any restriction in the House Amendment regarding the ability of carriers to use unbundled elements to provide long distance service.[769] Indeed, the House Amendment specifically states that carriers may obtain access to unbundled elements to offer "a telecommunications service," which is not limited to telephone exchange and exchange access services.[770] We observe that the Conference Committee incorporated language from the House Amendment and not the Senate Bill in describing in section 251(c)(3) the services carriers may offer using unbundled elements. Accordingly, we do not believe that the Joint Explanatory Statement's description of the provision in the Senate Bill controls our interpretation of section 251(c)(3) as enacted.

361. We also reject the argument that allowing carriers to use unbundled elements to provide originating and terminating toll services is inconsistent with the purposes of the 1996 Act. Congress intended the 1996 Act to promote competition for not only telephone exchange services and exchange access services, but also for toll services. Section 251(b)(3), for example, imposes a duty on LECs to provide dialing parity for telephone toll service.

362. We disagree with the incumbent LECs which argue that section 251(g) requires requesting carriers using unbundled elements to continue to pay federal and state access charges indefinitely. Section 251(g) provides that the federal and state equal access rules applicable before enactment, including the "receipt of compensation," will continue to apply after enactment, "until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after such date of enactment."[771] We believe this provision does not apply to the exchange access "services" requesting carriers may provide

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[766] Joint Explanatory Statement at 117-123.

[767] *Id.* at 117.

[768] S. 652, 104th Cong., 1st Sess. § 251 (1995).

[769] Joint Explanatory Statement at 120-121.

[770] H.R. 1555, 104th Cong., 1st. Sess. § 242 (1995).

[771] 47 U.S.C. § 251(g).

themselves or others after purchasing unbundled elements. Rather, the primary purpose of section 251(g) is to preserve the right of interexchange carriers to order and receive exchange access services if such carriers elect not to obtain exchange access through their own facilities or by means of unbundled elements purchased from an incumbent.

363. We affirm our tentative conclusion in the NPRM that, telecommunications carriers purchasing unbundled network elements to provide interexchange services or exchange access services are not required to pay federal or state exchange access charges except as described in section VII, *infra*, for a temporary period. As we explained in the NPRM, if we were to require indefinitely carriers purchasing unbundled elements to also pay access charges, then incumbent LECs would receive compensation in excess of their underlying network costs. This result would be inconsistent with the pricing standard for unbundled elements set forth in section 252(d)(1).[772] In addition, we believe this conclusion is consistent with Congress's overriding goal of promoting efficient competition for local telephony services, because it will allow, in the long term, new entrants using unbundled elements to compete on the basis of the economic costs underlying the incumbent LECs' networks. The facilities used to provide exchange access services are the same as those used to provide local exchange services. We note, however, as discussed below,[773] that certain additional charges are necessary for a specific, limited duration to smooth the transition to a competitive marketplace.

364. We further conclude that when a carrier purchases a local loop for the purpose of providing interexchange services or exchange access services,[774] incumbent LECs may not recover the subscriber line charge (SLC) now paid by end users. The SLC recovers the portion of loop costs allocated to the interstate jurisdiction, but as discussed in Section II.C, *supra*, we conclude that the 1996 Act creates a new jurisdictional regime outside of the current separations process. The unbundled loop charges paid by new entrants under section 251(c)(3) will therefore recover the unseparated cost of the loop, including the interstate component now recovered through the SLC. If end users or carriers purchasing access to

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[772] *See infra*, Section VII. We also note that where new entrants purchase access to unbundled network elements to provide exchange access services, whether or not they are also offering toll services through such elements, the new entrants may assess exchange access charges to IXCs originating or terminating toll calls on those elements. In these circumstances, incumbent LECs may not assess exchange access charges to such IXCs because the new entrants, rather than the incumbents, will be providing exchange access services, and to allow otherwise would permit incumbent LECs to receive compensation in excess of network costs in violation of the pricing standard in section 252(d). *See* 47 U.S.C. § 252. We further note, however, that in these same circumstances the new entrant purchasing access to an unbundled switch element must pay to the incumbent LEC the charges included in the transitional mechanism, described *infra*, at Section VII, for a temporary period.

[773] *See infra*, Section VII, discussing an interim mechanism addressing near-term access charge bypass.

[774] As discussed at *infra*, Section VIII, a different result will occur when interconnecting carriers purchase LEC retail services at wholesale rates under section 251(c)(4).

local loops were required to pay the SLC in this situation, LECs would enjoy double recovery, and the effective price of unbundled loops would exceed the cost-based levels required under section 251(d)(1).

365. Finally, we have considered the economic impact on small incumbent LECs of our conclusion that carriers purchasing access to unbundled network elements to provide interexchange or exchange access services are not required to pay federal or state access charges, except as described in Section VII, *infra*, for a temporary period. For example, the Rural Telephone Coalition argues that rural ratepayers could be subject to higher local service rates if interexchange carriers are allowed to bypass access charges through the purchase of unbundled elements before proceedings regarding access reform and universal service are completed. We reject the Rural Telephone Coalition's argument, however, because our rules, as discussed in Section VII, *infra*, provide for a limited, transitional plan to address public policy concerns raised by the bypass of access charges through unbundled network elements.

J. Specific Unbundling Requirements

366. Having interpreted the standards set forth in the 1996 Act for the unbundling of network elements, we now apply those standards to incumbent LECs' networks. Based on the information developed in this proceeding, we require incumbent LECs to provide unbundled access to local loops, network interface devices, local and tandem switching capability, interoffice transmission facilities, signaling and call-related databases, operations support systems functions, and operator services and directory assistance facilities, as described below. These network elements represent a minimum set of elements that must be unbundled by incumbent LECs. State commissions, as previously noted, are free to prescribe additional elements, and parties may agree on different or additional network elements in the voluntary negotiation process.

1. Local Loops

a. Background

367. In the NPRM, we tentatively concluded that incumbent LECs should be required to unbundle local loops. We sought comment on appropriate requirements for loop unbundling that would promote entry and build upon existing state initiatives, and whether we should adopt specific provisioning requirements for loop unbundling. We also sought comment on our tentative conclusion that incumbent LECs should make available as individual network elements various subloop elements such as the feeder, distribution, and concentration equipment.

b. Comments

368. Virtually all parties that discuss local loop unbundling support the NPRM's tentative conclusion that the local loop is a network element that should be unbundled.[775] These commenters assert that unbundling local loops is consistent with congressional intent,[776] and that doing so is technically feasible.[777] In addition, a number of state commissions note that they already require incumbent LECs to unbundle local loops.[778] In support of loop unbundling, several commenters cite ongoing unbundled loop arrangements between incumbent LECs and competing providers.[779] MFS asserts that the local loop is the most formidable entry barrier to the local exchange market and has the strongest bottleneck characteristics of any network element.[780]

369. There is disagreement, however, over how the local loop should be defined. Some commenters recommend a definition that would encompass the basic loop facilities and

[775] *See, e.g.*, Bell Atlantic comments at 22; ACTA comments at 23; LCI comments at 17; Comcast comments at 20; Matanuska Tel. at 2; ACSI comments at 35; CompTel comments at 30; Illinois Commission comments at 39; U S West comments at 47; Ameritech comments at 36; District of Columbia Commission at 23; Time Warner comments at 44-45; ALTS comments at 26; TIA comments at 9; Sprint comments at 30; NCTA comments at 37; Matanuska Tel. comments at 2; *but see* GTE comments at 33 ("there is no evident need for FCC intervention. Several states are already addressing such matters . . . Moreover, because several carriers are already providing unbundled loops pursuant to state requirements, FCC action is not necessary to assure progress by states").

[776] *See, e.g.*, Hyperion comments at 18; District of Columbia Commission comments at 23; Ameritech comments at 35; NTIA reply at 9-10; SNET comments at 22-23; MFS comments at 42; ACSI comments at 35.

[777] *See, e.g.*, Citizens Utilities comments at 15; PacTel reply at 18; New York Commission comments at 26; SBA comments at 13-14; TIA comments at 9; Texas Commission comments at 9, 17; ACSI comments at 35; NYNEX comments at 64-65; MCI comments at 29; GTE reply at 18. AT&T, for example, asserts that tariffs filed by Ameritech, SNET, NYNEX, SBC, and Bell Atlantic permit the interconnection of a competitor's switch to the incumbent LEC's loop. Letter from Betsy Brady and Bruce Cox, AT&T, to Regina Keeney, Chief, Common Carrier Bureau, FCC, Mar. 21, 1996 (AT&T March 21 Letter) at 18.

[778] *See, e.g.*, Alabama Commission comments at 18; Texas Commission comments at 17; Arizona Commission comments, Exhibit V at 8; New York Commission comments at 26; Oklahoma Commission comments, Attachment A at 13; Iowa Commission comments, Attachment B at 4.

[779] *See, e.g.*, PacTel comments at 52 (noting that it has an agreement to provide MFS with unbundled loops); Ameritech comments at 36 (by the end of 1996, over 45,000 of its unbundled loops will be used by interconnecting carriers); Frontier comments at 14 (Rochester Telephone is currently providing unbundled loops pursuant to tariff.)

[780] MFS comments at 42; *accord* MCI comments at 29; IDCMA reply at 10; Ameritech comments at 35; MECA comments at 38; CompTel comments at 30; ALTS comments at 26.

would not attempt to delineate all loop technologies.[781] Parties that favor a broad definition of local loop suggest some variation on the following: the communications path between the main distribution frame (MDF) in the central office and the network interface device (NID) at the customer premises.[782] USTA, PacTel, and BellSouth contend that such a definition complies with the 1996 Act and allows private negotiations to address the specific network architectures of incumbent LECs and the needs of the particular requesting carriers.[783]

370. Other commenters support a definition of the local loop that would require incumbent LECs to provide, where facilities exist or can be upgraded, five categories of local loops: 2-wire voice-grade analog lines, 2-wire Integrated Services Digital Network (ISDN) lines, 2-wire High-Bit-Rate Digital Subscriber Lines (HDSL), 4-wire HDSL, and 4-wire DS-1 lines.[784] These parties argue that guidance from the Commission on specific loop categories will minimize complex and resource-intensive disputes between incumbent LECs and requesting carriers by avoiding disagreements over whether a particular loop functionality qualifies as a "loop."[785] ITIC contends that the ability of new entrants to provide various digital loop functions, in competition with the incumbent LEC, is likely to stimulate entry by small entities.[786]

371. Connecticut and Texas have established different definitions of unbundled local loop functionality. The Connecticut Department of Public Utility Control has ordered SNET to unbundle 2-wire voice-grade links, 2-wire ISDN links, and 4-wire DS-1 links.[787] The Texas Commission has a similar definition, but specifically excludes DS1, DS3, and fiber loops interfacing with SONET, which the Texas Commission notes can be purchased as

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[781] USTA comments at 29; U S West comments at 47; Wyoming Commission comments at 24; PacTel comments at 52-53; BellSouth comments at 37 n.82; Sprint comments at 30.

[782] U S West comments at 47; Teleport comments at 35-36; MECA comments at 28; Ameritech comments at 36; NYNEX comments at 62 n.123; Frontier comments at 14; USTA comments at 29.

[783] USTA comments at 29; PacTel comments at 52-53; BellSouth comments at 37-38.

[784] MFS comments at 43-44; GST comments at 21-22; ALTS comments at 27; *but see* Bell Atlantic reply at 10 (HDSL links are actually subloop elements and should only be available through a bona fide request process).

[785] MFS comments at 42; GST comments at 20; Intermedia comments at 10.

[786] ITIC comments at 7-8.

[787] Connecticut Commission comments, Att. B at 2.

private line services.[788] Criticizing the approach taken by the Texas Commission, ACSI and Intermedia argue that DS1 and DS3-level loops, as well as analog voice and ISDN loops, should be considered unbundled loops.[789]

372. Potential local competitors contend that an incumbent LEC should be required to modify an existing loop when a requesting carrier seeks to provide a particular type of loop capability that is not technically feasible under the loop's existing architecture.[790] MFS notes that an incumbent LEC typically will take the steps necessary to provide a particular loop functionality, such as ISDN, to a customer when that customer's existing loop is incapable of supporting the requested functionality.[791] Therefore, MFS and GST propose that the loop types available to requesting carriers should match those made available by the incumbent LEC to end-user customers within the same geographic area.[792]

373. A number of potential local competitors request that the Commission adopt specific requirements governing loop unbundling. MFS and GST recommend adoption of a rule that would establish five minutes as the standard interruption interval during which a customer's loop is disconnected from the incumbent LEC's switch and reconnected to a competitor's switch.[793] Opposing MFS's proposed five-minute loop-cutover requirement, GTE argues that the process simply may take longer than five minutes, and that the cutover interval should be addressed through negotiations.[794] Intermedia and Teleport complain that incumbent LECs have abused their control over intra-office cables that connect unbundled loops to the competitor's collocated equipment, and they ask that the Commission prohibit such practices.[795] A number of potential local competitors request that the Commission specifically require incumbent LECs to provide unbundled loops even when the LEC uses an integrated

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[788] Texas Commission comments at 17-18.

[789] ACSI comments, Attachment 1 at 2-3; Intermedia comments at 10.

[790] AT&T comments at 29-30; MFS comments at 43; ALTS comments at 27; GST comments at 21.

[791] MFS comments at 45.

[792] MFS comments at 44, *accord* NYNEX comments at 64.

[793] MFS comments at 45; GST comments at 22-23.

[794] GTE reply at 18-19, n.32.

[795] Intermedia comments at 8-9. Teleport comments at 36-37.

digital loop carrier (IDLC)[796] to deliver a particular loop to the central office. These parties argue that the incumbent LEC could either move the requested loop from the IDLC to another loop carrier, or could employ demultiplexing equipment at the central office.[797]

374. *Subloop unbundling.* Commenters disagree over the Commission's tentative conclusion to identify subloop components as individual network elements. Parties that support a national subloop unbundling requirement argue that subloop unbundling is technically feasible and will enhance competition by allowing a competitor to purchase from the incumbent only those loop facilities that it cannot provide itself.[798] These parties identify the feeder, distribution, and feeder/distribution interface as the appropriate subloop elements.[799] Some parties would add to those components the network interface device, which, in most states, is the demarcation point between incumbent LECs' outside plant and customers' inside wiring.[800] AT&T and MCI contend that the feeder, FDI, and distribution segments of the local loop perform different functions and are, therefore, logically separable.[801] ACSI asserts that, just as different loop architectures have not prevented states from unbundling local loops, different subloop architectures should not prevent subloop unbundling.[802] ITIC, ITAA and Compaq assert that subloop unbundling will facilitate the

[796] An IDLC carries aggregated loop traffic from the point of concentration in the LEC's loop facilities directly into the switch via a multiplexed circuit.

[797] MFS comments at 45-46 n.58; AT&T reply at 12; GST comments at 23; MCI reply at 30.

[798] LCI comments at 17; MCI comments at 16; ACSI comments at 38-39; TCC comments at 35-37; AT&T comments at 1; Telecommunications Resellers Ass'n comments at 34; *see also* ACSI reply at 17 (ACSI plans to deploy switches and fiber rings that would replace the incumbent LEC's feeder plant, but would still need access to the incumbent LEC's loop distribution and, occasionally, loop concentration and multiplexing functionality).

[799] *See, e.g.*, ACSI comments at 36-37 AT&T comments at 19; TIA comments at 11-12; Cable & Wireless comments at 19; ACTA comments at 19; IDCMA reply at 12-13. Other carriers seek access to digital loop carriers and analog cross-connects. MCI comments at 29; ACTA comments at 29; LCI comments at 17; TCC comments at 37.

[800] *See, e.g.*, MCI comments at 16; IDCMA reply at 12; ACTA comments at 19; GCI comments at 12; LDDS comments at 41-42; MFS comments at 43 n.54; TCC comments at 36; Telecommunications Resellers Ass'n comments at 33; LCI comments at 17.

[801] AT&T comments at 19; MCI comments at 16. According to MCI, the connection is made via a patch panel, where a competitor could easily interconnect its own feeder facilities.

[802] ACSI reply at 14.

provision of high capacity loop functions and lead to innovative new data services.[803] SBA contends that subloop unbundling will facilitate entry by small businesses by allowing them to begin competing in smaller markets, and by minimizing the number of unnecessary elements they would need to purchase.[804]

375. Incumbent LECs argue that subloop unbundling is not critical for potential competitors to enter the local exchange market.[805] Bell Atlantic and GTE note that the comments of parties considered to be potential beneficiaries of subloop unbundling, such as cable operators and CAPs, express little interest in obtaining subloop elements.[806] In addition, Bell Atlantic, Ameritech, and U S West claim that every state commission that has examined the possibility of requiring subloop unbundling has rejected it.[807] Ameritech notes that no competitor has used the bona fide request process that Illinois made available over a year ago for subloop unbundling requests.[808] Ameritech also points out that MFS did not demand subloop unbundling in its recent interconnection agreement with Ameritech.[809] Rural Telephone Coalition and GVNW contend that subloop unbundling could be particularly burdensome to smaller LECs whose networks were not designed for this type of access.[810]

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[803] Letter from Colleen Boothby, Levine, Blaszak, Block & Boothby (on behalf of the Information Technology Industry Council's FCC Working Group), to William F. Caton, Secretary, FCC, July 16, 1996 (ITIC July 16 *Ex Parte*); Letter from Joseph Markoski, Squire, Sanders & Dempsey (on behalf of the Information Technology Association of America) to William F. Caton, Secretary, FCC, July 22, 1996 (ITAA July 19 *Ex Parte*), Letter from Robert Stearns, Senior Vice President, Compaq Computer Corporation, to Susan Ness, Commissioner, FCC, July 23, 1996 (Compaq July 23 *Ex Parte*) Letter from Dhruv Khanna, Senior Communications Attorney, Intel Corporation, to Reed Hundt, Chairman, FCC, July 25, 1996 (Intel July 25 *Ex Parte*).

[804] SBA comments at 14.

[805] *See, e.g.*, NYNEX reply at 30; Bell Atlantic reply at 10; Ameritech comments at 17; SBC reply at 21.

[806] Bell Atlantic reply at 10; GTE reply at 19-20.

[807] Bell Atlantic comments at 24; Ameritech reply at 14-15; U S West comments at 50 n.109.

[808] Ameritech comments at 38 n.62.

[809] Ameritech reply at 17.

[810] Rural Tel. Coalition comments at 32; GVNW comments at 26-27.

376. A majority of commenters, particularly incumbent LECs, argue that subloop unbundling is best addressed in the context of specific requests by competing carriers.[811] AT&T suggests that the Commission could declare that subloop elements are network elements under section 251(c)(3), but not require them to be tariffed until the incumbent LEC receives a request for such elements.[812] Incumbent LECs also argue that subloop unbundling raises significant technical issues, and explain in detail many of the complexities involved.[813] In addition, Sprint and several incumbent LECs maintain that subloop unbundling would raise difficult administrative questions, such as the tracking, pricing, billing, maintenance and repair of subelements.[814] Various parties assert that the costs to reengineer parts of the loop and develop operational support systems for subloop elements will raise the price of subloop elements to prohibitively high levels.[815]

c. Discussion

377. We conclude that incumbent LECs must provide local loops on an unbundled basis to requesting carriers. We note that the Joint Explanatory Statement lists local loops as an example of an unbundled network element.[816] As discussed below, the record demonstrates that it is technically feasible for incumbent LECs to provide access to unbundled local loops, and that such access is critical to encouraging market entry. Further, the competitive checklist

[811] Bell Atlantic comments at 22; Mass. Commission comments at 7; Cincinnati Bell reply at 7, NTIA reply at 10; GTE comments at 34; NYNEX comments at 67-68; Ameritech comments at 41-42; USTA comments at 32, BellSouth comments at 39 n.85; Sprint comments at 32; *see also* Ameritech reply at 17 (some types of subloop unbundling may be technically feasible but are difficult to identify in the absence of specific requests).

[812] AT&T reply at 17.

[813] Letter from Sandra Wagner, Director - Federal Regulatory, SBC Communications, to William F. Caton, Acting Secretary, FCC, June 4, 1996 (SBC June 4 *Ex Parte*); *see also* PacTel reply at 18 (access at the NID would require incumbent LECs to construct a separate NID for use by the requesting carrier to preserve network security and customer privacy); Ameritech reply at 19 (NID unbundling ignores function of "overvoltage protection" provided by NID).

[814] Sprint comments at 30-31; GTE comments at 33-34; NYNEX comments at 68-69; Bell Atlantic comments at 24; U S West comments at 50-51; BellSouth comments at 39; Ameritech comments at 41.

[815] GTE comments, Attachment 1 at 1; Sprint comments at 32; U S West reply at 25, NYNEX comments at 69; *see also* Ameritech comments, Attachment 1 at 4 (service activation cost for subloop elements would be 53 percent higher than for activation of an unbundled loop).

[816] Joint Explanatory Statement at 116.

contained in section 271 requires BOCs to offer unbundled loops separate from switching as a precondition to entry into the in-region, interLATA services market.[817]

378. Requiring incumbent LECs to make available unbundled local loops will facilitate market entry and improve consumer welfare. Without access to unbundled local loops, new entrants would need to invest immediately in duplicative facilities in order to compete for customers. Such investment and building would likely delay market entry and postpone the benefits of local telephone competition for consumers. Moreover, without access to unbundled loops, new entrants would be required to make a large initial sunk investment in loop facilities before they had a customer base large enough to justify such an expenditure.[818] This would increase the risk of entry and raise the new entrant's cost of capital. By contrast, the ability of a new entrant to purchase unbundled loops from the incumbent LEC allows the new entrant to build facilities gradually, and to deploy loops for its customers where it is efficient to do so. Moreover, in some areas, the most efficient means of providing competing service may be through the use of unbundled loops. In such cases, preventing access to unbundled loops would either discourage a potential competitor from entering the market in that area, thereby denying those consumers the benefits of competition, or cause the competitor to construct unnecessarily duplicative facilities, thereby misallocating societal resources.

379. Section 251(c)(3) requires incumbent LECs to provide access to unbundled elements "at any technically feasible point."[819] The vast majority of commenters, including incumbent LECs, agree with our tentative conclusion that it is technically feasible to provide access to unbundled local loops,[820] and a number of commenters identify the main distribution frame in a LEC central office as an appropriate access point.[821] Moreover, access to unbundled loops is currently provided by several LECs pursuant to state unbundling

[817] 47 U.S.C. § 271(c)(2)(B).

[818] As of year end 1995, Class A carriers reported $268 billion of total plant in service, of which $229 billion was classified as network plant. Local loop plant comprises approximately $109 billion of total plant in service, which represents 41 percent of total plant in service and 48 percent of network plant. *See* 1995 ARMIS Report 43-04.

[819] 47 U.S.C. § 251(c)(3).

[820] *See, e.g.*, PacTel reply at 18; New York Commission comments at 26; SBA comments at 13-14; TIA comments at 9; GTE reply at 18; NYNEX comments at 64-65.

[821] *See, e.g.*, Bell Atlantic comments, Albers Attachment at 6-8; Ameritech comments at 36.

requirements.[822] Thus, we conclude that it is technically feasible for incumbent LECs to provide access to unbundled local loops at, for example, a central office distribution frame.

380. We further conclude that the local loop element should be defined as a transmission facility between a distribution frame, or its equivalent, in an incumbent LEC central office, and the network interface device at the customer premises. This definition includes, for example, two-wire and four-wire analog voice-grade loops, and two-wire and four-wire loops that are conditioned to transmit the digital signals needed to provide services such as ISDN, ADSL, HDSL, and DS1-level signals.[823] We note that a number of parties proposed definitions of the local loop that encompassed some or all of these loop types.[824] In addition, we agree with ITIC that the ability to offer various digital loop functions in competition with incumbent LECs may be particularly beneficial to small entities by allowing them to serve niche markets.[825]

381. Incumbent LECs are required to provide access to these transmission facilities only to the extent technically feasible. That is, if it is not technically feasible to condition a loop facility to support a particular functionality, the incumbent LEC need not provide unbundled access to that loop so conditioned. For example, a local loop that exceeds the maximum length allowable for the provision of a high-bit-rate digital service could not feasibly be conditioned for such service.[826] Such a situation may necessitate a request for subloop elements.[827] Nevertheless, section 251(c)(3) does not limit the types of

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[822] *See, e.g.*, Ameritech comments at 36 (by the end of 1996, over 45,000 of its unbundled loops will be used by interconnecting carriers); Frontier comments at 14 (Rochester Telephone is currently providing unbundled loops pursuant to tariff); *see also* Alabama Commission Comments at 18; Texas Commission comments at 17; New York Commission comments at 26; Arizona Commission comments, Exh. V at 8.

[823] ISDN (Integrated Services Digital Network) at the Basic Rate Interface level permits the transmission of digital signals over the loop at the rate of 144 kbps, which provides two standard 64 kbps voice or data channels and a 16 kbps data channel. ISDN at the Primary Rate Interface permits 23 standard 64 kbps channels plus one 16 kbps data channel. ADSL (Asynchronous Digital Subscriber Line) is a transmission path that facilitates 6 Mbps digital signal downstream and 640 kbps digital signal upstream, while simultaneously carrying an analog voice signal. Two-wire HDSL (High-bit-rate Digital Subscriber Line) permits the transmission of a 768 kbps digital signal over a copper loop, while four-wire HDSL allows the transmission of 1.544 Mbps over two two-wire pairs.

[824] *See, e.g.*, MFS comments at 43-44; ALTS comments at 27; GST comments at 21-22; ACSI comments, Att. 1 at 2.

[825] ITIC comments at 7-8.

[826] Such loop conditioning may involve removing load coils or bridged taps that interfere with the transmission of digital signals.

[827] *See, e.g.*, Bell Atlantic reply at 10 n.11.

telecommunications services that competitors may provide over unbundled elements to those offered by the incumbent LEC.

382. Our definition of loops will in some instances require the incumbent LEC to take affirmative steps to condition existing loop facilities to enable requesting carriers to provide services not currently provided over such facilities. For example, if a competitor seeks to provide a digital loop functionality, such as ADSL, and the loop is not currently conditioned to carry digital signals, but it is technically feasible to condition the facility, the incumbent LEC must condition the loop to permit the transmission of digital signals. Thus, we reject BellSouth's position that requesting carriers "take the LEC networks as they find them" with respect to unbundled network elements.[828] As discussed above, some modification of incumbent LEC facilities, such as loop conditioning, is encompassed within the duty imposed by section 251(c)(3).[829] The requesting carrier would, however, bear the cost of compensating the incumbent LEC for such conditioning.[830]

383. We further conclude that incumbent LECs must provide competitors with access to unbundled loops regardless of whether the incumbent LEC uses integrated digital loop carrier technology, or similar remote concentration devices, for the particular loop sought by the competitor. IDLC technology allows a carrier to aggregate and multiplex loop traffic at a remote concentration point and to deliver that multiplexed traffic directly into the switch without first demultiplexing the individual loops. If we did not require incumbent LECs to unbundle IDLC-delivered loops, end users served by such technologies would not have the same choice of competing providers as end users served by other loop types. Further, such an exception would encourage incumbent LECs to "hide" loops from competitors through the use of IDLC technology.

384. We find that it is technically feasible to unbundle IDLC-delivered loops. One way to unbundle an individual loop from an IDLC is to use a demultiplexer to separate the unbundled loop(s) prior to connecting the remaining loops to the switch. Commenters identify a number of other methods for separating out individual loops from IDLC facilities,

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[828] BellSouth comments at 39.

[829] *See supra* Section IV.D., interpreting the term "technically feasible." *See also* MFS comments at 43 (arguing that incumbent LECs condition loops in order to provide particular digital loop functionalities to their customers).

[830] *See supra* Section VII, discussing the recovery of costs under section 252(d)(1).

including methods that do not require demultiplexing.[831] Again, the costs associated with these mechanisms will be recovered from requesting carriers.

385. We decline to define a loop element in functional terms, rather than in terms of the facility itself. Some parties advocate defining a loop element as merely a functional piece of a shared facility, similar to capacity purchased on a shared transport trunk.[832] According to these parties, this definition would enable an IXC to purchase a loop element solely for purposes of providing interexchange service. While such a definition, based on the types of traffic provided over a facility, may allow for the separation of costs for a facility dedicated to one end user, we conclude that such treatment is inappropriate. Giving competing providers exclusive control over network facilities dedicated to particular end users provides such carriers the maximum flexibility to offer new services to such end users. In contrast, a definition of a loop element that allows simultaneous access to the loop facility would preclude the provision of certain services in favor of others. For example, carriers wishing to provide solely voice-grade service over a loop would preclude another carrier's provision of a digital service, such as ISDN or ADSL, over that same loop.[833] We note that these two types of services could be provided by different carriers over, for example, separate two-wire loop elements to the same end user.

386. Incumbent LECs must provide cross-connect facilities, for example, between an unbundled loop and a requesting carrier's collocated equipment, in order to provide access to that loop. As we conclude in section IV.D, above, an incumbent LEC must take the steps necessary to allow a competitor to combine its own facilities with the incumbent LEC's unbundled network elements. We highlight this requirement for unbundled loops because of allegations by competitive providers that incumbent LECs have imposed unreasonable rates, terms, and conditions for such cross-connect facilities in the past.[834] Incumbent LECs may recover the cost of providing such facilities in accordance with our rules on the costs of interconnection and unbundling. Charges for all such facilities must meet the cost-based standard provided in section 252(d)(1), and the terms and conditions of providing these facilities must be reasonable and nondiscriminatory under section 251(c)(3).

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[831] Under more recent standards for IDLC facilities, a competitor's loop traffic could be separated from the incumbent LEC's loop traffic without the use of multiplexers. *See, e.g.*, MCI comments at 30 (IDLC loops can be moved onto other loop carrier links, or alternatively, can be removed from the mulitiplexed signal through "hair pinning").

[832] *See, e.g.*, Cable & Wireless comments at 26-27; ACTA comments at 17.

[833] Digital services such as ISDN and ADSL occupy the same frequency spectrum on a loop as ordinary voice-grade services.

[834] Intermedia comments at 8-9; Teleport comments at 36-37.

387. At this time, we decline to adopt additional terms and conditions, such as the five-minute loop cutover requirement proposed by MFS, for loop provisioning. We agree with commenters who contend that the provisioning of unbundled local loops must be subject to close scrutiny to ensure that incumbent LECs do not delay loop cutover or otherwise complicate the acquisition of loops by a competitor. We conclude, however, that the rules we adopt in the Access to Unbundled Network Elements section that require nondiscriminatory terms and conditions for provisioning, billing, testing, and repair of unbundled elements, and the availability of electronic ordering systems, adequately address these concerns. We will continue to review and revise our rules in this area as necessary.

388. Section 251(d)(2)(A) requires the Commission to consider whether "access to such network elements as are proprietary in nature is necessary."[835] Most parties did not identify any proprietary concerns associated with providing unbundled access to local loops. Ericsson notes that some "active" loop equipment, such as channel banks and remote terminal equipment, is often proprietary in nature, and that manufacturers would require time to modify such equipment to create end-to-end network compatibility on a national basis.[836] Ericsson does not contend, however, that any proprietary information would be revealed if loops using such equipment were unbundled, or that use of such equipment should prevent loop unbundling in general.[837] Thus, we conclude that loop elements are, in general, not proprietary in nature under our interpretation of section 251(d)(2)(A). Even if loop elements were proprietary in nature, however, Ericsson does not meet the second consideration in our section 251(d)(2)(A) standard, which requires a showing that a new entrant can offer the proposed telecommunications service through the use of other, nonproprietary elements in the incumbent LEC's network.[838] Ericsson merely contends that manufacturers may need time to establish compatibility between its proprietary equipment and equipment of other manufacturers.[839] Therefore, we find that Ericsson's concerns do not justify withholding unbundled loops from requesting carriers pursuant to section 251(d)(2)(A).

389. Section 251(d)(2)(B) directs the Commission to consider whether "the failure to provide access to such network elements would impair the ability of the telecommunications

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[835] 47 U.S.C. § 251(d)(2)(A).

[836] Ericsson comments at 4.

[837] Ericsson's comments were in response to a question in the NPRM seeking comment on the need to accommodate new loop technologies or services. Ericsson comments at 4.

[838] *See supra* Section V.E.3.

[839] Ericsson comments at 4-5.

carrier seeking access to provide the services that it seeks to offer."[840] We have interpreted the term "impair" to mean either increased cost or decreased service quality that would result from using network elements of the incumbent LEC other than the one sought.[841] Commenters do not identify alternative facilities that would fulfill requesting carriers' need for transmission between the central office and the customer premises at the same cost and same quality of service. Accordingly, we conclude that competitors' ability to provide telephone exchange, exchange access, or other telecommunications services would be significantly impaired if they did not have the opportunity to purchase unbundled loops from incumbent LECs.

390. As a general matter, we believe that subloop unbundling could give competitors flexibility in deploying some portions of loop facilities, while relying on the incumbent LEC's facilities where convenient. For example, a competitor may seek to minimize its reliance on the LEC's facilities by combining its own feeder plant with the incumbent LEC's distribution plant.[842] In addition, some high bandwidth services, such as ADSL, cannot be provided over long loop lengths. ITIC, Compaq, and Intel assert that subloop unbundling would lead to innovative new data services.[843] In these situations, carriers would need access at points along the loop closer to the customer premises. The record presents evidence primarily of logistical, rather than technical, impediments to subloop unbundling.[844] Several LECs and USTA, for example, assert that incumbent LECs would need to create databases for identifying, provisioning, and billing for subloop elements.[845] Further, incumbent LECs argue that there is

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[840] 47 U.S.C. § 251(d)(2)(B).

[841] *See supra* Section V.E.3.

[842] Subloop unbundling could have network efficiency advantages as well. One party notes that subloop unbundling could allow packetized data traffic to be shifted to a data network, rather than flowing through the circuit-switched network portions of the public switched network. *See* ITIC July 16 *Ex Parte*.

[843] ITIC July 16 *Ex Parte*, ITAA July 22 *Ex Parte*, Compaq July 23 *Ex Parte*, Intel July 25 *Ex Parte*. ITAA contends that subloop unbundling would allow data and other traffic to be routed before it reaches an incumbent LEC's central office switch. According to ITAA, such routing would moot incumbent LECs' argument that traffic from the Internet and other on-line services is negatively impacting their switches. ITAA July 19 *Ex Parte*.

[844] *See, e.g.*, Sprint comments at 30-31; GTE comments at 33-34; NYNEX comments at 68-69; Bell Atlantic comments at 24 (all discussing a variety of tracking, billing, and maintenance issues that would be raised by subloop unbundling).

[845] USTA comments at 31; NYNEX comments at 69; Ameritech comments at 41; BellSouth comments at 39; U S West comments at 50.

insufficient space at certain possible subloop interconnection points.[846] We note that these concerns do not represent "technical" considerations under our interpretation of the term "technically feasible."[847]

391. Nonetheless, we decline at this time to identify the feeder, feeder/distribution interface (FDI), and distribution components of the loop as individual network elements. We find that proponents of subloop unbundling do not address certain technical issues raised by incumbent LECs concerning subloop unbundling. Incumbent LECs contend that access by a competitor's personnel to loop equipment necessary to provide subloop elements, such as the FDI, raise network reliability concerns for customers served through that FDI.[848] SBC, for example, asserts that access to its loop concentration points by competitors would increase the risk of error by a competitor's technicians that may disrupt service to customers of one or both carriers.[849] U S West contends that the potential for poor technical implementation of subloop interconnection and the lack of overall responsibility for loop performance is very likely to degrade overall service quality.[850] Proponents of subloop unbundling do not adequately respond to these arguments by incumbent LECs. As discussed above, we have determined that we must take into account specific, demonstrable claims regarding network reliability in determining whether to identify any particular component as an element that must be unbundled. Therefore, we believe that, at this stage, based on the current record evidence, the technical feasibility of subloop unbundling is best addressed at the state level on a case-by-case basis at this time.[851] Information developed by the parties in the context of a specific request for subloop unbundling will provide a useful framework for addressing the loop maintenance and network reliability matters that we have identified. Based on actions taken by the states or other future developments, and on the importance of subloop unbundling in light of technological advancements, we intend to revisit the specific issue of subloop unbundling sometime in 1997.

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[846] Bell Atlantic comments at 24; SBC comments at 38; NYNEX comments at 66.

[847] *See supra* Section IV.D.

[848] BellSouth comments at 39; NYNEX comments at 66; SBC comments at 39; U S West comments at 52 n.113; PacTel comments at 18.

[849] SBC comments at 39.

[850] U S West comments at 52 n.113.

[851] We encourage states to pursue subloop unbundling in response to requests for subloop elements by competing providers.

392. We require incumbent LECs to offer unbundled access to the network interface device (NID),[852] as a network element, as described below. When a competitor deploys its own loops, the competitor must be able to connect its loops to customers' inside wiring in order to provide competing service, especially in multi-tenant buildings. In many cases, inside wiring is connected to the incumbent LEC's loop plant at the NID. In order to provide service, a competitor must have access to this facility. Therefore, we conclude that a requesting carrier is entitled to connect its loops, via its own NID, to the incumbent LEC's NID.[853]

393. Pursuant to section 251(c)(3), we find that this arrangement clearly is technically feasible. Ameritech notes that it currently maintains such connections with competitors that have deployed their own loop facilities.[854] This is persuasive evidence that unbundled access at the NID, in this manner, does not raise network reliability concerns. Under section 251(d)(2)(A), the record contains no evidence of proprietary concerns with unbundled access to the NID. In addition, under our interpretation of the "impair" test of section 251(d)(2)(B), commenters do not contend that new entrants could obtain the same functionality at the same cost and service quality through other network elements of the incumbent LEC. Moreover, the record indicates that certain network architectures used by new entrants, such as fiber rings, can most efficiently connect end users to the new entrant's switching office without use of the incumbent LEC's facilities.[855] Thus, we conclude that the unavailability of access to incumbent LECs' NIDs would impair the ability of carriers deploying their own loops to provide service. Further, we believe that unbundled access to the NID will facilitate entry strategies premised on the deployment of loops. As discussed in section VII, above, the new entrant bears the costs of connecting its NID to the incumbent LEC's NID.

394. We do not require an incumbent LEC to permit a new entrant to connect its loops directly to the incumbent LEC's NID. MCI contends that directly connecting its loops to incumbent LECs' NIDs is "[t]he only practical solution" for gaining access to inside

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[852] The NID is a cross-connect device used to connect loop facilities to inside wiring.

[853] We emphasize that access to inside wiring through the incumbent LEC's NID does not entitle a competitor to deliver its loop facilities into a building without the permission of the building owner. Similarly, access to an incumbent LEC's NID does not entitle the competitor to the riser and lateral cables between the NID and individual units within the building, which may be owned or controlled, for example, by the premises owner.

[854] Letter from James K. Smith, Director-Federal Relations, Ameritech, to William F. Caton, Acting Secretary, FCC, July 15, 1996 (Ameritech July 15 *Ex Parte*).

[855] Letter from Don Sussman, MCI, to William F. Caton, FCC, July 12, 1996 (MCI July 12 *Ex Parte*).

wiring.[856] According to MCI, there is no extra wiring to connect the incumbent LEC's NID to the new entrant's NID.[857] Ameritech demonstrates, however, that it currently provides access to inside wiring through the type of arrangement that MCI asserts is not practical -- that is, by connecting a new entrant's loops to inside wiring via the new entrant's NID and Ameritech's NID. MCI does not demonstrate that its ability to provide competing service is unreasonably limited by the arrangements explained by Ameritech.

395. The record contains conflicting evidence on the technical feasibility of requiring incumbent LECs to permit competitors to connect their loops directly to incumbent LECs' NIDs. Ameritech asserts that such a direct connection would leave Ameritech's unused loops without overvoltage protection.[858] MCI argues that overvoltage protection is provided through the incumbent LEC's "protector module" that is separate from the NID.[859] Ameritech responds that its NIDs are integrated units providing both overvoltage protection and a demarcation point, and that these two functions of the NID are "inseverable."[860] AT&T contends direct access to incumbent LECs NIDs is technically feasible. According to AT&T, if a competitor connects its loops directly to the incumbent LEC's NID, the incumbent LEC's loops remain connected to the grounding equipment that protects against overvoltage.[861] According to AT&T, when the competitor does not use spare terminals on the NID, the competitor would be required to ground the incumbent LEC's unused loops to protect against overvoltage.[862]

396. We find that the record in this proceeding does not permit a determination on the technical feasibility of the direct connection of a competitor's loops to the incumbent LEC's NID. Our requirement of a NID-to-NID connection addresses the most critical need of competitors that deploy their own loops -- obtaining access to the inside wiring of the

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[856] MCI July 12 *Ex Parte* at 6.

[857] *Id.* at 5.

[858] Ameritech July 15 *Ex Parte* at 5.

[859] Letter from Donald Evans, Vice President - Federal Regulatory Affairs, MCI, to William F. Caton, Secretary, FCC, July 16, 1995 (MCI July 16 *Ex Parte*).

[860] Letter from James Smith, Director-Federal Relations, Ameritech, to William F. Caton, Acting Secretary, FCC, July 24, 1996 (Ameritech July 24 *Ex Parte*).

[861] Letter from Bruce Cox, Government Affairs Director, AT&T, to William F. Caton, Acting Secretary, FCC, July 18, 1996 (AT&T July 18 *Ex Parte*).

[862] *Id.*

building. We recognize, however, that competitors may benefit by directly connecting their loops to the incumbent LEC's NID, for example, by avoiding the cost of deploying NIDs.[863] States should determine whether direct connection to the NID can be achieved in a technically feasible manner in the context of specific requests by competitors for direct access to incumbent LECs' NIDs.[864]

2. Switching Capability

a. Background

397. In the NPRM, we tentatively concluded that incumbent LECs should be required to make available local switching capability as an unbundled network element. We sought comment on how a local switching element should be defined, and we identified two possible models: the switch "platform" approach, which would entitle and require a requesting carrier to purchase all of the features and functions of the switch on a per-line basis and the port approach used by the New York Commission, which offers local switching capability through the purchase of a port at a retail rate. We also sought comment on other definitions of a local switching element. In addition, we requested that commenters address whether vertical switching functions, such as those enabling the provision of custom local area signaling service (CLASS) features and call waiting, should be considered individual network elements separate from the basic switching functionality.

b. Comments

398. The vast majority of commenters support the Commission's tentative conclusion that local switching should be an unbundled network element.[865] Such parties note that the section 271 competitive checklist includes unbundled local switching and the legislative history of the 1996 Act identifies local switching as a possible element.[866] Several potential

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[863] *Id.* at 1.

[864] Ameritech July 15 *Ex Parte* at 5-6.

[865] *See, e.g.*, GCI comments at 12; TIA comments at 11-12; Citizens Utilities comments at 15; Intermedia comments at 13; Bay Springs, *et al.* comments at 18; Wyoming Commission comments at 22.

[866] *See, e.g.*, Ameritech comments at 43; LDDS comments at 44; USTA comments at 32; BellSouth comments at 40.

local competitors contend that unbundled local switching functionality is very important to promote entry into the local exchange market.[867]

399. Some incumbent LECs support a definition of local switching as a switching port.[868] These LECs favor a definition of a port that focuses on *providing access* to additional switching features, rather than on the switching features themselves.[869] PacTel, for example, asserts that a port provides dialtone and a telephone number, but does not include local usage or vertical features such as custom calling.[870] Bell Atlantic contends that the 1996 Act requires incumbent LECs to *provide access* to unbundled network elements, and that a switch port meets this directive by providing access to the switch.[871]

400. Sprint, USTA, SBC, NYNEX, and MECA, on the other hand, favor a definition of the unbundled local switching element that includes the basic function of connecting network access lines to other lines or trunks.[872] These parties would expressly exclude from this local switching definition vertical features such as custom calling.[873] Sprint and SBC argue that vertical features are retail services offered to end users today, and therefore, must be purchased by the competitor under the wholesale rate provisions of the Act.[874] USTA

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[867] LDDS reply at 18; TIA comments at 18; AT&T March 21 Letter 18 at 17-18; *but see* SBC reply at 23 ("Given that 'high margin' services are made possible through the switch, new entrants will likely purchase their own switching facilities.").

[868] BellSouth comments at 41; Cincinnati Bell comments at 18; U S West comments at 54-55; Bell Atlantic comments at 25; GTE comments at 37.

[869] BellSouth comments at 41; Cincinnati Bell comments at 18; USTA comments at 33; U S West comments at 54-55; Bell Atlantic comments at 25; GTE comments at 37; NYNEX comments at 69-70.

[870] PacTel comments at 55 (local usage should be excluded from the definition of a port because it is a tariffed service and should therefore be available to requesting carriers only through resale); *see also* SBC comments at 43 (the port should be separate from the switch).

[871] Bell Atlantic reply at 12.

[872] Sprint comments at 34; USTA reply at 16-17; SBC reply at 20; NYNEX reply at 31; MECA comments at 29.

[873] Sprint comments at 36; USTA reply at 16; SBC reply at 20; MECA comments at 29. Examples of vertical features include call waiting and three-way calling, which are custom calling features, and caller ID and call forwarding, which are custom local area signaling service (CLASS) features that rely on the transmission of signaling information between the calling and called parties.

[874] USTA reply at 16-17. PacTel reply at 19. SBC reply at 21; *see also* Sprint comments at 37-38 (although it is not technically feasible to unbundle vertical services, the costs of such services can be identified and should be excluded from the charge for the local switching element).

suggests that this approach best comports with the Act and is a reasonable compromise between the more limited port approach and the switching platform proposal.[875]

401. A number of commenters support a definition of the local switch that has been referred to as the "local switching platform."[876] These parties recommend defining the local switching element as encompassing all functions performed by the local switch, including basic switching functionality and vertical features.[877] Supporters of the switching platform approach contend that, because the requesting carrier would pay for all local switching functionality on a per-line basis, it would have the incentive and ability to combine features and services more effectively than it would under more limited definitions of the local switching element.[878]

402. LDDS and AT&T argue that the switch platform approach is more consistent with the Act than the port approach. These carriers argue that, under the port approach, local switching has not been "unbundled" because a competitor cannot combine a port with loop and trunking facilities to provide telephone service. Instead, the competitor must also purchase basic switching functionality from the incumbent LEC at wholesale rates.[879] According to AT&T and LDDS, the switching platform does not raise technical feasibility problems because requesting carriers would not have direct access to the switching hardware or software. Instead, the requesting carrier would "designate" the features to be associated with its own lines and the routing of its customers' calls, and the incumbent LEC would actually perform that function.[880]

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[875] USTA reply at 16.

[876] MCI comments at 30-32; AT&T comments at 20-21; LDDS comments at 44-46; Texas Commission reply at 8; TCC comments at 37-38; ACTA comments at 18-20; ACSI comments at 40-41; CompTel comments at 33-35; Ad Hoc Telecommunications Users Committee reply at 8.

[877] Functions listed by proponents of the switch platform include local usage, exchange access, access to operators, announcements, recognition of customer requests for service, obtaining call-specific information, data analysis, selection of traffic routes, call signaling, recording for billing and network management, tests required for network maintenance and call processing, custom calling features (*e.g.* call forwarding, call waiting), and CLASS features (*e.g.* caller ID, call return). LDDS comments at 44; ACSI comments at 40-41; MCI comments at 30. AT&T and LDDS also propose to include in the local switching definition Centrex, carrier identification code determination, and access to databases and adjunct processors for the purpose of offering advanced intelligent network (AIN) services. LDDS comments at 45; AT&T Mar. 21 Letter at 18.

[878] LDDS comments at 45; AT&T comments at 21.

[879] LDDS comments at 55; AT&T reply at 18. The Texas Commission notes that Ameritech's unbundled port tariffs in Illinois expressly exclude basic switching functionality. Texas Commission comments at 13-14.

[880] AT&T reply at 19; LDDS reply at 19

403. Opponents of the local switching platform assert that implementing a switch platform would cause technical problems. U S West and GVNW argue that the only technically feasible way to implement the switching platform would be physically to partition the switch which, according to U S West, would greatly reduce the switch's efficiency.[881] AT&T characterizes this argument as frivolous and asserts that physical partitioning of the switch has not been proposed by any party.[882] NYNEX contends that incumbent LECs would need to add capacity to their switches to accommodate competitors' demand for switch platforms.[883] AT&T responds that, because the requesting carrier is likely to be serving former customers of the incumbent LEC, the switching resources needed by the incumbent and competitor, at least initially, are likely to balance out.[884] GTE, U S West, and USTA also argue that the switching platform approach would discourage incumbent LECs from upgrading their switches because all new features would be immediately available to competitors at a discounted rate.[885]

404. Incumbent LECs argue that the switch platform would allow a requesting carrier to circumvent the statutory scheme that requires incumbent LECs to offer local exchange service at wholesale rates for resale by requesting carriers.[886] These commenters also contend that vertical features, such as custom calling and call waiting, are retail services, not network elements, and should be obtained by requesting carriers pursuant to section 251(c)(4).[887] Ad Hoc Telecommunications Users maintains that the switch platform approach raises entry costs by forcing competitive providers to purchase switching functions they may never need or use.[888] MCI and TCC contend that the local switching element should specifically include vertical features such as CLASS features and custom calling because incumbent LECs do not

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[881] U S West comments at 55.

[882] AT&T reply at 19.

[883] NYNEX reply at 32.

[884] Letter from Bruce Cox, Government Affairs Director, AT&T, to William Caton, Secretary, FCC, June 28, 1996 (AT&T June 28 *Ex Parte*).

[885] GTE comments at 38; SBC comments at 43; USTA reply at 17.

[886] PacTel comments at 54; Bell Atlantic comments at 26; GTE reply at 20; *see also* Sprint comments at 38 (the local switching platform does not create incentives for competitors to build out facilities).

[887] USTA comments at 34-35; Cincinnati Bell comments at 18.

[888] Ad Hoc Telecommunications Users Committee comments at 23.

incur the costs for these services on a usage basis.[889] ACSI and LCI also support the availability of vertical switching functionalities on an unbundled basis.[890]

405. Incumbent LECs contend that the switch platform approach is impractical because standard measures of switching, such as the number of line or trunk terminations, would not capture the dynamic nature of switching.[891] In response, MCI and LDDS state that a requesting carrier would commit to purchasing a minimum level of trunk port capacity and a minimum level of busy hour switch capacity for at least one year.[892] Several BOCs and Sprint contend that the Commission should not adopt the switch platform because there is insufficient understanding of what it would entail.[893]

406. Most parties support the Commission's proposal to require incumbent LECs to unbundle tandem switching as a network element.[894] AT&T notes that the availability of unbundled tandem switches is critical to the connection of its own switches to incumbent LECs' switches.[895] AT&T argues that unbundled tandem switching is technically feasible because IXCs currently interconnect with incumbent LECs' tandem switches through standard specifications.[896] Other commenters indicate that tandem switching is available today through access tariffs, and therefore it is unnecessary for the Commission to unbundle tandem switching.[897] SBC states that the Commission should not apply the same unbundling

[889] MCI comments at 31; TCC comments at 31.

[890] ACSI comments at 41; LCI comments at 18.

[891] USTA comments at 34; MECA comments at 30.

[892] MCI comments at 30; LDDS comments at 44-45.

[893] Ameritech comments at 45; SBC comments at 42; Bell Atlantic reply at 11; Sprint comments at 39; NYNEX reply at 31.

[894] *See, e.g.*, AT&T comments at 22; New York Commission comments at 27; U S West comments at 48; MCI comments at 17; Competition Policy Institute comments at 16; GST comments at 24; TIA comments at 13.

[895] AT&T Mar. 21 Letter at 21.

[896] AT&T comments at 22; ALTS comments at 30.

[897] Bell Atlantic comments at 27; TIA comments at 13.

requirements for tandem and end office switches because tandem switches only offer trunk interfaces and do not contain switching features on a per-line basis.[898]

407. AT&T, MCI, and TCC also ask that the local switching element be defined to include data switching by packet switches.[899] MCI asserts that it is technically feasible for the requesting carrier's own facilities to interface with an incumbent LEC's packet switch through a connection at a DS1 frame or patch panel.[900] PacTel supports the unbundling of data switches as network elements.[901]

408. Several potential local competitors argue that the Commission should require incumbent LECs, in providing unbundled local switching, to enable requesting carriers to designate the trunk assignment for its local exchange customers.[902] CompTel states that this would maximize competitors' ability to create new services.[903] PacTel argues that it is not technically feasible to route local calls originating on unbundled loops onto particular outgoing trunks connected to that switch.[904]

409. ALTS argues that incumbent LECs should be required to make local switching available so that all signaling information necessary to complete a call is passed to the connecting carrier, such as an IXC or a competing provider.[905] The Wyoming Commission is considering adoption of a rule that would require incumbent LECs to pass on signaling

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[898] SBC comments at 34 n.67.

[899] AT&T comments at 20; TCC comments at 39; MCI comments at 18.

[900] MCI comments at 18.

[901] PacTel reply at 21.

[902] ALTS comments, Attachment A at 20-21; LCI comments at 18; TCC reply at 17; *see also* CompTel comments at 34 (the Commission should enable requesting carriers to establish routing parameters for the following categories of traffic: domestic interLATA, presubscribed intraLATA, non-presubscribed intraLATA, 800/888, 900, interLATA operator traffic, intraLATA/0-/0+ operator traffic, and international direct dialed).

[903] CompTel comments at 34.

[904] PacTel reply at 20.

[905] ALTS comments at 29 (claiming that some carriers strip certain signaling information and end offices and tandem offices, thereby undermining the ability of new entrants to receive and aggregate traffic for various IXCs).

information to interconnected carriers, and would also prohibit incumbent LECs from claiming a proprietary right to signaling protocols.[906]

c. Discussion

(1) Local Switching Capability

410. We conclude that incumbent LECs must provide local switching as an unbundled network element. The record supports a finding that it is technically feasible for incumbent LECs to provide access to an unbundled local switching element, and that denying access to a local switching element would substantially impair the ability of many competing carriers to provide switched telecommunications services. We also note that section 271 requires BOCs to offer or provide "[l]ocal switching unbundled from transport, local loop transmission, or other services" as a precondition to providing in-region interLATA services.[907] As discussed below, we identify a local switching element that includes the basic function of connecting lines and trunks as well as vertical switching features, such as custom calling and CLASS features.[908] We agree with the Illinois Commission that defining the switching element in this way will permit competitors to compete more effectively by designing new packages and pricing plans.[909]

411. In the United States, there are over 23,000 central office switches, the vast majority of which are operated by incumbent LECs.[910] It is unlikely that consumers would receive the benefits of competition quickly if new entrants were required to replicate even a small percentage of incumbent LECs' existing switches prior to entering the market. The Illinois Commission staff presented evidence in a recent proceeding indicating that it takes

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[906] Wyoming Commission comments at 24.

[907] 47 U.S.C. § 271(c)(2)(B)(vi).

[908] Custom calling features, such as call waiting, three-way calling, and call forwarding, are switch-based calling functions. CLASS features, such as caller ID, are number translation services that are based on the availability of interoffice signaling.

[909] *AT&T Communications of Illinois, Petition for a Total Local Exchange Wholesale Service Tariff from Illinois Bell Telephone Company Pursuant to Section 13-505.5 of the Illinois Public Utilities Act*, Order, Docket Nos. 95-0458 and 95-0531, June 26, 1996 (Illinois Wholesale Order) at 63-66.

[910] *Statistics of Communications Common Carriers*, Federal Communications Commission, 1994/1995 Edition, at Table 2.4. This figure is derived from carriers filing with the FCC, which represent approximately 92 percent of the industry.

between nine months and two years for a carrier to purchase and install a switch.[911] We find this to be persuasive evidence of the entry barrier that would be created if new entrants were unable to obtain unbundled local switching from the incumbent LEC. The ability to purchase unbundled switching will also promote competition in an area until the new entrant has built up a sufficient customer base to justify investing in its own switch. We expect that the availability of unbundled local switching is likely to increase the number of carriers that will successfully enter the market, and thus should accelerate the development of local competition.

412. We define the local switching element to encompass line-side and trunk-side facilities plus the features, functions, and capabilities of the switch.[912] The line-side facilities include the connection between a loop termination at, for example, a main distribution frame (MDF), and a switch line card.[913] Trunk-side facilities include the connection between, for example, trunk termination at a trunk-side cross-connect panel and a trunk card. The "features, functions, and capabilities" of the local switch include the basic switching function of connecting lines to lines, lines to trunks, trunks to lines, trunks to trunks. It also includes the same basic capabilities that are available to the incumbent LEC's customers, such as a telephone number, directory listing, dial tone, signaling, and access to 911, operator services, and directory assistance.[914] In addition, the local switching element includes all vertical features that the switch is capable of providing, including custom calling, CLASS features, and Centrex, as well as any technically feasible customized routing functions. Thus, when a requesting carrier purchases the unbundled local switching element, it obtains all switching features in a single element on a per-line basis. A requesting carrier will deploy individual vertical features on its customers' lines by designating, via an electronic ordering interface, which features the incumbent LEC is to activate for particular customer lines.

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[911] Supplemental Rebuttal Testimony of Jake Jennings, Office of Policy and Planning, Illinois Commerce Commission, ICC Staff Ex. 1.04, Docket No. 95-0458, at 11-12 (Mar. 11, 1996).

[912] The NPRM used the terms "switch platform" and "port," as they had been developed by the Illinois and New York Commissions, respectively, to describe two possible approaches to establishing an unbundled local switching element. Parties commenting on the unbundled switching element attributed a variety of functionalities to each of these terms. To avoid confusion, we will not use these terms in discussing the unbundled local switching element. Instead, we will address commenters' proposals according to the functionality that they recommend be included in the definition of an unbundled local switching element.

[913] A line card is a plug-in electronic printed circuit card that operates ringing, holding, and other features associated with one or several telephone lines.

[914] Purchasing the local switching element does not entitle a requesting carrier to connect its own AIN call processing database to the incumbent LEC's switch, either directly or via the incumbent LEC's signal transfer point or database. Section V.I.4, which discusses the unbundling of incumbent LECs' signaling systems and databases. We also note that E911 and operator services are further unbundled from local switching. *See infra* Section V.I.6.

413. We disagree with commenters who argue that vertical switching features should be classified exclusively as retail services, available to competing providers only through the resale provision of section 251(c)(4).[915] The 1996 Act defines network element as "a facility or equipment used in the provision of a telecommunications service" and "the features, functions, and capabilities that are provided by means of such facility or equipment."[916] Vertical switching features, such as call waiting, are provided through operation of hardware and software comprising the "facility" that is the switch, and thus are "features" and "functions" of the switch.[917] We note that the Illinois Commission recently defined an unbundled local switching element to include vertical switching features.[918] Although we find that vertical switching features should be available to competitors through the resale provision of section 251(c)(4), we reject the view that Congress intended for section 251(c)(4) implicitly to remove vertical switching features from the definition of "network element."[919] Therefore, we find that vertical switching features are part of the unbundled local switching element.[920]

414. At this time we decline to require further unbundling of the local switch into a basic switching element and independent vertical feature elements. Such unbundling does not appear to be necessary to promote local competition. Indeed, most potential local competitors do not recommend that vertical switching features be available as separate network elements. MCI, AT&T and LDDS believe that such features should be available to new entrants as part of the local switching element.[921] We also note that additional unbundling of the local switch would not result in a practical difference in the way the local switching element is provisioned. As discussed below, when a competing provider orders the unbundled basic switching element for a particular customer line, it will designate which vertical features

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[915] Section 251(c)(4)(A) requires incumbent LECs "to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers." 47 U.S.C. § 251(c)(4)(A).

[916] 47 U.S.C. § 153(29).

[917] In some cases vertical features may be provided using hardware and software external to the actual switch. In those instances, the functionality of such external hardware and software is a separate element under section 251(c)(3), and is available to competing providers. *See infra* Section V.I.4, discussing unbundled signaling and databases.

[918] *Illinois Wholesale Order* at 63-66.

[919] *See supra* Section V.H, rejecting arguments that services available for resale under section 251(c)(4) cannot be provided via unbundled elements.

[920] *See infra* Section VII.C.2.b.2, concerning the pricing of an unbundled switching element.

[921] AT&T June 28 *Ex Parte* at 1-2; MCI comments at 31; LDDS comments at 44.

should be activated by the incumbent LEC for that line. In addition, the record indicates that the incremental costs associated with vertical switching features on a per-line basis may be quite small,[922] and may not justify the administrative difficulty for the incumbent LEC or the arbitrator to determine a price for each vertical element. Thus, states can investigate, in arbitration or other proceedings, whether vertical switching features should be made available as separate network elements. We will continue to review and revise our rules in this area as necessary.

415. We conclude that providing access to an unbundled local switching element at a LEC central office is technically feasible. We are not persuaded by the argument that shared use of an unbundled switching element would jeopardize network security and reliability by permitting competitors independently to activate and deactivate various switching features. A competing provider will purchase and obtain the local switching element the same way it obtains an unbundled local loop, that is, by ordering, via electronic interfaces,[923] the local switching element and particular vertical switching features.[924] The incumbent LEC will receive the order and activate (or deactivate) the particular features on the customer line designated by the competing provider. Consequently, the incumbent LEC is not required to relinquish control over operations of the switch.

416. We also reject the argument that a definition of local switching that incorporates shared use of a local switch would involve physical partitioning of the switch.[925] The requirements we establish for local switch unbundling do not entail physical division of the switch, and consequently do not impose the inefficiency or technical difficulties identified by some commenters.

417. Nor are we persuaded by the arguments of some incumbent LECs that an unbundled switching element based on shared use of the local switch is technically infeasible because incumbent LECs lack significant excess capacity at any given time. Initially, many requests for local switching elements from competitors will likely result from the loss of customers by the incumbent LEC. Thus, at least initially, an increase in the use of a local switch by the requesting carrier is not likely to lead to an enormous, immediate increase in switch use overall. If incumbent LECs and competing providers believe that they would

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[922] LDDS comments at 57, Letter from Bruce Cox, Government Affairs Director, AT&T, to Elliot Maxwell, FCC, June 25, 1996 (AT&T June 25 *Ex Parte*).

[923] *See infra* Section V.I.4, *infra*, addressing requesting carriers' access to incumbent LECs' ordering and provisioning systems.

[924] Section V.I.5 addresses the arrangements for ordering unbundled network elements.

[925] U S West comments at 55-57.

benefit by quantifying their anticipated demand for switch resources, they are free to do so in the negotiation and arbitration processes. Such planning may be necessary when a competitor anticipates that usage of the local switching element by its customers will place demands on the incumbent LEC's switch that exceed the usage levels anticipated by the incumbent LEC.[926]

418. We conclude that customized routing, which permits requesting carriers to designate the particular outgoing trunks that will carry certain classes of traffic originating from the competing provider's customers, is technically feasible in many LEC switches. Customized routing will enable a competitor to direct particular classes of calls to particular outgoing trunks, which will permit a new entrant to self-provide, or select among other providers of, interoffice facilities, operator services, and directory assistance.[927] Bell Atlantic notes that customized routing is generally technically feasible for local calling, although it notes that the technology and capacity constraints vary from switch to switch.[928] SBC contends that customized routing is technically infeasible for older switches, such as the 1AESS switch.[929] AT&T acknowledges that, although the ability to establish customized routing in 1AESS switches may be affected by the "call load" in each office, only 9.8% of the switches used by the seven RBOCs, GTE and SNET are 1AESS switches.[930] We recognize that the ability of an incumbent LEC to provide customized routing to a requesting carrier will depend on the capability of the particular switch in question. Thus, our requirement that incumbent LECs provide customized routing as part of the "functionality" of the local switching element applies, by definition, only to those switches that are capable of performing customized routing. An incumbent LEC must prove to the state commission that customized routing in a particular switch is not technically feasible.

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[926] Bell Atlantic, for example, notes that a competitor's service or pricing packages could stimulate greater switch usage than previously experienced by the incumbent. Letter from Patricia Koch, Assistant Vice President, Bell Atlantic, to William Caton, Acting Secretary, FCC, June 21, 1996 (Bell Atlantic June 21 *Ex Parte*).

[927] *See, e.g.*, AT&T June 28 *Ex Parte*. In addition, we note that the Illinois Commission recently directed Ameritech and Centel to permit a carrier purchasing wholesale local exchange service to designate a provider of operator services and directory assistance other than that of the incumbent LEC. Such access is accomplished through the routing of such calls from the incumbent LEC's switch to the competing provider of the operator service or directory assistance. *See Illinois Wholesale Order* at 45.

[928] Letter from Patricia Koch, Assistant Vice President, Bell Atlantic, to William Caton, Acting Secretary, FCC, June 24, 1996 (Bell Atlantic June 24 *Ex Parte*); *see also* BellSouth comments at 41-42 n.89 (the ability to provide customized routing depends on the quantity of customized routing requests from other competitors).

[929] SBC comments at 41-42.

[930] Letter from Bruce Cox, Government Affairs Director, AT&T, to William F. Caton, Secretary, FCC, July 11, 1996 (AT&T July 11 *Ex Parte*).

419. Section 251(d)(2)(A) requires the Commission, in determining which network elements should be made available to competing providers, to consider "whether access to such network elements as are proprietary in nature is necessary."[931] To withhold a proposed network element from a competing provider, an incumbent LEC must demonstrate that the element is proprietary and that gaining access to that element is not necessary because the competing provider can use other, nonproprietary elements in the incumbent LEC's network to provide service.[932] U S West asserts that switch unbundling could raise concerns involving, among other things, "licensing of intellectual property." It cites a request by one interconnector to be the exclusive provider of particular features in U S West's generic switching software.[933] Bell Atlantic states that it is not at liberty to sub-license the software that operates vertical switching features.[934] We note, however, that these incumbent LECs do not object to providing vertical switching functionalities to requesting carriers under the resale provision of section 251(c)(4).[935] In addition, the vast majority of parties that discuss unbundled local switching do not raise proprietary concerns with the unbundling of either basic local switching or vertical switching features. Even if we accept the claim of U S West and Bell Atlantic that vertical features are proprietary in nature, these carriers do not meet the second consideration in our section 251(d)(2)(A) standard, which requires an incumbent LEC to show that a new entrant could offer the proposed telecommunications service through the use of other, nonproprietary elements in the incumbent LEC's network.[936] Accordingly, we find that access to unbundled local switching is clearly "necessary" under our interpretation of section 251(d)(2)(A).[937]

420. Section 251(d)(2)(B) directs the Commission to consider whether the failure to provide access to an unbundled element "would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer."[938] We have interpreted

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[931] 47 U.S.C. § 251(d)(2)(A).

[932] *See supra* Section V.E.

[933] U S West comments at 55 n.117.

[934] Bell Atlantic comments, Albers Attachment at 17-18.

[935] U S West reply at 26-27; Bell Atlantic comments at 26.

[936] *See supra* Section V.E.

[937] *Id.*

[938] 47 U.S.C. § 251(d)(2)(B).

the term "impair" to mean either increased cost or decreased service quality that would result from using network elements of the incumbent LEC other than the one sought.[939] SBC and MFS contend that access to unbundled local switching may not be essential for new entrants because competitors are likely to deploy their own switches.[940] These parties present no evidence that competitors could provide service using another element in the LEC's network at the same cost and at the same level of quality. In addition, most commenters that address this issue generally argue that local switching is essential for the provision of competing local service,[941] and we agree. We thus conclude that a requesting carrier's ability to offer local exchange services would be impaired, if not thwarted, without access to an unbundled local switching element.

421. Section 251(c)(3) requires that incumbent LECs provide access to unbundled network elements on terms and conditions that are "just, reasonable, and nondiscriminatory."[942] We agree with CompTel and LDDS that new entrants will be disadvantaged if customer switchover is not rapid and transparent. We also note that the Michigan Commission has recognized the significance of customer switchover intervals and has directed Ameritech and GTE to file proposals on how they will "ensure the equal availability of expeditious processing of local, interLATA, and intraLATA carrier changes."[943] Therefore, we require incumbent LECs to switch over customers for local service in the same interval as LECs currently switch end users between interexchange carriers. This requirement applies to switchovers that only require the incumbent LEC to make changes to software. Switchovers that require the incumbent LEC to make physical modifications to its network, such as connecting a competitor's loop to its switch, are not subject to this requirement, and instead are governed by our terms and conditions for all unbundled elements.[944] Today, incumbent LECs routinely change customers' presubscribed interexchange carriers quickly and transparently, thereby contributing to the competitiveness of the interexchange market. We

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[939] *See supra* Section V.E.

[940] SBC reply at 23; MFS comments at 46.

[941] *See, e.g.*, LDDS reply at 18 (unbundled local switching is "critical" to local competition); TIA comments at 18; AT&T Mar. 21 Letter at 17-18.

[942] 47 U.S.C. § 251(c)(3).

[943] *In the Matter, On the Commission's Own Motion, To Establish Permanent Interconnection Arrangements Between Basic Local Exchange Service Providers*, Opinion and Order, Mich. Pub. Serv. Comm'n, Case No. U-10860, at 36-37 (June 5, 1996).

[944] *See supra* Section V.G., discussing provisioning intervals for unbundled network elements.

expect that a similar requirement for local exchange switchovers that require only a software change will similarly contribute to local exchange competition.

422. We reject the proposal by some incumbent LECs to define unbundled local switching as the facilities that provide a *point of access* to the switch, but that would not actually include switching functionality. Under this definition, the purchaser of the local switching element would not actually obtain local switching, only the right to purchase local switching functionality and other switching features at wholesale rates. We believe that the unbundled local switching element must include the functionality of connecting lines and trunks. The definition proposed by these incumbent LECs would contravene the requirement in section 251(c)(3) that incumbent LECs provide network elements "in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service."[945] If a competing provider combined its own loops and transport with the local switching element ("point of access"), it would be unable to provide telecommunications service without separately purchasing, at wholesale rates, switching functionality from the incumbent LEC.

423. We also disagree with the proposal to define local switching as a point of access plus basic switching functionality, but that would exclude vertical switching features.[946] As a legal matter, this definition is inconsistent with the 1996 Act's definition of "network element," which includes all the "features, functionalities, and capabilities provided by means of such facility or equipment."[947] In addition, this definition would not fulfill the pro-competitive objectives of the 1996 Act as effectively as the per-line definition we adopt. A competitor that obtains basic and vertical switching features at cost-based rates will have maximum flexibility to distinguish its offerings from those of the incumbent LEC by developing a variety of service packages and pricing plans.[948] Moreover, an upfront purchase of all local switching features may speed entry by simplifying practical issues such as the pricing of individual switching features.

424. We also address the impact on small incumbent LECs. For example, the Illinois Independent Telephone Association and the Rural Telephone Coalition favor rules that

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[945] 47 U.S.C. § 251(c)(3).

[946] Sprint comments at 34; USTA reply at 16-17; SBC reply at 20; NYNEX reply at 31; MECA comments at 29.

[947] 47 U.S.C. § 153(29); *see supra* section V.C., which interprets the Act's definition of "network element."

[948] *See, e.g.*, LDDS comments at 33; AT&T comments at 21.

recognize the differences between larger and smaller LECs.[949] We have considered the economic impact of our rules in this section on small incumbent LECs. In this section, for example, we expressly provide for the fact that certain LECs may possess switches that are incapable of performing customized routing for competitors that purchase unbundled local switching. As noted by Rural Telephone Coalition and the Illinois Independent Telephone Coalition, this approach is necessary to accommodate the different technical capabilities of large and small carriers. We also note that section 251(f) of the 1996 Act provides relief for certain small LECs from our regulations under section 251.

(2) Tandem Switching Capability

425. We also affirm our tentative conclusion in the NPRM that it is technically feasible for incumbent LECs to provide access to their tandem switches unbundled from interoffice transmission facilities. We note that some states already have required incumbent LECs to unbundle tandem switching.[950] Parties do not contend, pursuant to section 251(d)(2)(A), that tandem switches are proprietary in nature. With regard to section 251(d)(2)(B), we find that competitors' ability to provide telecommunications service would be impaired without unbundled access to tandem switching. Therefore, we find that the availability of unbundled tandem switching will ensure that competitors can deploy their own interoffice facilities and connect them to incumbent LECs' tandem switches where it is efficient to do so.

426. We define the tandem switch element as including the facilities connecting the trunk distribution frames to the switch, and all the functions of the switch itself, including those facilities that establish a temporary transmission path between two other switches. The definition of the tandem switching element also includes the functions that are centralized in tandems rather than in separate end office switches, such as call recording, the routing of calls to operator services, and signaling conversion functions.

(3) Packet Switching Capability

427. At this time, we decline to find, as requested by AT&T and MCI, that incumbent LECs' packet switches should be identified as network elements. Because so few parties commented on the packet switches in connection with section 251(c)(3), the record is insufficient for us to decide whether packet switches should be defined as a separate network element. We will continue to review and revise our rules, but at present, we do not adopt a national rule for the unbundling of packet switches.

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[949] Illinois Ind. Tel. Ass'n comments at 1; Rural Tel. Coalition reply at 37.

[950] *See, e.g.*, Ameritech comments at 43, Cincinnati Bell comments at 18, GTE comments at 38, AT&T March 21 Letter at 23.

3. Interoffice Transmission Facilities

a. Background

428. In the NPRM, we proposed to require incumbent LECs to make available unbundled transport facilities in a manner that corresponds to the rate structure for interstate transport charges. We specifically proposed to require unbundled access to links between the end office and the serving wire center (SWC), the SWC and the IXC point of presence (POP), the end office and the tandem switch, and the tandem switch and the SWC. We also tentatively concluded that incumbent LECs should be required to unbundle channel termination facilities for special access from the interoffice facilities. In addition, we requested comment on whether and how other interoffice facilities used by incumbent LECs should be unbundled.

b. Comments

429. The vast majority of the parties that discussed local transport unbundling supported the Commission's proposal to provide access to dedicated and shared interoffice facilities as unbundled network elements.[951] BellSouth, for example, asserts that individual transport components should be available as unbundled elements, and notes that some LECs already have unbundled transport from its other access services.[952]

430. Several incumbent LECs contend that they already provide unbundled transport services pursuant to the Commission's *Expanded Interconnection* rules.[953] PacTel asserts that its proposal to tariff unbundled transport elements, including dedicated transport and tandem-switched transport, will fulfill its duties under sections 251 and 271.[954] Bell Atlantic and TIA, on the other hand, indicate that existing tariffs for unbundled transport facilities are

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[951] AT&T comments at 22; USTA comments at 35; Frontier comments at 16; GCI comments at 12; Sprint comments at 39; GST comments at 24; NYNEX comments at 63; NEXTLINK comments at 23; ACSI comments at 41; MCI comments at 17; ALTS comments at 30; Citizens Utilities comments at 15; CompTel comments at 45; TIA comments at 13; Bell Atlantic comments at 22; U S West comments at 48; Teleport comments at 37; MFS comments at 48; USTA comments at 35; TCC comments at 35; New York Commission comments at 27; Ameritech comments at 43; BellSouth comments at 42.

[952] BellSouth comments at 42-43.

[953] Ameritech comments at 42-43; Cincinnati Bell comments at 18; GTE comments at 38.

[954] PacTel comments at 57.

insufficient to comply with the 1996 Act.[955] MFS asks the Commission to clarify that, under the expanded interconnection rules as well as the 1996 Act, incumbent LECs must unbundle all interoffice transport facilities without requiring the requesting carrier to purchase channel terminations or other elements.[956]

431. Parties agree that local transport unbundling is technically feasible.[957] MCI, for example, asserts that transport facilities are already unbundled for exchange access and thus there is no question that unbundling is technically feasible.[958] NCTA, GST, TIA, and MFS contend that unbundling transport elements should be presumed technically feasible because of the Commission's *Expanded Interconnection* proceeding.[959] AT&T and Telecommunications Resellers Association point out that IXCs currently obtain interconnections between transport elements and the tandem switches pursuant to standard specifications.[960]

432. A number of commenters specify particular components of local transport that should be unbundled: (1) dedicated transport trunks from incumbent LEC end offices to competitors' switches, to IXC POPs, and to other end offices of the incumbent LEC; and (2) common transport trunks between incumbent LEC end offices and tandem switches.[961] In addition, ALTS, MFS, AT&T, and MCI contend that requesting carriers should have the ability to order such transport trunks with or without electronics (*i.e.*, as "dark fiber").[962] GTE disagrees and argues that the definition of network element only encompasses facilities "*used*

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[955] Bell Atlantic comments at 27 (Bell Atlantic has already filed, or plans to file, intrastate tariffs for the network elements it has unbundled under expanded interconnection.); TIA comments at 13.

[956] MFS comments at 48; *accord* AT&T comments at 22; MCI comments at 17.

[957] *See, e.g.*, GST comments at 24; AT&T comments at 22; GTE reply at 18-19; GVNW comments at 28; NYNEX comments at 65; MCI comments at 32; Comcast comments at 18; CompTel comments at 31; NCTA comments at 42; MFS comments at 48; Telecommunications Resellers Ass'n comments at 35; Ameritech comments at 43.

[958] MCI comments at 32.

[959] NCTA comments at 42; GST comments at 24; TIA comments at 13; MFS comments at 47-48.

[960] AT&T comments at 22; Telecommunications Resellers Ass'n comments at 35.

[961] *See, e.g.*, AT&T comments at 22; NYNEX comments at 62-63; GVNW comments at 20; TCC reply at 18; ACSI comments, Attachment 1 at 5-6.

[962] ALTS comments at 30; MCI comments at 32; AT&T comments at 22; MFS comments at 48.

in the provision of telecommunications service," and that dark fiber does not meet this definition because LECs do not "use" it in their networks.[963]

433. Several parties ask that the Commission specify additional transport components as unbundled network elements beyond those proposed in the NPRM. AT&T contends that incumbent LECs should have to unbundle their digital cross-connect systems (DCSs), which are now used to disaggregate high-speed traffic from IXCs into individual circuits.[964] MCI and AT&T contend that these facilities will enable IXCs to use more cost-efficient, high-speed facilities to route traffic to the incumbent LEC and have the traffic disaggregated into individual circuits at the DCS.[965] CompTel asserts that, when direct-trunked transport transits a tandem switch or other intermediate node, incumbent LECs should offer each individual link as an unbundled element.[966] MCI also asserts that competitors need "loop transport" to carry traffic from the incumbent's unbundled loops to the competitor's switch.[967]

434. A number of parties assert that the availability of unbundled transport facilities would promote local competition. AT&T contends that it seeks to combine unbundled common transport with competitive tandem switching and dedicated transport to provide IXCs with alternative access service from the competitor's end office to the IXC POP.[968] AT&T, Telecommunications Resellers Association, and TIA assert that the availability of unbundled dedicated transport will allow competitors to connect their switches to incumbent LEC switches efficiently.[969] MCI contends that incumbent LECs have denied MCI access to trunks between the incumbent LECs' end offices, thereby increasing MCI's costs of deploying local facilities and restricting MCI's ability to acquire redundant facilities for its local traffic.[970] NYNEX and LDDS recommend that the Commission require incumbent LECs to offer unbundled dedicated transport between their own end office or tandem switches and the

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[963] GTE reply at 21.

[964] AT&T comments at 22 n.23; *accord* SBC comments at 87.

[965] AT&T comments at 22; MCI comments at 17.

[966] CompTel comments at 45.

[967] MCI comments at 22.

[968] AT&T Mar. 21 Letter at 22.

[969] *Id.*; Telecommunications Resellers Ass'n comments at 35; TIA comments at 13.

[970] MCI comments at 46.

requesting carrier's switch or POP.[971] The Texas Public Utility Commission has specifically required incumbent LECs to provide competitors with "loop facilities transport service," which connects an unbundled loop to the competitor's switch.[972]

435. Several parties caution that pricing distortions could accompany a ruling that transport components are network elements under section 251(c)(3).[973] GTE, for example, argues that the Commission should not permit requesting carriers to use unbundled transport elements to avoid access charges.[974] Similarly, Ameritech states that the 1996 Act prohibits arbitrary price distinctions between switched and special transport, and that, if interoffice facilities are unbundled from tandem switching, no such distinction can be made.[975] Other parties maintain that the 1996 Act requires cost-based pricing of all unbundled elements, including transport elements.[976]

436. A few parties oppose a requirement that incumbent LECs unbundle facilities that correspond to interstate transport and special access rate elements.[977] Cincinnati Bell argues that these elements are already available through existing tariffs, and therefore should not be required to be offered as unbundled elements pursuant to the 1996 Act.[978] MECA argues that local transport and special access facilities are toll access facilities and therefore are not necessary to provide competitive basic local exchange service.[979] MECA also states that any requirement concerning local transport and special access should not apply to any LEC that was not covered by the MFJ restrictions and, in order to minimize arbitrage opportunities, any

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[971] NYNEX comments at 63 n.126; LDDS reply at 18.

[972] Texas Commission comments at 18.

[973] *See e.g.*, GTE comments at 38; CompTel comments at 45; Ameritech comments at 43.

[974] GTE comments at 38.

[975] Ameritech comments at 43.

[976] ACSI comments at 42; MCI comments at 32.

[977] *See, e.g.*, MECA comments at 38; Cincinnati Bell comments at 18.

[978] Cincinnati Bell comments at 18.

[979] MECA comments at 38.

modifications to local transport and special access must wait until the LECs have restructured their local rates.[980]

437. TCC urges the Commission to define dedicated transport as an interoffice transmission path dedicated to a single carrier, including multiplexing and grooming, redundant facilities, and cross-office wiring to a digital cross-connect panel.[981] ACSI argues that the Commission should require incumbent LECs to make both dedicated and switched transport available at the DS-0, DS-1, DS-3 and Optical Carrier levels, which should be offered as completely unbundled links between serving wire centers (SWCs) and interconnector points-of-presence, the central office and the SWC, the end office and the tandem, and the SWC and the tandem.[982] Teleport advocates that interoffice trunking facilities be defined in terms of their underlying transmission characteristics without reference to the use of the facility.[983]

438. ALTS argues that, since there are currently well-defined standards for transport, there should be no impediment to requiring equivalent levels of technical performance among competing carriers, *i.e.*, no meaningful distinctions among the technical performance of different DS1s.[984] Therefore, as in the case with local loops, ALTS contends that competitors should receive the same or better ordering, provisioning, and installation service as the incumbent provides itself and that penalties should be assessed if deadlines are not met.[985]

c. Discussion

439. We conclude that incumbent LECs must provide interoffice transmission facilities on an unbundled basis to requesting carriers. The record supports our conclusion that such access is technically feasible and would promote competition in the local exchange

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[980] MECA comments at 38.

[981] TCC comments at 38; *see also* NYNEX comments at 63 for a similar definition.

[982] ACSI comments at 41.

[983] Teleport comments at 37.

[984] ALTS comments at 30.

[985] *Id.* at 30-31.

market. We note that the 1996 Act requires BOCs to unbundle transport facilities prior to entering the in-region, interLATA market.[986]

440. We require incumbent LECs to provide unbundled access to shared transmission facilities between end offices and the tandem switch.[987] Further, incumbent LECs must provide unbundled access to dedicated transmission facilities between LEC central offices or between such offices and those of competing carriers. This includes, at a minimum, interoffice facilities between end offices and serving wire centers (SWCs), SWCs and IXC POPs, tandem switches and SWCs, end offices or tandems of the incumbent LEC, and the wire centers of incumbent LECs and requesting carriers. The incumbent LEC must also provide, to the extent discussed below, all technically feasible transmission capabilities, such as DS1, DS3, and Optical Carrier levels (*e.g.* OC-3/12/48/96) that the competing provider could use to provide telecommunications services. We conclude that an incumbent LEC may not limit the facilities to which such interoffice facilities are connected, provided such interconnection is technically feasible, or the use of such facilities. In general, this means that incumbent LECs must provide interoffice facilities between wire centers owned by incumbent LECs or requesting carriers, or between switches owned by incumbent LECs or requesting carriers. For example, an interoffice facility could be used by a competitor to connect to the incumbent LEC's switch or to the competitor's collocated equipment. We agree with the Texas Commission that a competitor should have the ability to use interoffice transmission facilities to connect loops directly to its switch. We anticipate that these requirements will reduce entry barriers into the local exchange market by enabling new entrants to establish efficient local networks by combining their own interoffice facilities with those of the incumbent LEC.

441. The ability of new entrants to purchase the interoffice facilities we have identified will increase the speed with which competitors enter the market. By unbundling various dedicated and shared interoffice facilities, a new entrant can purchase all interoffice facilities on an unbundled basis as part of a competing local network, or it can combine its own interoffice facilities with those of the incumbent LEC. The opportunity to purchase unbundled interoffice facilities will decrease the cost of entry compared to the much higher cost that would be incurred by an entrant that had to construct all of its own facilities. An efficient new entrant might not be able to compete if it were required to build interoffice facilities where it would be more efficient to use the incumbent LEC's facilities. We recognize that there are alternative suppliers of interoffice facilities in certain areas. We are convinced, however, that entry will be facilitated if competitors have greater, not fewer, options for procuring interoffice facilities as part of their local networks, and that Congress

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[986] 47 U.S.C. § 271(c)(2)(B)(v).

[987] Section V.I. addresses unbundled access to the tandem switching element.

intended for competitors to have these options available from competitors. Thus, the rules we establish for the unbundled interoffice facilities should maximize a competitor's flexibility to use new technologies in combination with existing LEC facilities.

442. We find that it is technically feasible for incumbent LECs to unbundle the foregoing interoffice facilities as individual network elements. The interconnection and unbundling arrangements among the larger LECs, IXCs, and CAPs that resulted from our *Expanded Interconnection* rules confirm the technical feasibility of unbundling interoffice facilities used by incumbent LECs to provide special access and switched transport.[988] As AT&T and Telecommunications Resellers Association point out, IXCs currently interconnect with incumbent LECs' transport facilities pursuant to standard specifications.[989] We also note that commenters do not identify technical feasibility problems with unbundling interoffice facilities.

443. We also find that it is technically feasible for incumbent LECs to unbundle certain interoffice facilities not addressed in our *Expanded Interconnection* proceeding. First, we conclude that an incumbent LEC must provide unbundled access to interoffice facilities between its end offices, and between any of its switching offices and a new entrant's switching office, where such interoffice facilities exist. This allows a new entrant to purchase unbundled facilities between two end offices of the incumbent LEC, or between the new entrant's switching office and the incumbent LEC's switching office. Although our *Expanded Interconnection* rules did not specifically require incumbent LECs to unbundle these facilities, commenters do not identify any potential technical problem with such unbundling. Moreover, some LECs already offer unbundled dedicated interoffice facilities, for example, between their end offices and SWCs for exchange access.

444. In addition, as a condition of offering unbundled interoffice facilities, we require incumbent LECs to provide requesting carriers with access to digital cross-connect system (DCS) functionality. A DCS aggregates and disaggregates high-speed traffic carried between IXCs' POPs and incumbent LECs' switching offices, thereby facilitating the use of cost-efficient, high-speed interoffice facilities. AT&T notes that the BOCs, GTE, and other large LECs currently make DCS capabilities available for the termination of interexchange traffic.[990] We find that the use of DCS functionality could facilitate competitors' deployment of high-speed interoffice facilities between their own networks and LECs' switching offices.

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[988] *See, e.g.*, MCI comments at 32; NCTA comments at 42; GST comments at 24; TIA comments at 13; MFS comments at 47-48.

[989] AT&T comments at 22; Telecommunications Resellers Ass'n comments at 35.

[990] Letter from Bruce Cox, Government Affairs Director, AT&T, to William F. Caton, Acting Secretary, FCC, July 18, 1996.

Therefore, we require incumbent LECs to offer DCS capabilities in the same manner that they offer such capabilities to IXCs that purchase transport services.

445. We disagree with PacTel's assertion that it is not technically feasible for incumbent LECs to provide DCS functionality to competitors that purchase unbundled interoffice facilities.[991] First, contrary to PacTel's assertion, we do not require incumbent LECs to develop new arrangements for the offering of DCS capabilities to competitors. We only require that DCS capabilities be made available to competitors to the extent incumbent LECs offer such capabilities to IXCs. Second, PacTel suggests the provision of DCS capabilities requires physical partitioning of the DCS equipment in order to prevent carriers from gaining control of each other's traffic.[992] We do not require such partitioning for the provision of DCS capabilities. As noted above, we only require incumbent LECs to permit competitors to use DCS functionality in the same manner that incumbent LECs now permit IXCs to use such functionality.

446. Section 251(d)(2)(A) requires the Commission to consider whether "access to such network elements as are proprietary in nature is necessary."[993] Commenters do not identify any proprietary concerns relating to the provision of interoffice facilities that LECs are required to unbundle. We also note that many of these facilities are also currently offered on an unbundled basis to competing carriers. Therefore, the record provides no basis for withholding these facilities from competitors based on proprietary considerations.

447. Section 251(d)(2)(B) requires the Commission to consider whether the failure to provide access to an unbundled element "would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer."[994] We have interpreted the term "impair" to mean either increased cost or decreased service quality that would result from using network elements other than the one sought.[995] Certain commenters contend that unbundled access to these facilities would improve their ability to provide competitive local

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[991] Letter from Alan Ciamporcero, Vice President, PacTel, to William F. Caton, Acting Secretary, FCC, July 17, 1996 (PacTel July 17 *Ex Parte*).

[992] *Id.*

[993] 47 U.S.C. § 251(d)(2)(A).

[994] 47 U.S.C. § 251(d)(2)(B).

[995] *See supra* Section V.E.

exchange and exchange access service.[996] MCI, for example, argues that its inability to obtain unbundled access to trunks between an incumbent LEC's end offices raises its cost of providing local service.[997] Accordingly, we conclude that the section 251(d)(2)(B) requires incumbent LECs to provide access to shared interoffice facilities and dedicated interoffice facilities between the above-identified points in incumbent LECs' networks, including facilities between incumbent LECs' end offices, new entrant's switching offices and LEC switching offices, and DCSs. We believe that access to these interoffice facilities will improve competitors' ability to design efficient network architecture, and in particular, to combine their own switching functionality with the incumbent LEC's unbundled loops.[998]

448. We reject Cincinnati Bell's argument that existing tariffs for transport and special access services filed pursuant to our *Expanded Interconnection* rules fulfill our obligation to implement the requirements of section 251(c).[999] First, the *Expanded Interconnection* rules require the unbundling of interstate transport services only by Class A carriers [1000] whereas section 251(c) requires network unbundling by all incumbent LECs, except for carriers that are exempt under section 251(f) from our interconnection rules.[1001] Consequently, some non-Class A carriers that were not subject to our *Expanded Interconnection* requirements will be required to comply with the requirements of this Order. Second, we find that the Class A carriers' existing tariffs for unbundled transport elements do not satisfy the unbundling requirement of section 251(c), as suggested by Cincinnati Bell, because such tariffs are only for interstate access services, not for unbundled interoffice facilities. As such, existing federal tariffs for transport and special access exclude *intra*state transport, and therefore are not equivalent to unbundled interoffice facilities, which we have determined to be nonjurisdictional in nature.

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[996] *See, e.g.*, AT&T Mar. 21 Letter; LDDS Comments at 47.

[997] MCI comments at 46.

[998] *See, e.g.* MCI comments at 22.

[999] Cincinnati Bell comments at 18.

[1000] Class A carriers are those exchange carriers having more than $100 million in total company regulated revenues. *See 1990 Cost Support Order*, 5 FCC Rcd 1364, (Com. Car. Bur. 1990); *Commission Requirements for Cost Support Material to be Filed with 1989 Annual Access Tariffs*, 4 FCC Rcd 1662, 1663 (Com. Car. Bur. 1988).

[1001] *See infra* Section XII, addressing the exemption for rural LECs.

449. We also disagree with MECA, GTE, and Ameritech that we should consider "pricing distortions" in adopting rules for unbundled interoffice facilities.[1002] Section , below, addresses the pricing of unbundled network elements identified pursuant to section 251(c)(3) as it relates to our current access charge rules. Nor are we are persuaded by MECA's argument that incumbent LECs not subject to the MFJ should not be required to unbundle transport facilities because, according to MECA, such facilities are unnecessary for local competition.[1003] As discussed above, the ability of a new entrant to obtain unbundled access to incumbent LECs' interoffice facilities, including those facilities that carry interLATA traffic, is essential to that competitor's ability to provide competing telephone service.

450. We do not impose specific terms and conditions for the provision of unbundled interoffice facilities. We believe that the rules we establish in this Order for all unbundled network elements adequately address ALTS's concern regarding the provisioning, billing, and maintenance of unbundled transport facilities.[1004] We also decline at this time to address the unbundling of incumbent LECs' "dark fiber." Parties that address this issue do not provide us with information on whether dark fiber qualifies as a network element under sections 251(c)(3) and 251(d)(2). Therefore, we lack a sufficient record on which to decide this issue. We will continue to review and revise our rules in this area as necessary.

451. Rural Telephone Coalition contends that incumbent LECs should not be required to construct new facilities to accommodate new entrants.[1005] We have considered the economic impact of our rules in this section on small incumbent LECs. In this section, for example, we expressly limit the provision of unbundled interoffice facilities to *existing* incumbent LEC facilities. We also note that section 251(f) of the 1996 Act provides relief for certain small LECs from our regulations under section 251.

4. Databases and Signaling Systems

a. Background

(1) NPRM

[1002] MECA comments at 38, GTE comments at 38; Ameritech comments at 43.

[1003] MECA comments at 38.

[1004] Section V.G addresses terms and conditions governing incumbent LECs' provision of access to unbundled network elements.

[1005] Rural Tel. Coalition reply at 36.

452. In the NPRM, we tentatively concluded that incumbent LECs should be required to unbundle access to their signaling systems and databases as network elements.[1006] We asked commenters to identify points at which carriers interconnect with SS7 networks[1007] today, as well as the technical feasibility of establishing other points of access and interconnection.[1008] We also asked commenters to identify those signaling and database functions currently provided by incumbent LECs on an unbundled basis, and other functions not currently offered by incumbent LECs, that the parties believe should be offered on an unbundled basis.[1009]

453. In the NPRM, we noted the possibility that competitors that provide local exchange service using resold incumbent LEC services or unbundled elements might want to connect an alternative call processing database to the incumbent LEC's SS7 network in order to offer services and features not available through the incumbent LEC's own SS7 network databases.[1010]

454. We also sought comment on unbundling access to the Advanced Intelligent Network (AIN), and referenced our separate Intelligent Networks proceeding which deals with related issues.[1011] We sought comment on whether to unbundle access to AIN facilities and functionalities.

(2) SS7 Signaling Network Technology

455. Signaling systems facilitate the routing of telephone calls between switches. Most LECs employ signaling networks that are physically separate from their voice networks, and these "out-of-band" signaling networks simultaneously carry signaling messages for

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[1006] NPRM at para. 107.

[1007] A signaling network that is physically separate from the voice networks.

[1008] NPRM at para. 108.

[1009] NPRM at para. 108.

[1010] NPRM at para. 112.

[1011] NPRM at para. 113; *see In the Matter of Intelligent Networks*, CC Docket No. 91-346, Notice of Inquiry, 6 FCC Rcd 7256 (1991), Notice of Proposed Rulemaking, 8 FCC Rcd 6813 (1993) (*Intelligent Networks*). We incorporated the record of the *Intelligent Network* proceeding into this docket by reference. NPRM at para. 113 n.151.

multiple calls. In general, most LECs' signaling networks adhere to a Bellcore standard Signaling System 7 (SS7) protocol.[1012]

456. SS7 networks use signaling links to transmit routing messages between switches, and between switches and call-related databases. A typical SS7 network includes a signaling link, which transmits signaling information in packets, from a local switch to a signaling transfer point (STP), which is a high-capacity packet switch.[1013] The STP switches packets onto other links according to the address information contained in the packet.[1014] These additional links extend to other switches, databases, and STPs in the LEC's network.[1015] A switch routing a call to another switch will initiate a series of signaling messages via signaling links through an STP to establish a call path on the voice network between the switches.

457. As mentioned above, the SS7 network also employs signaling links (via STPs) between switches and call-related databases, such as the Line Information Database (LIDB), Toll Free Calling (*i.e.*, 800, 888 number) database, and AIN databases. These links enable a switch to send queries via the SS7 network to call-related databases, which return customer information or instructions for call routing to the switch.[1016]

458. From the perspective of a switch in a LEC network, the databases discussed above merely supply information or instructions. Updating or populating the information in such databases, however, takes place through a separate process involving different equipment. Carriers input information directly into a service management system (SMS), which in turn downloads such information into the individual databases.

459. The Advanced Intelligent Network (AIN) is a network architecture that uses distributed intelligence in centralized databases to control call processing and manage network

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[1012] The SS7 protocol is widely used and has been adopted by Bellcore, the American National Standards Institute, and the International Telecommunication Union--Telecommunication Standardization Sector. *See* Bellcore, BOC Notes on the LEC Networks (1994).

[1013] STPs are usually deployed in pairs for redundancy purposes. *Id.*

[1014] Any element capable of handling SS7 signaling messages is also generally referred to as a Signaling Point. Each Signaling Point has a unique network address and every SS7 signaling message has a routing label containing addresses for the origination and destination of the message plus a signaling link selection code. *Id.*

[1015] For example, an STP to STP connection is generally used for inter-network interconnection. An STP to switch connection is a common part of the SS7 network and is used to connect end offices to the SS7 network. A connection between a call-related database and a switch is usually done via a connection at an STP (*i.e.*, database to STP to switch). *Id.*

[1016] Switch software commonly referred to as a "trigger" interrupts call progress, in order for the switch to query call-related databases. *Id.*

information, rather than performing those functions at every switch. An AIN-capable switch[1017] halts call progress when a resident software "trigger" is activated, and uses the SS7 network to access intelligent databases, known as Service Control Points (SCPs), that contain service software and subscriber information, for instruction on how to route, monitor, or terminate the call.[1018] AIN is being used in the deployment of number portability, wireless roaming, and such advanced services as same number service (i.e., 500 number service) and voice recognition dialing. AIN services are designed and tested in an off-line computer known as a Service Creation Environment (SCE). Once a service is successfully tested, the software is transferred to an SMS that administers and supports SCP databases in the network. The SMS then regularly downloads software and information to an SCP where interaction with the voice network takes place via the signaling links and STPs discussed above.

b. Comments

460. Almost all parties, including incumbent LECs, support the Commission's tentative conclusion to require incumbent LECs to unbundle access to their signaling systems.[1019] Parties generally agree that access to SS7 network signaling is essential to the provision of competitive local exchange service and that providing such access is technically feasible.[1020] Indeed, most BOCs state that they already provide access to their signaling

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[1017] A switch with AIN capabilities is referred to as a service switching point (SSP). *Id.*

[1018] Switch queries and database responses use a part of the SS7 protocol called the Transaction Capabilities Application Part (TCAP). *Id.*

[1019] *See, e.g.*, Ad Hoc Telecommunications Users Committee comments at 24; ACSI comments at 42; ALTS comments at 31; AT&T comments at 23; Comcast comments at 20; Ericsson comments at 5; GCI comments at 12; GST comments at 24; Intermedia comments at 13; MFS comments at 48-49; MCI comments at 32; Sprint comments at 39; Teleport comments at 37; Time Warner comments at 44-45; Ameritech comments at 46-47; BellSouth comments at 43; NYNEX comments at 71; PacTel comments at 57-60; Alabama Commission comments at 18; District of Columbia Commission comments at 23; Florida Commission comments at 17; Mass. Commission comments at 7; New York Commission comments at 27; Wyoming Commission comments at 23. These parties also generally support access to databases associated with signaling. Some parties, however, urge the Commission to weigh the potential harm from access to database and signaling systems, which might give someone the opportunity to cause inadvertent or malicious damage to large parts of the public switched network. Secretary of Defense comments at 6-7; Sprint comments at 39-40; Lincoln Tel. reply at 15; GVNW comments at 20, 29 (screening necessary to prevent network failures from proliferating between interconnected networks).

[1020] *See, e.g.*, Ad Hoc Telecommunications Users Committee comments at 24; ACSI comments at 42; ALTS comments at 31; AT&T comments at 23; Citizens Utilities comments at 15; CompTel comments at 43; Continental comments at 19; Ericsson comments at 5; Frontier comments at 16; GCI comments at 12; LCI comments at 18; MCI comments at 32; NEXTLINK comments at 23; Sprint comments at 39-40; TIA comments at 14; Ameritech comments at 47; Bell Atlantic comments at 27-28; GTE comments at 38-41; U S West comments at 57-58; California Commission comments at 26; Colorado Commission comments at 24; Louisiana Commission comments at 5; Wyoming Commission comments at 23-24; USTN reply at 4.

systems.[1021] BellSouth states that it currently provides such access at its STPs via signaling links to all carriers, including IXCs, independent telephone companies, wireless carriers, and other local exchange carriers.[1022] Commenters also report that independent SS7 network aggregators currently provide access to signaling systems to many independent local exchange and interexchange carriers, and to some competitive local carriers.[1023] In addition, several state commissions note that they already have, or are considering, a requirement that incumbent LECs unbundle access to their signaling systems, including associated databases.[1024]

461. Some incumbent LECs argue that, because there are competitive providers for SS7 network services, there is no need for the Commission to require incumbent LECs to unbundle these network elements for competing carriers.[1025] Most potential competitors counter that access to incumbent LEC SS7 networks will be necessary for some carriers, either because alternative providers of signaling systems and databases will not be available to them or because it will not be technically feasible to use any signaling network other than the incumbent LEC's SS7 network.[1026] AT&T argues that, even where there are alternative SS7

[1021] Ameritech comments at 46-47; Bell Atlantic comments at 27-30; BellSouth comments at 43; GTE comments at 40-41; NYNEX comments at 71; PacTel comments at 58-59; SBC comments at 46-48; Sprint comments at 39-41; USTA comments at 36.

[1022] BellSouth comments at 43.

[1023] AT&T comments at 23; BellSouth comments at 44-45; NYNEX comments at 71; GVNW comments at 29 (most small incumbent LECs obtain SS7 functionalities from US Intelco or a neighboring large incumbent LEC); GTE comments at 40-41 n.61 (competitors include Independent Telecommunications Network, Southern New England Telephone, and GTE Intelligent Network Services); NYNEX comments at 71; PacTel comments at 58; Bell Atlantic comments at Attachment 3, 16 (independent SS7 providers offer an out-of-band signaling channel which allows the service providers to interconnect with other SS7 networks); USTN reply at 1. Commenters note that these aggregators also provide access to databases associated with signaling.

[1024] *See, e.g.*, California Commission comments at 26 (under consideration by the California Commission); Colorado Commission comments at 24; Louisiana Commission comments at Attachment A; Michigan Commission comments at 12; Texas Commission comments at 19; Wyoming Commission comments at 23-24 (Wyoming Commission has draft rules only); In the Matter of the Commission Investigation Relative to the Establishment of Local Exchange Competition and Other Competitive Issues, Case No. 95-845-TP-COI at 49 (Ohio Commission June 12, 1996) (access to SS7 functionalities, and necessary customer databases such as 911, LIDB, Toll Free Calling, and Directory Assistance).

[1025] *See, e.g.*, Bell Atlantic comments at 27-28; BellSouth comments at 44-45; GTE comments at 40-41 (access is not necessary under section 251(d)(2)(A) to the extent it is proprietary and denial of such access would not impair the provision of competitive services under section 251(d)(2)(B) to the extent it is not proprietary); PacTel comments at 40, 57-60; NYNEX comments at 71 (there are already alternative suppliers of these functions, and as demand grows, more will enter the market).

[1026] *See* AT&T comments at 23; Letter from Frank Simone, Regulatory Division Manager, Federal Government Affairs, AT&T to William Caton, Acting Secretary, FCC, June 13, 1996 (AT&T June 13 *Ex Parte*).

networks, unbundling of the incumbent's SS7 network will increase competition and help control costs for new entrants.[1027]

462. Some incumbent LECs contend that the 1996 Act only requires them to unbundle access to their signaling systems and databases to the extent necessary to support call routing and completion for competitors.[1028] Other parties, including IXCs, disagree and contend that access to incumbent LECs' signaling systems under the 1996 Act should include access to all associated databases and use of deployed AIN technology, and that such access is necessary in order for them to compete successfully in the local exchange market.[1029]

463. Many parties argue that open access and interconnection to incumbent LECs' SS7 networks and signaling protocols are critical to maintaining the seamless routing and completion of traffic between competing carriers.[1030] Frontier asserts that the use of proprietary or closed protocols by incumbent LECs effectively can prevent interconnected networks from communicating with each other.[1031] Several state commissions have proposed or required that incumbent LECs provide unaltered transmission of signaling information between interconnecting carriers and their customers.[1032] In support of such access, several commenters cite recent interconnection agreements that provide for the exchange of SS7 signaling messages.[1033]

[1027] AT&T comments at 23; *accord* Telecommunications Resellers Ass'n comments at 36.

[1028] ALLTEL comments at 10; Ameritech comments at 46-47; Bell Atlantic comments at 22.

[1029] *See, e.g.*, AT&T comments at 23; MCI reply at 30-31.

[1030] ACSI comments at 45 (open access is important to support CLASS features and access to databases); Frontier comments at 16; GST comments at 24; MCI comments at 33; New York Commission comments at 27 (signaling systems may represent a bottleneck to efficient exchange of traffic for all LECs); Texas Commission comments at 20; Wyoming Commission comments at 24; USTN reply comments at 2.

[1031] Frontier comments at 16 n.31 (such anti-competitive behavior would be contrary to the pro-competitive goals of the 1996 Act); *accord* Wyoming Commission comments at 24 (incumbent LECs may not claim a proprietary right to signaling protocols).

[1032] Wyoming Commission comments at 23-24 (Wyoming Commission draft rules require unaltered transmission of signaling information); Texas Commission comments at 19 (Texas law requires interconnecting carriers to provide nondiscriminatory access to ensure the interoperability of networks and service to end users).

[1033] Georgia Commission comments at Attachment E 6-7 (BellSouth and MCIMetro interconnection agreement provides for the exchange of SS7 signaling messages including the Transaction Capabilities Application Part (TCAP) part of the SS7 protocol that supports *inter alia* CLASS features).

464. Virtually all parties agree that physical access, or interconnection, to the incumbent LEC's SS7 network should occur at the STP, because it provides essential network management and security functions that are not performed by other SS7 network elements.[1034] Commenters assert that such access at the STP would provide other carriers with access to all of the functions of an incumbent LEC's SS7 network.[1035] A few parties urge the Commission to require incumbent LECs to unbundle direct access to SCP databases.[1036] Most commenters, including all of the incumbent LECs, assert that such access is not technically feasible because SCP databases do not perform the mediation functions present at the STP.[1037] Some incumbent LECs argue that direct access to any SS7 network elements, other than the STP, would require development of additional industry standards before such access could be considered technically feasible.[1038]

465. Several parties advocate access to unbundled signaling links and STPs.[1039] BellSouth, however, argues that incumbent LECs should only have to provide access to their SS7 network at an STP for competitors.[1040] Parties describe several methods for competing

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[1034] *See, e.g.*, Ameritech comments at 48-50; Bell Atlantic comments at 27; MCI comments at 34-35; NYNEX comments at 71; Sprint comments at 40. Part of the STP security function is to screen incoming signaling traffic for unusable messages and to prevent them from reaching the SCP or switch where they could potentially cause reliability and performance problems. GVNW comments at 29; SBC comments at 46; USTA comments at 36. The STP also prevents unauthorized access to proprietary information. GTE comments at 39-40.

[1035] Bell Atlantic comments at 27; GTE comments at 39; USTA comments at 36. *See* AT&T comments at 24 n.25.

[1036] Frontier comments at 16; LCI comments at 18.

[1037] *See, e.g.*, ACSI at 45; Bell Atlantic comments at 27-28; Colorado Commission comments at 24 (Colorado Commission requires unbundled access to the SCP via the STP); Comcast comments at 18; GTE comments at 40 (until appropriate mediation techniques and associated software and hardware are developed, access to SCP databases should remain through the STP); PacTel comments at 59; NYNEX comments at 71; SBC comments at 47; Ameritech reply at 20-21 (industry has yet to develop standards for SCP access); AT&T reply at 19-20 n.32; PacTel reply at 21-22.

[1038] GTE comments at 40; SBC comments at 47; Sprint comments at 40.

[1039] ALTS comments at Attachment A, 23; AT&T comments at 23; Cable & Wireless comments at 19, 24-25; Citizens Utilities comments at 15; GCI comments at 12; Frontier comments at 16; Telecommunications Resellers Ass'n comments at 35; NYNEX comments at 71 (provides unbundled access to network signaling resources for call set up and for database queries through unbundled signaling links and ports at its STPs); PacTel reply at 21-22; TIA comments at 14; California Commission comments at 26 (California Commission is considering *inter alia*, unbundling STPs and signaling links); Colorado Commission comments at 26; Wyoming Commission comments at 23-24 (Wyoming Commission draft rules require unbundling of signaling links, STPs, and SCPs); Iowa Commission comments at Appendix B, 4 (arguing that signaling links and STPs must be unbundled by incumbent LECs).

[1040] BellSouth reply at 23.

carriers to access unbundled elements of the incumbent LEC's SS7 network. A new entrant could provide or purchase signaling links to connect its switch to the incumbent LEC's STP, or it could provide its own signaling link and STP and then connect its STP to the incumbent LEC's STP.[1041] SBC adds that a competing carrier could also contract with a third party that has already established signaling link connectivity to the incumbent LEC's STPs.[1042] SBC also notes that it requires certification of new companies before implementing SS7 interconnection in order to protect the integrity of its network.[1043]

466. Commenters disagree over what databases qualify as network elements under the 1996 Act. Some parties, including IXCs and other potential local competitors, argue that access to all incumbent LEC databases should be unbundled as network elements.[1044] This would include both incumbent LEC call processing and non-call processing databases.[1045] Most incumbent LECs counter that administrative or "back office" databases do not fall within the definition of network element in the 1996 Act.[1046] Incumbent LECs supporting this limited definition also argue that only those databases used for the routing and completion of calls are required to be unbundled by the 1996 Act.[1047]

[1041] SBC comments at 47; Sprint comments at 40 (currently provides access to its SS7 network through "A" signaling links which run from the end office to the STP and through "B" signaling links which connect the STPs of two separate SS7 networks); U S West comments at 48 (competitors should be able to provide their own transport to an STP or purchase transport from the incumbent LEC); PacTel comments at 58 (Pacific Bell proposed, before the California Commission, to unbundle its signaling links that provide interconnection between other carriers' switches or STPs to Pacific Bell's STPs).

[1042] SBC comments at 47.

[1043] SBC comments at 47.

[1044] ACSI comments at 42-44; AT&T comments at 23-26; ALTS comments at 31; MCI comments at 32-33.

[1045] ACSI comments at 42-44; ALTS comments at 31; MCI comments at 32-33 (both call processing and non-call processing databases necessary to route, complete and bill simple and complex calls should be unbundled as network elements).

[1046] Ameritech comments at 48-51; Bell Atlantic reply at 12-23; GTE reply at 21; Lincoln Tel. reply at 12; NYNEX reply at 34.

[1047] Bell Atlantic reply at 12-23; GTE reply at 21; Lincoln Tel. reply at 12; NYNEX reply at 34.

467 A number of parties urge the Commission to require incumbent LECs to provide competing carriers with the same access to their databases that they provide to themselves.[1048] Some potential local competitors argue that access to a number of existing incumbent LEC databases is important if they are to compete effectively with the incumbent LEC.[1049] Many parties, including most incumbent LECs, identify access to the Line Information Database (LIDB)[1050] and the Toll Free Calling (*i.e.*, 800, 888 numbers) database[1051] as important to the provision of local service.[1052] Some potential local competitors contend that databases are a significant expense and that they will be prohibitively costly to duplicate immediately or in the near future.[1053] The Louisiana Commission notes that it currently requires incumbent LECs to provide competitive providers with access to LIDB, Toll Free Calling, and AIN databases through signaling interconnection such that the functionality, quality, terms and conditions are equal to those the incumbent LEC provides to itself.[1054] Several incumbent LECs respond that they already provide such access to the LIDB and Toll Free Calling

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[1048] ALTS comments at 31; ACSI comments at 42-43; MCI comments at 32-33; NCTA comments at 42 (competitors' customer information should be included in incumbent LEC databases on the same price, terms, and conditions as the incumbent LEC provides for itself); Teleport comments at 37; Wyoming Commission comments at 23 (nondiscriminatory access for call routing and completion); GCI comments at 13; LCI comments at 18; Vartec comments at 5.

[1049] ACSI comments at 42-43; MCI comments at 32-37. Letter from Leonard Sawicki, MCI Telecommunications to Robert Tanner, Common Carrier Bureau, FCC, July 3, 1996 (MCI July 3 *Ex Parte*). MCI identifies LIDB, Toll Free Calling, Local Number Portability and Directory Assistance databases as call processing databases necessary for new entrants to offer competitive local telephone service. *Id.*

[1050] Parties described the LIDB as a database containing information as to whether a subscriber number is a valid working line, telephone line type, call screening information and validation information for calling cards. *See* MCI July 3 *Ex Parte*. *See In the Matter of Local Exchange Carrier Line Information Database*, Report and Order, 8 FCC Rcd 7130 (1993).

[1051] Toll free calling (*i.e.*, 800, 888 numbers) is a nationwide service generally used to bill the called party. It utilizes a single national SMS and ten regional toll free calling SCP databases. Toll Free Calling SCPs are currently owned by Ameritech, Bell Atlantic, BellSouth, GTE, NYNEX, PacTel, SBC, SNET, Sprint (local), and U S West. The national SMS is owned by Bellcore and operated by a third party administrator. *See In the Matter of Toll Free Service Access Codes*, Notice of Proposed Rulemaking, 10 FCC Rcd 13692 (1995).

[1052] ACTA comments at 14; ALTS comments at 31; Ameritech comments at 47 (call routing and completion functions sometimes require supplemental calling functions or information such as 800 number routing data or credit verification); GTE comments at 24; U S West comments at 48; Bell Atlantic reply at 12-23; GTE reply at 18; NYNEX reply at 34.

[1053] AT&T comments at 23-24; NCTA comments at 42; Telecommunications Resellers Ass'n comments at 36.

[1054] Louisiana Commission comments at 5; *see* Michigan Commission comments at 12 (requires non-discriminatory access to databases necessary for the provision of local exchange service including LIDB and Toll Free Calling databases).

databases via their SS7 network.[1055] GVNW argues that all access to call-related databases must be mediated to prevent unauthorized messages from entering an incumbent's database.[1056]

468. Many potential local competitors argue that access to the incumbent LEC's LIDB should be unbundled.[1057] Most parties agree that query access to the LIDB is technically feasible.[1058] Most potential local competitors contend that they also need access to the incumbent LECs' administrative database (SMS) that is used to input customer data into the LIDB.[1059] AT&T argues that such access is technically feasible, and can be provided to competitors in the same manner that the incumbent LEC now does for itself.[1060] Other parties propose that the Commission require the incumbent LEC to input a competing carriers' customer information into its LIDB for the competitor.[1061]

469. Several parties argue that the Commission should unbundle the Toll Free Calling database for access by competitors.[1062] Most incumbent LECs commented that they already

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[1055] Ameritech comments at 47; BellSouth comments at 43; GTE comments at 40; NYNEX comments at 71; Sprint comments at 40.

[1056] GVNW comment at 29; *see also* MECA comments at 38-39 (competitors should not have direct "on-line" access to incumbent databases).

[1057] ACTA comments at 14; ACSI comments at 42 (access to the LIDB is important to identify presubscribed interexchange carriers); GST comments at 25; ALTS comments at 31.

[1058] AT&T comments at 24; ALTS comments at 31; Ameritech comments at 46-51; Bell Atlantic comments at 27-28; GTE comments at 38-41; Louisiana Commission comments at 5; NCTA comments at 42; NYNEX reply at 34; Teleport comments at 37-38; U S West comments 48.

[1059] AT&T comments at 25-26; American Network Exchange comments at 5 (requesting access to LIDB, but without the current restrictions imposed by *In the Matter of Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards*, CC Docket No. 91-115); ACSI comments at 42; Citizens Utilities comments at 15; NCTA comments at 42; Teleport comments at 37.

[1060] AT&T comments at 26. The conditions, (*e.g.*, type of media, electronic information transfer method) applicable to competitor interconnection with such databases should be identical to those the incumbent LEC uses for itself. *Id.*

[1061] Georgia Commission comments at 21 (under BellSouth-MCIMetro interconnection agreement, BellSouth will enter MCIMetro line information into its LIDB so as to enable MCIMetro customers to participate in alternative billing systems, such as collect calling and third number billing).

[1062] ALTS comments at 31; American Network Exchange comments at 5; ACSI comments at 43; Louisiana Commission comments at 5.

provide query access to their Toll Free Calling databases.[1063] In addition, access to the single national SMS is available under tariff administered by Bellcore.[1064]

470. Parties also argue that they need equal access to 911 and E911 services, including the underlying Automatic Location Indicator (ALI) database.[1065] Several state commissions have also asserted that such access is necessary for new entrants as well as incumbent LECs.[1066] NCTA asserts that competitors must have access to incumbent LEC systems for 911 and E911 services because currently only incumbent LECs maintain them.[1067]

471. Some competitive providers urge the Commission to require incumbent LECs to unbundle access to their AIN.[1068] Several parties argue that AIN should be unbundled to allow competitors to access the incumbent LEC's AIN physically at all points that the incumbent does for itself.[1069] Cable & Wireless argues that larger carriers may be able to design and build their own AIN technology, but smaller carriers may not be able to afford to

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[1063] GTE comments at 40; Sprint comments at 40; NYNEX reply at 34. Reservation and activation of 800 and 888 numbers is available today as an unbundled tariff offering from many common carriers and independent suppliers through the RESP ORG process. *See In the Matter of Toll Free Service Access Codes*, Notice of Proposed Rulemaking, 10 FCC Rcd 13692 (1995).

[1064] Access to individual 800 and 888 numbers is achieved through the RESP ORG process administered by Bellcore. Customers contact a RESP ORG (which can be an IXC, LEC, wireless carrier, or a large organization like Westinghouse) which enters subscriber information into the 800 SMS, assigning a number to the subscriber. The SMS than loads the routing information into the SCPs, at which time the number is working and can be utilized by the subscriber. *See In the Matter of Toll Free Service Access Codes*, Notice of Proposed Rulemaking, 10 FCC Rcd 13692 (1995).

[1065] ACSI comments at 43; ALTS comments at 32; Citizens Utilities comments at 15; Comcast comments at 20; Continental comments at 19; GST comments at 25; MCI comments at 18, 33-34; NCTA comments at 42; Teleport comments at 37.

[1066] Georgia Commission comments at 19; Wyoming Commission comments at 23.

[1067] NCTA comments at 42.

[1068] Ad Hoc Telecommunications Users Committee comments at 24-25; ACTA comments at 18; ACSI at 42; Cable & Wireless comments at 23-25; CompTel comments at 43; GCI comments at 13; MCI comments at 33-34; Cable & Wireless reply at 23-24; USTN reply at 3-4. Letter from Genevieve Morelli, Vice President & general Counsel, CompTel to William Caton, Acting Secretary, FCC, June 14, 1996 (CompTel June 12 *Ex Parte*); Letter from Linda Oliver, Counsel for WorldCom to William Caton, Acting Secretary, FCC, June 14, 1996 (WorldCom June 14 *Ex Parte*).

[1069] CompTel comments at 43 (competitive providers should be able to interconnect with AIN elements at all points that ILECs interconnect currently); MCI comments at 35.

deploy all of the necessary equipment.[1070] MCI argues that access to the incumbent LEC's AIN capabilities would allow them to bring new services to the marketplace and enhance their ability to compete with the incumbent.[1071] Several commenters ask the Commission to adopt the approach of the Louisiana Commission which ordered unbundled access to incumbent LEC databases for all services that the incumbent LEC provides itself, including 800 number, LIDB, and AIN services.[1072] Sprint argues that access to AIN should be unbundled to the extent AIN is used by the incumbent LEC to provide call routing functions.[1073] Many incumbent LECs respond that AIN is still an evolving technology, and therefore it is not technically feasible for the Commission to require unbundled access.[1074] Some incumbent LECs also argue that AIN is not a signaling system or database, and therefore is not a network element under the Act.[1075]

472. A number of parties assert that currently the only technically feasible point of access to the incumbent LEC's AIN is at the incumbent LECs' SCE and SMS.[1076] Several competitive providers contend that access at the SCE and SMS would provide a competing carrier with the same ability to offer AIN-based services as the incumbent LEC without

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[1070] Cable & Wireless comments at 23 (access to the incumbent LEC's existing AIN platform including the SMS database, signaling links and SCPs will allow new entrants to bring new services to the market efficiently and quickly).

[1071] MCI comments at 35.

[1072] ACSI comments at 43; CompTel comments at 43-44; MCI comments at 35 (competitive providers should stand in the same relationship to AIN components as the ILEC does when it offers AIN services to its customers).

[1073] Sprint reply at 20 n.27.

[1074] BellSouth comments at 44; SBC comments at 44; PacTel reply at 22 (*Intelligent Networks* docket contains evidence that AIN unbundling is not technically feasible).

[1075] Bell Atlantic comments at 29; Ameritech reply at 21 (arguing that because there are no services provided via AIN that are not also provided via the switch, that AIN unbundling is not necessary for competitive providers).

[1076] Ameritech comments at 49 (Ameritech claims that it has offered to provide database access via its SMS and SCE in the *Intelligent Networks* proceeding, but also argues that such access is still under development and not yet technically feasible); GTE comments at 42 (record in CC Docket No. 91-346 contains persuasive evidence that, other than access to the SMS, access to AIN network elements is neither technically nor operationally feasible at this time); Sprint comments at 41; Ameritech reply at 15 (agreeing with Sprint's position on SMS access); Bell Atlantic comments at 29-30 (as demonstrated in the *Intelligent Networks* docket, the only point at which it is technically feasible to provide AIN access is at the Service Management System level); LCI comments at 18-19.

having to recreate initially all of the AIN elements.[1077] Ericsson notes that mere unbundling of databases and signaling elements is not likely to allow competitors to create and offer competing AIN services unless they have access to both a service creation environment and service management system.[1078] Bell Atlantic asserts that AIN is not a network element within the scope of the 1996 Act, but allows that, if it were, unbundled access to the SMS should meet the requirements of section 251.[1079] BellSouth, however, contends that the Commission should not attempt to declare undefined "software building blocks" to be network elements.[1080] GVNW further argues that such access will require "partitioning" of incumbent LECs' databases to protect each carriers' information.[1081]

473. In our *Intelligent Networks* docket, several parties, including most incumbent LECs, expressed support for the Commission's proposal to require unbundled access to the SMS by third parties.[1082] Several parties argue that such access is technically feasible.[1083] Most incumbent LECs agree that, of the potential points of access to AIN proposed in our *Intelligent Networks* NPRM, access to the SMS poses the least risk of harm to the public

[1077] Ameritech comments at 49 (working on such access for third parties, although Ameritech believes it is not yet technically feasible); Bell Atlantic comments at 29 (access for third parties at the SMS would satisfy the requirements of section 251); Cable & Wireless comments at 24; Ericsson comments at 5-7; Sprint comments at 40 (access at the SMS is the only technically feasible point of interconnection for AIN that maintains network reliability); GVNW comments at 31 (competitor could create its own services in an incumbent LEC's SMS using the incumbent's SCE, which would protect the integrity of the incumbent LEC's AIN platform); LCI comments at 18 (SMS and SCE access are essential for competitors to provide advanced services).

[1078] Ericsson comments at 6.

[1079] Bell Atlantic comments at 29.

[1080] BellSouth comments at 46.

[1081] GVNW comments at 31.

[1082] *See, e.g.*, BellSouth update comments in CC Docket No. 91-346 at 6; Bell Atlantic comments in CC Docket No. 91-346 at 6; GTE comments in CC Docket No. 91-346 at 21; Central comments in CC Docket No. 91-346 at 12; SNET comments in CC Docket No. 91-346 at 5; NYNEX comments in CC Docket No. 91-346 at 3 n.3, 10-11; Siemens comments in CC Docket No. 91-346 at 2; TIA comments in CC Docket No. 91-346 at 2; MCI comments in CC Docket No. 91-346 at 10; Ericsson reply in CC Docket No. 91-346 at 2-3.

[1083] MCI comments in CC Docket No. 91-346 at 6; Siemens comments in CC Docket No. 91-346 at 2; TIA comments in CC Docket No. 91-346 at 2.

switched network.[1084] Many of these commenters argue that access to the SMS would provide competitors with an opportunity to create innovative call processing services.[1085] U S West, however, contends that, since third parties using SMS access would be dependent on incumbent LEC software at the SCE, competitors would not be satisfied with such access because it would not allow them to develop their own proprietary services.[1086] Other parties argue that SMS access will not provide significant benefits to third parties because of the limitations inherent in the service creation parameters established by the LECs.[1087]

474. Several parties argue that incumbent LEC SCP databases and AIN triggers in the incumbent LEC switch should be unbundled for a requesting carrier.[1088] Most incumbent LECs argue that sufficient mediation needs to be developed and implemented before any third party interconnection to AIN will be technically feasible.[1089] Some parties, however, counter that there is sufficient screening in the STP and that incumbent LECs should be required to accept AIN signaling messages from competitors' AIN SCP databases without additional mediation.[1090] AT&T argues that the refusal to carry AIN messages prevents competitive

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[1084] Bell Atlantic comments in CC Docket No. 91-346 at 6-7; BellSouth comments in CC Docket No. 91-346 at 12, 13; GTE comments in CC Docket No. 91-346 at 19, 21; NYNEX comments in CC Docket No. 91-346 at 3; PacTel comments in CC Docket No. 91-346 at 20-21; SBC comments in CC Docket No. 91-346 at 5, 8; U S West comments in CC Docket No. 91-346 at 52; United and Central comments in CC Docket No. 91-346 at 1.

[1085] GSA comments in CC Docket No. 91-346 at 3; SNET comments in CC Docket No. 91-346 at 2; Siemens comments in CC Docket No. 91-346 at 2; TIA comments in CC Docket No. 91-346 at 2; MCI in CC Docket No. 91-346 comments at 10; Ericsson reply in CC Docket No. 91-346 at 2-3.

[1086] U S West comments in CC Docket No. 91-346 at 53; Ad Hoc Telecommunications Users Committee comments in CC Docket No. 91-346 at 11 (incumbent LECs' ability to mimic third party services created in the incumbent LEC's SCE will diminish the incentive of third parties to create new services that would compete with LEC AIN offerings).

[1087] AT&T comments in CC Docket No. 91-346 at 5-11 (competitors would be restricted to the particular LEC's AIN architecture and software platform, preventing the creation and deployment of unique AIN services); ALLNET comments in CC Docket No. 91-346 at 2; Ad Hoc Telecommunications Users Committee comments in CC Docket No. 91-346 at 8-9.

[1088] Ad Hoc Telecommunications Users Committee comments at 17; GCI at 12; Louisiana Commission at 5; LCI comments at 18.

[1089] BellSouth comments at 47. Mediation refers to additional screening software or devices to prevent incorrect or unacceptable AIN messages from reaching the switch or SCP database. *Id.*

[1090] ACTA comments at 21 (mediation devices will increase post dial delay and significantly increase competitors costs); CompTel comments at 45 (since section 251 unbundling is limited to telecommunications carriers, who already adhere to network security and integrity requirements as well as rigorous testing procedures, there is no need for mediation for access to AIN elements).

carriers from offering the same advanced AIN and CLASS services as the incumbent.[1091] AT&T further contends that mediation will not be necessary, because just as carriers are certified before interconnecting with other carriers' SS7 networks, carriers can be certified for AIN.[1092] Some competitors argue that a short transitional period of mediated access could be established to allow time for the adoption of standards to ensure network integrity, but only if incumbent LECs were required to use the same mediated access.[1093]

475. A few parties, including AT&T and MCI, propose unbundling of AIN in order to allow competing carriers to interconnect their own SCP database to the incumbent LECs' AIN so that competing carriers could provide call processing instructions to the incumbent LEC's switch for calls to or from its own customers.[1094] AT&T argues that this would allow it to offer different services to the customer than does the incumbent LEC, which would increase competition in the local exchange market.[1095] Ericsson admits that this is "an attractive concept which might increase competition" but argues that there are numerous technical issues that must be resolved, including billing and service interaction issues.[1096] Incumbent LECs, manufacturers and other parties argue that it is not technically feasible for a competing provider to connect its own alternative call processing database to the incumbent

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[1091] AT&T reply at 20 (arguing that such a refusal violates the requirement of section 251(c)(2) for interconnection on "just, reasonable and nondiscriminatory" terms).

[1092] *See* Letter in CC Docket No. 91-346 from Bruce Cox, Government Affairs Director, AT&T, to William F. Caton, Acting Secretary, FCC, Aug. 21, 1995 (*AT&T Intelligent Networks Proposal*) Attachment at 2; *but see* PacTel reply at 22 (certification would not prevent competitors from sending erroneous messages to an incumbent LEC's AIN SCP which could lead to unauthorized changes in a customer's service or PIC).

[1093] Cable & Wireless comments at 25; MCI comments at 36; ACSI comments at 44.

[1094] ACTA comments at 21; AT&T comments at 23-25; Cable & Wireless comments at 24; MCI comments at 18, 33 (arguing that such interconnection is supported by the findings of the Information Industry Liaison Committee (IILC) Issue #026 Task Force on Long Term Unbundling); CompTel comments at 44; AT&T reply at 19-20.

[1095] AT&T comments at 23-25. AT&T admits that this arrangement would require carriers to agree upon an expanded signaling message set for AIN call processing, but it argues that such messages are already defined by Bellcore and it is the refusal of incumbent LECs' to accept them that prevents its deployment. *Id.*

[1096] Ericsson comments at 6.

LEC signaling network.[1097] Many parties, including virtually all incumbent LECs, argue against allowing a competing carrier or reseller to connect its own alternative call processing database directly to the incumbent LEC's SS7 network because of the network reliability and security issues it creates.[1098] These parties warn that requiring such unbundled access to AIN could make an incumbent LEC's switch vulnerable to inappropriate routing and billing instructions from the competitor's SCP.[1099] BellSouth argues that the *Intelligent Networks* docket supports a finding that this type of AIN unbundling is not technically feasible.[1100] Sprint contends that it could not forecast capacity needs for a competing carrier's alternative database in order to identify its own network capacity requirements.[1101] GVNW adds that any national rule requiring such a form of interconnection would require many small incumbent LECs to make uneconomic upgrades of their switches in order to accommodate it.[1102]

[1097] Sprint comments at 41 (there are significant network reliability issues involved with introducing a third party database to an SS7 network); BellSouth comments at 46 (before interconnection of a third-party database to an incumbent LEC's signaling system, more development is still needed for routing, protocol screening, call gapping, resource contention, overload control, feature interaction management and billing concerns for such an arrangement); Ericsson comments at 6 (interconnection of a third-party database to an incumbent LEC's signaling system might promote competition but there are complex technical issues to address before such a scheme could become technically feasible); Teleport comments at 37-38.

[1098] BellSouth comments at 45-46 (introduction of a third-party database to an incumbent LEC's signaling system creates the potential for fraud, sabotage, and slamming of the incumbent LEC's customers); SBC comments at 45 (record in CC Docket No. 91-346 is replete with evidence demonstrating the current technical infeasibility of interconnection of third-party databases to an incumbent LEC' signaling system); Sprint comments at 41 (cannot test for system validation and feature interaction); Teleport comments at 37-38; GVNW comments at 30-31 (such interconnection must be mediated to protect both networks from potential harm from incorrect SS7 messages).

[1099] BellSouth comments at 46; Ericsson comments at 6; TCG comments at 37-38; GTE reply at 21-22 (third-party access to AIN triggers not technically feasible without mediation because of network reliability and service integrity issues); Teleport comments at 37-38; *but see* Cable & Wireless comments at 24 (incumbent LEC arguments concerning network integrity are analogous to AT&T arguments in *Carterfone* that non-Bell System equipment could cause malfunctions in the network).

[1100] BellSouth comments at 45-46 (areas still needing resolution include routing, protocol screening, call gapping, resource contention, overload control, feature interaction management, and billing). *See also* Letter in CC Docket No. 91-346 from Karen Weis, Division Manager, AT&T, and Ben G. Almond, Executive Director, Federal Regulatory, BellSouth, to William F. Caton, Acting Secretary, FCC, Dec. 14, 1995 (*AT&T-BellSouth Intelligent Networks Joint Report*). The *AT&T-Bell South Intelligent Networks Joint Report* detailed the results of their laboratory-to-laboratory test concerning the interconnection of an AT&T SCP to BellSouth's SSP. *Id.*

[1101] Sprint comments at 41.

[1102] GVNW comments at 30-31.

476. Many parties contend that further testing of AIN is needed before further access and interconnection between carriers can be considered technically feasible.[1103] Most of the BOCs support a two year testing plan for the industry to further investigate issues relating to AIN before moving forward to third party interconnection.[1104] Several parties, however, urge the Commission to reject the LECs' proposed *Intelligent Networks* testing plan, argue that it is not necessary to ensure network integrity and that it is inconsistent with the 1996 Act.[1105] Parties opposed to the LECs' testing plan assert that it is vague and revisits work that has already been done in existing industry fora.[1106] Supporters of the LECs' testing plan, however, counter that they are willing to consider working within existing industry fora.[1107] As described in the *Intelligent Networks* docket, the LEC testing plan will take place over a two year period with final recommendations to be decided by the participants themselves. Some competitors, while allowing for the need for further testing, advocate imposing a mandatory time limit on the resolution of the outstanding mediation issues for unbundled access to AIN.[1108]

477. Some commenters believe that a Commission order to unbundle AIN functionalities would satisfy the objectives of the *Intelligent Networks* proceeding.[1109] AT&T

[1103] Bell Atlantic comments at 29 n.10; BellSouth comments at 47; Ericsson comments at 6-7; GTE comments at 42; GVNW comments at 32; Lincoln Tel. comments at 10; SBC comments at 46; U S West comments at 58.

[1104] Bell Atlantic comments at 29 n.10; BellSouth comments at 47; GTE comments at 42; Lincoln Tel. comments at 10; SBC comments at 44 (Commission should issue order in CC Docket No. 91-346 that endorses the Tier 1 LECs' joint proposal for an industry IN project); U S West comments at 58 (industry testing plan will lead to development of non-proprietary AIN interfaces). *See* Letter in CC Docket No. 91-346 from Sandra Wagner, Director, Federal Regulatory, SBC Communications, Inc., to William F. Caton, Acting Secretary, FCC, June 23, 1995 (*LEC Intelligent Networks Proposal*). Active participants in the LEC Proposal are Bell Atlantic, GTE, PacTel, SBC and U S West. Other incumbent LECs supporting the LEC Proposal, but not currently "active" include BellSouth, Lincoln Tel., SNET, and Sprint.

[1105] Cable & Wireless comments at 26; MCI comments at 36-37. *See also* AT&T update comments in Docket 91-346 at 5-6.

[1106] MCI comments at 36-37; *but see* GTE reply at 22 (testing is necessary and is not intended for delay).

[1107] Letter in CC Docket No. 91-346 from Sandra Wagner, Director, Federal Regulatory, SBC Communications, to William Caton, Acting Secretary, FCC, May 22, 1996 (SBC May 22 *Intelligent Networks Ex Parte*). SBC contends that the Joint LEC project proposed creating a new forum directly in response to MCI's prior assertions that ATIS sponsored forums were ineffective in addressing interconnection issues. *Id.* at 4-5.

[1108] Cable & Wireless comments at 25; MCI comments at 36 (advocating that the Commission refer outstanding issues from the IILC Issue #026 consensus document to an established forum and that it should monitor progress to ensure implementation of access to the remaining interface points is accomplished within six months of the end of an initial negotiation or arbitration process).

[1109] AT&T comments at 25 n.29; Cable & Wireless comments at 26.

asserts that, if unbundled signaling explicitly includes the exchange of AIN signaling messages between incumbent LEC switches and competitor's SCPs, then the Commission does not need to pursue CC Docket No. 91-346 further because its objectives will be met in this proceeding.[1110] SBC, however, urges the Commission not to merge the *Intelligent Networks* proceeding into this docket.[1111]

c. Discussion

478. In the interconnection section above, we conclude that the exchange of signaling information between LECs necessary to exchange traffic and access call related databases was included within the interconnection obligation of section 251(c)(2).[1112] Thus, notwithstanding any obligations under section 251(c)(3), incumbent LECs are required to accept and provide signaling in accordance with the exchange of traffic between interconnecting networks. We conclude that this exchange of signaling information may occur through an STP-to-STP interconnection.

(1) Signaling Links and STP

479. We conclude that incumbent LECs, upon request, must provide nondiscriminatory access to their signaling links and STPs on an unbundled basis. We believe it is technically feasible for incumbent LECs to provide such access, and that such access is critical to entry in the local exchange market. Further, the 1996 Act requires BOCs to provide "nondiscriminatory access to databases and associated signaling necessary for call routing and completion" as a precondition for entry into in-region interLATA services.[1113] Thus, it appears that Congress contemplated the unbundling of signaling systems as network elements.

[1110] AT&T comments at 25 n.29.

[1111] SBC comments at 46 (arguing that record in CC Docket No. 91-346 is already complete).

[1112] *See supra*, Section IV. We emphasize, in Section V.J.4.c.(4), such exchange of signaling information does not include the exchange of AIN signaling information between networks for the purpose of providing AIN messages to the incumbent LEC's switch from a competitor's SCP database.

[1113] 47 U.S.C. § 271(c)(2)(B)(x). *See also* statement of Sen. Pressler, noting that "access to signaling and databases [is] important if you are going to compete and get into the market." 141 Cong. Rec. S8163 (June 12, 1995).

480. We conclude that access to unbundled signaling links and STPs is technically feasible.[1114] The majority of commenters, including incumbent LECs, agree that it is technically feasible to provide unbundled access to signaling links and STPs.[1115] Parties note that incumbent LECs and signaling aggregators already provide such access.[1116] In addition, several state commissions already require incumbent LECs to provide unbundled elements of SS7 networks.[1117] Because of the screening role played by the STP and associated network reliability concerns that were raised in the record, however, we do not require that incumbent LECs permit requesting carriers to link their own STPs directly to the incumbent's switch or call-related databases.[1118] We take a deliberately conservative approach here because of significant evidence in the record and we note that mere conclusory objections to technical feasibility would not alone be sufficient evidence.

481. Under section 251(d)(2)(A), the Commission must consider whether access to proprietary network elements is necessary.[1119] Commenters did not identify proprietary concerns with signaling protocols for the SS7 network.[1120] Moreover, in general, SS7 signaling networks adhere to Bellcore standards, rather then LEC-specific protocols and provide seamless interconnectivity between networks.[1121] Thus, we conclude that the

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[1114] As discussed *infra*, we conclude that it is not technically feasible to unbundle the SCP from its associated STP, therefore, we do not require incumbent LECs to unbundle those signaling links connecting SCPs to STPs. We emphasize that we take this conservative course here because of the real evidence in the record and note that mere conclusory objections to technical feasibility will not be considered sufficient evidence of such.

[1115] *See, e.g.*, AT&T comments at 23; TIA comments at 14; U S West comments at 48; PacTel reply at 21-22.

[1116] *See, e.g.*, BellSouth comments at 43; GVNW comments at 29; NYNEX comments at 71; USTN reply at 1.

[1117] *See, e.g.*, Colorado Commission comments at 24; Michigan Commission comments at 12; Texas Commission comments at 19.

[1118] *See, e.g.*, Ameritech comments at 50; Bell Atlantic comments at 27; MCI comments at 34-35; Sprint comments at 40. We note, however, that we do not preempt those state commissions that have required incumbent LECs to do so. *See Illinois Wholesale Order*.

[1119] 47 U.S.C. § 251(d)(2)(A).

[1120] AT&T argues that there are no proprietary information issues because signaling information is generated in the incumbent LEC's switch and is provisioned entirely by the incumbent LEC. AT&T comments at 26.

[1121] A few commenters urge that we prohibit incumbent LECs from taking a proprietary interest in signaling protocols. These parties argue that such a proprietary interest conflicts with the continuing necessity for open access to signaling protocols to maintain the seamless nationwide "network of networks." *See* Frontier comments at 16 n.31; Wyoming Commission comments at 24.

unbundling of signaling links and STPs does not present proprietary concerns with respect to the incumbent LEC.

482. Under section 251(d)(2)(B), the Commission must consider whether "the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer."[1122] Access to signaling systems continues to be a critical element to providing competing local exchange and exchange access service. The vast majority of calls made over incumbent LEC networks are set-up and controlled by separate signaling networks. Incumbent LECs argue that access to signaling systems and associated databases is already available from other providers and therefore, they should not have to unbundle them for access by competitors.[1123] As discussed above, section 251(d)(2)(B) only relieves an incumbent LEC of its unbundling obligation if other unbundled elements in its network could provide the same service without diminution of quality. Because alternative signaling methods, such as in-band signaling, would provide a lower quality of service,[1124] we conclude that a competitor's ability to provide service would be significantly impaired if it did not have access to incumbent LECs' unbundled signaling links and STPs.

483. The purchase of unbundled elements of the SS7 network gives the competitive provider the right to use those elements for signaling between its switches (including unbundled switching elements), between its switches and the incumbent LEC's switches, and between its switches and those third party networks with which the incumbent LEC's SS7 network is interconnected. When a competitive provider purchases unbundled switching from the incumbent LEC, the incumbent LEC must provide nondiscriminatory access to its SS7 network from that switch in the same manner in which it obtains such access itself. Carriers that provide their own switching facilities should be able to access the incumbent LEC's SS7 network for each of their switches via a signaling link between their switch and an incumbent

[1122] 47 U.S.C. § 251(d)(2)(B).

[1123] *See, e.g.*, Bell Atlantic comments at 27-28; BellSouth comments at 44; GTE comments at 40-41; NYNEX comments at 71.

[1124] SS7 network signaling is critical in the provision of modern telecommunications services, allowing signaling messages to travel separately from the voice path for individual calls, increasing efficiency and making possible a host of new signaling-based services. AT&T comments at 23. Popular features like Calling Number Identification (Caller ID) and Calling Name Identification, as well as enhanced call set-up functions and such Custom Calling features as Repeat Call and Return Call, would be unavailable without SS7 capabilities. Bell Atlantic comments at Attachment 3, 17.

LEC's STP.[1125] Competitive carriers should be able to make this connection in the same manner as an incumbent LEC connects one of its own switches to the STP. This could be accomplished by the incumbent providing an unbundled signaling link from its STP to the competitor's switch or by a competitor bringing a signaling link from its switch to the incumbent LEC's STP.

(2) Call-Related Databases

484. We conclude that incumbent LECs, upon request, must provide nondiscriminatory access on an unbundled basis to their call-related databases[1126] for the purpose of switch query and database response through the SS7 network.[1127] Thus, for example, we find that it is technically feasible for incumbent LECs to provide access to the Line Information Database (LIDB), the Toll Free Calling Database and Number Portability downstream databases.[1128] The vast majority of parties, including incumbent LECs, agree that it is technically feasible to provide access to the LIDB and the Toll Free Calling databases at an STP linked to the database.[1129] Several state commissions also report that they have ordered incumbent LECs' to provide such access to the LIDB and the Toll Free Calling

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[1125] Competitors should be able to interconnect their own switches to the incumbent LEC's signaling system in any technically feasible manner. Competitors may bring a signaling "A" link from their switch to the incumbent LEC's STP. CAPs use this type of connection today to connect their tandem switches to incumbent LECs' STPs. AT&T comments at 24 n.26. Competitors might also link their switch to their own STP, and then connect to an incumbent LEC's STP via a signaling "D"or "B" link.

[1126] Call-related databases are those SS7 databases used for billing and collection or used in the transmission, routing, or other provision of a telecommunications service.

[1127] Query and response access to a call-related database is intended to require the incumbent LEC only to provide access to its call-related databases as is necessary to permit a competing provider's switch (including the use of unbundled switching) to access the call-related database functions supported by that database. The incumbent LEC may mediate or restrict access to that necessary for the competing provider to provide such services as are supported by the database.

[1128] AT&T indicates that for LIDB and 800/888 database queries standard TCAP messages have been established, and reliability, security, provisioning, and billing issues have been addressed. Letter from Karen Weis, Division Manager, AT&T to William Caton, Acting Secretary, FCC, July 16, 1996 (AT&T July 16 *Ex Parte*). Bell Atlantic states that it currently provides interconnection for LIDB and 800 databases. Bell Atlantic comments at 2. Number portability "downstream databases" are defined in Part 51 of our rules as adopted by this Order. *See In the Matter of Telephone Number Portability*, First Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 95-116, FCC 96-286 (rel. July 2, 1996).

[1129] *See, e.g.*, Ameritech comments at 47; AT&T comments at 24; ALTS comments at 31; GTE comments at 40; MCI comments at 34-35; NYNEX comments at 71; U S West comments at 48.

databases.[1130] We require incumbent LECs to provide this access to their call-related databases by means of physical access at the STP linked to the unbundled database. We find that such access is critical to entry in the local exchange market.

485. We conclude that it is not technically feasible to unbundle the SCP from its associated STP. We note that the overwhelming majority of commenters contend that it is not technically feasible to access call-related databases in a manner other than by connection at the STP directly linked to the call-related database.[1131] Parties argue that the STP is designed to provide mediation and screening functions for the SS7 network that are not performed at the switch or database.[1132] We, therefore, emphasize that access to call-related databases must be provided through interconnection at the STP and that we do not require direct access to call-related databases.

486. Several commenters also identified access to call-related databases used in the incumbent's AIN to be critical to fair competition in the local market,[1133] and some state commissions have ordered incumbent LECs to provide access to AIN databases.[1134] We conclude that such access is technically feasible via an STP for those call-related databases used in the incumbent LEC's AIN.[1135] First, of course, when a new entrant purchases an incumbent's local switching element it is technically feasible for the new entrant to use the incumbent's SCP element in the same manner, and via the same signaling links, as the incumbent itself. Thus, we find no technical impediments in the record with regard to such access when a requesting carrier is also purchasing a local switching element associated with the AIN call-related database.

[1130] Louisiana Commission comments at 5; Michigan Commission comments at 12; PacTel comments at Appendix A, 7 (California Commission has required such access).

[1131] *See, e.g.*, Sprint comments at 40; AT&T reply at 19-20 n.32.

[1132] *See, e.g.*, GTE comments at 40; USTA comments at 36.

[1133] Cable & Wireless comments at 24; Citizens Utilities comments at 15; MCI comments at 32-33; TIA comments at 14; CompTel comments at 43; AT&T comments at 23-26.

[1134] Louisiana Commission comments at 5; Wyoming Commission comments at 23-24; *see also Illinois Wholesale Order*.

[1135] AT&T comments at 23-26; CompTel comments at 43; MCI comments at 36; Letter from Wendy Blueming, Regulatory Affairs and Public Policy, SNET to William Caton, Acting Secretary, FCC, July 23, 1996 (SNET July 23 *Ex Parte*); AT&T July 16 *Ex Parte*.

487. Further, we conclude that when a new entrant deploys its own switch, and links it to the incumbent LEC's signaling system, it is technically feasible for the incumbent to provide access to the incumbent's SCP to provide AIN-supported services to customers served by the new entrant's switch. Some SS7 network services resellers currently provide such access.[1136] Other potential local competitors present additional evidence supporting the technical feasibility of such access.[1137] Unlike the situation where a competitor's SCP would control the incumbent's switch (which is discussed below in section V.I.4.c.(4)), in this scenario, the incumbent's SCP will respond to and control the competitor's switch, and potential competitors that have commented in the record do not express network reliability concerns with regard to such control.[1138] Further, like the software resident in a switch, the incumbent LEC's applications resident in an SCP are merely part of the overall software and hardware making up the SCP facility. Thus, carriers purchasing access under either scenario above may use the incumbent's service applications in addition to their own.[1139]

488. Although we conclude that access to incumbent AIN SCPs is technically feasible, we agree with BellSouth that such access may present the need for mediation mechanisms to, among other things, protect data in incumbent AIN SCPs and ensure against excessive traffic volumes.[1140] In addition, there may be mediation issues a competing carrier

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[1136] SNET July 23 *Ex Parte*; Letter from Stephen Kraskin, Illuminet (USTN) to Office of the Secretary, FCC July 23, 1996 (USTN July 23 *Ex Parte*).

[1137] *See* AT&T July 16 *Ex Parte*; *see also* AT&T comments at 23-26; CompTel comments at 43; MCI comments at 36.

[1138] *See* AT&T July 16 *Ex Parte*. AT&T asserts that no additional or unique reliability problems would be created that have not already been addressed and resolved by those incumbent LECs who have proposed SMS access for third parties in the Intelligent Networks proceeding. *Id.*

[1139] *See infra*, Section V.I.4.c.(3) on unbundled access to the incumbent LEC's SCE and SMS.

[1140] Letter from W.W. Jordan, Executive Director - Federal Regulatory, BellSouth to William Caton, Acting Secretary, FCC, July 16, 1996 (BellSouth July 16 *Ex Parte*) ("With a BellSouth SCP to a ALEC SSP [switch] interconnection arrangement, network reliability and security concerns, from BellSouth's perspective, would largely be limited to issues associated with traffic management."); Letter from James Smith, Director--Federal Relations, Ameritech to William Caton, Acting Secretary, FCC, July 17, 1996 (Ameritech July 17 *Ex Parte*) ("The volume of queries sent from the CLEC SSP [switch] could overload the LEC SCP, interfering with the operation of the service provided to that CLEC, or with other services which may operate on the LEC's SCP."); Letter from Joseph Mulieri, Director--FCC Relations, Bell Atlantic to Robert S. Tanner, Attorney Advisor, FCC, July 18, 1996 (Bell Atlantic July 18 *Ex Parte*). BellSouth also raises the need for mediation to prevent unauthorized modification of information within an incumbent LEC's AIN SCP database. BellSouth July 16 *Ex Parte*. Incumbent LECs' comments in this proceeding and in the IN docket generally focus on the need for mediation to prevent a competitor's database from sending inappropriate AIN signaling information to the incumbent LEC's switch (*see infra* Section V.I.4.c.(4)). *See* PacTel comments at 61-62; BellSouth comments at 45-46; Bell Atlantic comments at Appendix 3, 18-19; U S West comments in CC Docket No. 91-346 at 73-74, 84; NYNEX comments in CC Docket No. 91-346 at 14-15; SBC comments in CC Docket No. 91-346 at 8-9.

will need to address before requesting such access.[1141] Accordingly, if parties are unable to agree to appropriate mediation mechanisms through negotiations, we conclude that during arbitration of such issues the states (or the Commission acting pursuant to section 252(e)(5)) must consider whether such mediation mechanisms will be available and will adequately protect against intentional or unintentional misuse of the incumbent's AIN facilities. We encourage incumbent LECs and competitive carriers to participate in industry fora and industry testing to resolve outstanding mediation concerns.[1142] Incumbent LECs may establish reasonable certification and testing programs for carriers proposing to access AIN call related databases in a manner similar to those used for SS7 certification.[1143]

489. We recognize that providing unbundled access to AIN call-related databases at cost, and in particular providing access to the incumbent LEC's software applications that reside in the AIN databases, may reduce the incumbent's incentive to develop new and advanced services using AIN. In the near term, however, requiring entrants to bear the cost of deploying a fully redundant network architecture, including AIN databases and their application software, would constitute a significant barrier to market entry for competitive carriers. As local service markets develop, however, competition may reduce the incumbent LEC's control over bottleneck facilities and increase the importance of innovation. In those circumstances it is important that incumbent LECs have the incentive to develop unique and innovative services supported by AIN. Therefore at a later date, we will revisit the proper balance between providing unbundled access and maintaining the incentives of incumbent LECs to innovate.

490. Parties generally do not identify proprietary concerns when access to call-related databases is provided via STPs. In general, signaling protocols used to access call-related databases adhere to open Bellcore standards. Parties also do not raise proprietary concerns with specific call-related databases themselves. Today, many separate carriers access incumbent LEC Toll Free Calling and LIDB databases for the proper routing and billing of calls.[1144] Thus, we conclude that, in general, unbundled access to call-related databases does not present proprietary concerns with respect to section 251(d)(2)(A). Incumbent LECs may,

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[1141] Mediation may be necessary for requesting carriers to ensure that inadvertent feature interactions, network management control and customer privacy concerns do not arise from such access. *See e.g.*, Ameritech July 17 *Ex Parte*.

[1142] *See, e.g.*, Christine Maglott, *Information Industry Liaison Committee Wrestles with Mediation Issues*, ATIS News, 3, Vol. 11, No.3, May-June, 1996.

[1143] SBC notes that carriers proposing to gain access to its SS7 network and gather information from its SCP must be certified and enter into contractual agreements for information access and proper billing. SBC comments at 47-48.

[1144] *See* AT&T July 16 *Ex Parte*.

however, present such proprietary concerns in the arbitration process with regard to specific databases, and states (or the Commission acting pursuant to section 252(e)(5)) may take action to limit unnecessary access to proprietary information.

491. We also conclude that denying access to call-related databases would impair the ability of a competing provider to offer services such as Alternative Billing Services and AIN-based services. AIN-based services represent the cutting edge of telephone exchange services, and competitors would be at a significant disadvantage if they were forced to develop their own AIN capability immediately. In addition, the record indicates that deployment of call-related databases in the near term would represent a substantial cost to new entrants. As mentioned above, incumbent LECs argue that access to certain call-related databases is already competitively available and therefore they should not have to unbundle access to them.[1145] As discussed above, however, section 251(d)(2)(B) would only relieve an incumbent LEC of its unbundling obligation if other unbundled elements in its network could provide the same service without diminution of quality. Because of the absence of such elements, we conclude that a competitor's ability to provide service would be significantly impaired if it did not have unbundled access to incumbent LECs' call-related databases, including the LIDB, Toll Free Calling, AIN, and number portability downstream databases for the purpose of switch query and database response through the SS7 network.

492. We also conclude that access to call-related databases as discussed above, and access to the service management system discussed below, must be provided to, and obtained by, requesting carriers in a manner that complies with section 222 of the Act. Section 222, which was effective upon adoption, sets out requirements for privacy of customer information. Section 222(a) provides that all telecommunications carriers have a duty to protect the confidentiality of proprietary information of other carriers, including resellers, equipment manufacturers, and customers. Section 222(b) requires that telecommunications carriers that use proprietary information obtained from another telecommunications carrier in providing any telecommunications service "shall use that information only for such purpose, and shall not use such information for its own marketing purposes."[1146] Sections 222(c) and (d) provide protection for, and limitations on the use of, and access to, customer proprietary network

[1145] We note that competitive provision of AIN SCP database services is not evidenced in the record.

[1146] 47 U.S.C. § 222(b).

information (CPNI).[1147] We note that we have initiated a proceeding to clarify the obligations of carriers with regard to section 222(c) and (d).[1148]

(3) Service Management Systems

493. Finally, we conclude that incumbent LECs should provide access, on an unbundled basis, to the service management systems (SMS), which allow competitors to create, modify, or update information in call-related databases. We believe it is technically feasible for incumbent LECs to provide access to the SMS in the same manner and method that they provide for their own access. We find that such access is necessary for competitors to effectively use call-related databases, which we have already found to be critical to entry in the local exchange market.

494. Commenters argue that they need equal access to incumbent LECs' SMSs to write or populate their own information in call-related databases.[1149] As discussed above, information bound for many call-related databases is entered first at an off-line SMS, which then downloads the information to the call-related database for real time use on the network. We find that competing provider access to the SMS is technically feasible if it is provided in the same or equivalent manner that the incumbent LEC currently uses to provide such access to itself.[1150] For example, if the incumbent LEC inputs information into the SMS using magnetic tapes, the competitive carrier must be able to create and submit magnetic tapes for the incumbent to input into the SMS in the same way the incumbent inputs its own magnetic tapes. If the incumbent accesses the SMS through an electronic interface, the competitive carrier should be able to access the SMS through an equivalent electronic interface.[1151] We further conclude that, whatever method is used, the incumbent LEC must provide the

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[1147] Section 222(f)(1) defines CPNI as "information that relates to the quantity, technical configuration, type, destination, and amount of use of a telecommunications service subscribed to by any customer of a telecommunications carrier, and that is made available to the carrier by the customer solely by virtue of the carrier-customer relationship." 47 U.S.C. § 222(f)(1)(A).

[1148] *See Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and other Customer Information*, Notice of Proposed Rulemaking, CC Docket No. 96-115, FCC 96-221 (rel. May 17, 1996).

[1149] AT&T comments at 26; MCI comments at 34-35.

[1150] Many carriers currently submit such information to incumbent LECs or third party SMSs. USTN reply at 1-4; Bell Atlantic comments at Attachment 3, 16; GTE comments at 40-41 n.61.

[1151] For example, access to the AIN SMS is accomplished through the SCE, which is a computer environment for the design and test of AIN based services.

competing carrier with the information necessary to correctly enter or format for entry the information relevant for input into the particular incumbent LEC SMS.

495. Specifically with respect to AIN, we find that the record in the *Intelligent Networks* proceeding supports access to the SMS.[1152] A competing carrier seeking access to the SMS that is part of the incumbent LEC's AIN would do so through the incumbent LEC's service creation environment (SCE), an interface used to design, create, and test AIN supported services. Software successfully tested in the SCE is transferred to the SMS, where it is then downloaded into an SCP database for active deployment on the network. We are persuaded that the risk of harm to the public switched network from such access to the SMS is minimized by the technical safeguards inherent in the SCE and SMS. As described in comments filed in the *Intelligent Networks* docket, competitors accessing the SCE and SMS would not communicate directly with the LEC's database or switch.[1153] We therefore conclude that such access is technically feasible, and that incumbent LECs should provide requesting carriers with the same access to design, create, test, and deploy AIN-based services at the SMS that the incumbent LEC provides for itself.[1154] While many incumbent LECs express concerns with the technical feasibility of access to AIN, we conclude that those

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[1152] *See Intelligent Networks*, Notice of Proposed Rulemaking, 8 FCC Rcd 6813 (1993). In the *Intelligent Networks* proceeding, most incumbent LECs supported SMS access. *See* GTE comments in CC Docket No. 91-346 at 21; United and Central comments in CC Docket No. 91-346 at 12; SNET comments in CC Docket No. 91-346 at 5; NYNEX comments in CC Docket No. 91-346 at 3 n.3, 10-11; BellSouth update comments in CC Docket No. 91-346 at 6; Bell Atlantic comments in CC Docket No. 91-346 at 6. Other parties, including potential competitors and manufacturers, also supported SMS access. *See* Siemens comments in CC Docket No. 91-346 at 2; TIA comments in CC Docket No. 91-346 at 2; MCI comments in CC Docket No. 91-346 at 10; Ericsson reply in CC Docket No. 91-346 at 2-3. Many commenters asserted that SMS access through the SCE would provide a valuable opportunity for third parties to create services. *See* GSA comments in CC Docket No. 91-346 at 3; SNET comments in CC Docket No. 91-346 at 2; Siemens comments in CC Docket No. 91-346 at 2; Ericsson reply in CC Docket No. 91-346 at 2-3; TIA comments in CC Docket No. 91-346 at 2; MCI comments in CC Docket No. 91-346 at 10.

[1153] In their comments, BellSouth and Bell Atlantic describe the way they provide or plan to provide access to the SMS for third parties. Bell Atlantic proposes to first develop and deploy AIN services based on customer request and then subsequently to allow third parties themselves to create AIN services at a terminal either in a Bell Atlantic office or a third party office. Bell Atlantic comments in CC Docket No. 91-346 at 6. BellSouth proposes to permit third parties to use the service logic resident on BellSouth's service creation environment to create AIN services. BellSouth update reply in CC Docket No. 91-346 at 10.

[1154] Incumbent LECs that have deployed AIN must provide such access to competing carriers that will allow them to develop call processing applications pursuant to the same parameters the incumbent LEC uses itself, such as the time-of-day and origination of call parameters. BellSouth's recently proposed service to provide access to its SCE and SMS appears to be an example of the type of access to the SMS that incumbent LECs must provide to competitors upon request. *Pleading Cycle Established for Comments on BellSouth Telecommunications, Inc.'s Petition for Expedited Waiver of Part 69 Rules*, Public Notice, DA 96-27 (Jan. 17, 1996) (*BellSouth Part 69 Waiver Petition*).

concerns deal primarily with the interconnection of third party AIN SCP databases to the incumbent LEC's AIN and not access to the SCE and SMS.[1155]

496. We recognize that, although technically feasible, providing nondiscriminatory access to the SMS and SCE for the creation and deployment of AIN services may require some modifications, including appropriate mediation, to accommodate such access by requesting carriers. We note that BellSouth is currently prepared to tariff and offer such access to third parties, and other incumbent LECs, including Bell Atlantic and Ameritech, indicate that they have made significant progress towards implementing such access.[1156] Therefore, if parties are unable to agree to appropriate mediation mechanisms through negotiations, we conclude that during arbitration of such issues the states (or the Commission acting pursuant to section 252(e)(5)) must consider whether such mediation mechanisms will be available and will adequately protect against intentional or unintentional misuses of the incumbent's AIN facilities. We again encourage incumbent LECs and competitive carriers to participate in industry fora and industry testing to resolve outstanding mediation concerns.

497. Parties did identify some proprietary concerns regarding access to the SCE and SMS used in the incumbent LEC's AIN. Some incumbent LECs contend that the interface used at the SCE is proprietary in nature.[1157] GVNW argues that specific AIN-based services designed by carriers should be proprietary in nature.[1158] Competitors correctly argue that AIN can be used, not only for telecommunication services traditionally supported by the switch, but as a means to deploy advanced services not otherwise possible.[1159] We find that competing providers without access to AIN would be at a significant disadvantage to

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[1155] Of the three potential points of access to AIN proposed in the *Intelligent Networks* NPRM, LEC commenters generally agree that SMS access poses the least risk of harm to the public switched telephone network. *See* Bell Atlantic comments in CC Docket No. 91-346 at 6-7; BellSouth comments in CC Docket No. 91-346 at 12, 13; GTE comments in CC Docket No. 91-346 at 19, 21; NYNEX comments in CC Docket No. 91-346 at 3; PacTel comments in CC Docket No. 91-346 at 20-21; SBC comments in CC Docket No. 91-346 at 5, 8; U S West comments in CC Docket No. 91-346 at 52; United and Central comments in CC Docket No. 91-346 at 1. Competitors also support such access. *See* MCI Comments at 6; Siemens Comments at 2; TIA Comments at 2.

[1156] *BellSouth Part 69 Waiver Petition*. BellSouth proposes to tariff services that permit third parties to create and administer AIN services through access to the SCE and SMS. Bell South's SCE/SMS service will support third-party service development with the following AIN triggers: off-hook immediate, off-hook delay, public office dialing plan, customized dialing plan, feature code and terminating attempt triggers. *Id.* *See* Bell Atlantic comments in CC Docket No. 91-346 at 6, 8; Ameritech July 17 *Ex Parte*.

[1157] U S West comments at 58 n.124 (for example, BellSouth uses DESIGNedge for such access which utilizes a proprietary database technology tailored to its network); Bell Atlantic comments at 28-29.

[1158] GVNW comments at 30 (incumbent LECs should be able to copyright AIN based services that they create or incumbents will have much less incentive to develop such services).

[1159] AT&T comments at 23-25; Cable & Wireless comments at 24; MCI comments at 18, 33.

incumbent LECs, because they could not necessarily offer the same services to the customer. This access will help competing providers without imposing costs on incumbent LECs because the entrants will pay the cost.[1160] We therefore conclude, under section 251(d)(2)(A), that access to AIN, including those elements that may be proprietary, is necessary for successful entry into the local service market.

498. Most parties generally did not identify proprietary concerns with access to those SMSs used other than for AIN. Some parties, however, argue that there are proprietary interfaces used to enter information into various databases.[1161] Competing carriers counter that competitive providers would not need to have direct access to the proprietary methods of data entry used by incumbent LECs, and as a result we conclude that the unbundled access to SMSs used for other than AIN does not present proprietary concerns with respect to section 251(d)(2)(A).[1162]

499. We also conclude that unbundled access to all SMSs is necessary for a competing provider to effectively use unbundled call-related databases. We find that the inability of competing carriers to use the SMS in the same manner that an incumbent LEC uses to input data itself would impair the ability of a competing carrier to effectively offer services to its customers using unbundled call-related databases. Commenters in the record point out that access to call-related databases alone would not allow the competing carrier to provide such services to its customers without access to an SMS.[1163] We also conclude that AIN-based services are important to a new entrant's ability to compete effectively for customers with the incumbent LEC, and in developing new business by introducing new AIN based services. Thus we conclude that a competitor's ability to provide service would be significantly impaired if it did not have unbundled access to an incumbent LEC's SMS, including access to the SMS(s) used to input data to the LIDB, Toll Free Calling, Number Portability and AIN call-related databases.

500. We reject the contention by several incumbent LECs that signaling and database access was meant by the 1996 Act to apply only to such access as is necessary for call routing and completion. Although the competitive checklist for BOC entry into in-region interLATA services under section 271 requires "nondiscriminatory access to databases and associated

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[1160] *See supra*, Section VII.

[1161] AT&T June 13 *Ex Parte*.

[1162] AT&T comments at 26.

[1163] Ericsson comments at 6.

signaling necessary for call routing and completion"[1164] the definition of a network element is more comprehensive in scope. A network element as defined by the 1996 Act includes "databases" and in particular "databases sufficient for billing and collection or used in the transmission, routing, or *other* provision of a telecommunications service."[1165] We find that the inclusion of "other provision of a telecommunications service" meant Congress intended the unbundling of databases to be read broadly and could include databases beyond those directly used in the transmission or routing of a telecommunications service.

(4) Third Party Call-Related Databases

501. We find that there is not enough evidence in the record to make a determination as to the technical feasibility of interconnection of third party call-related databases to the incumbent LEC's signaling system. Some parties argue that such interconnection, including the interconnection of third party AIN SCP databases, would allow them to provide more efficient or advanced call processing and services to customers, thereby increasing their ability to compete with the incumbent LEC.[1166] AT&T and MCI specifically argue that it would be technically feasible for them to interconnect their AIN SCP database to an incumbent LEC's AIN for the purpose of providing call processing instructions to the incumbent LEC's switch.[1167] Incumbent LECs contend that such interconnection would leave their switch vulnerable to a multitude of potential harms because sufficient mediation for such interconnection does not currently exist at the STP or SCP and has not yet been developed.[1168] AT&T counters that there is no need for additional mediation and that sufficient certification and testing of AIN based services before deployment in such a fashion is technically feasible.[1169]

502. At this time, in view of this record and the record compiled in the *Intelligent Networks* docket, we cannot make a determination of the technical feasibility of such interconnection. We do, however, believe that state commissions could find such an

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[1164] 47 U.S.C. § 271(c)(2)(B)(x).

[1165] 47 U.S.C. § 153(29).

[1166] AT&T comments at 23-25; Cable & Wireless comments at 24; MCI comments at 18, 33.

[1167] AT&T comments at 23-25; MCI comments at 18, 33.

[1168] *See* U S West comments in CC Docket No. 91-346 at 73-74, 84; NYNEX comments in CC Docket No. 91-346 at 14-15; SBC comments in CC Docket No. 91-346 at 8-9.

[1169] *See AT&T Intelligent Networks Proposal* Attachment at 2.

arrangement to be technically feasible and we do not intend to preempt such an order through these rules. The Illinois Commission recently ordered access to incumbent LECs' AIN that does allow for this type of interconnection.[1170] We intend to address this issue early in 1997, either in the IN docket or in a subsequent phase of this proceeding, taking into account, *inter alia*, any relevant decisions of state commissions.[1171]

503. We also address the impact on small incumbent LECs. For example, GVNW asserts that any national rule requiring this form of interconnection would require many small incumbent LECs to make uneconomic upgrades of their switches in order to accommodate it.[1172] We have considered the economic impact of our rules in this section on small incumbent LECs. Accordingly, we have not adopted any national standards concerning AIN at this time. We also note that section 251(f) provides relief for certain small LECs from our regulations implementing section 251.

5. Operation Support Systems

a. Background

504. We sought comment, in the NPRM, on whether national requirements for electronic ordering interfaces would reduce the time and resources required for new entrants to enter and compete in regional markets.[1173] We also sought comment on the unbundling of databases generally in our discussion on unbundling database and signaling systems.[1174]

b. Comments

[1170] *Illinois Wholesale Order*

[1171] There are other additional outstanding issues from the *Intelligent Networks* proceeding that are not resolved here including direct access to the SCP and national standards for AIN access.

[1172] GVNW comments at 30-31.

[1173] NPRM at para. 89.

[1174] NPRM at paras. 107-114.

505. Several new entrants argue that incumbent LECs should be required to unbundle access to their "operations support systems" and "back-office" databases as network elements.[1175] Parties define operations support systems and back office databases generally to include those systems and databases required for pre-ordering, ordering, provisioning, maintenance and repair, and billing.[1176] Several state commissions report that they have required incumbent LECs to provide access to some of these systems and databases.[1177] Potential competitors argue that, without such access, incumbent LECs can make it extremely difficult for them to utilize unbundled network elements and resold services, thereby severely impairing their ability to compete.[1178] Competitors argue that they should be able to access such incumbent LEC systems as necessary to receive and input data.[1179] Competitors contend that such access is required by sections 251(c)(3) and 251(c)(4) as part of the terms and conditions of each section.[1180] TCC further argues that until such access is in place,

[1175] ACTA comments at 14; ACSI comments at 42-43; ALTS comments at 31; American Network Exchange comments at 5, AT&T comments at 33-39; Cable & Wireless comments at 36-37; Citizens Utilities comments at 15; CompTel comments at 31; GCI comments at 16; MCI comments at 33; TCC comments at 54-60; Teleport comments at 38-39; Vartec comments at 6-10 (incumbent LECs should unbundle access to the Billing Name and Address database); WorldCom June 14 *Ex Parte at 4-5*; CompTel June 14 *Ex Parte*.

[1176] *See* Competition Policy Institute comments at 16; GCI comments at 16; MCI comments at 18; NCTA comments at 42; Sprint comments at 17-18, 41; Teleport comments at 38-39. MCI also identifies several "back office" databases it believes are necessary to provide competitive local telephone service including, among others, Customer Record Information System (CRIS), Master Street Address Guide (MSAG) CMDS System (industry mechanism to exchange billed messages such as third-party, collect and calling cards), Telecommunications Management Network Type Database (TMN), and Number Assignment Database. MCI July 3 *Ex Parte* at 2-4.

[1177] Texas Commission comments at 19 (number assignment, ordering and repairs); In Re Petition of AT&T for the Commission to Establish Resale Rules, Rates, Terms and Conditions and the Initial Unbundling of Services, Georgia Commission Docket 6352, (Georgia Commission May 29, 1996); Order Declaring Resale Prohibitions Void and Establishing Tariff Terms, New York Commission Case 94-C-0095 and Case 95-C-0657 (New York Commission June 25, 1996).

[1178] ACSI comments at 47; AT&T comments at 33-39 (an incumbent LEC's monopoly control over operational support systems is as formidable an obstacle to market entry as its control over the network itself); Cable & Wireless comments at 36-37; Citizens Utilities comments at 15; Continental comments at 19; Sprint comments at 17-19, 22; TCC comments at 54-60 (incumbent LECs can block new entry by refusing to install "automated, nondiscriminatory systems" for ordering, installing, maintaining, repairing and billing); Teleport comments at 38-39; CompTel comments at 37-38 (such access is necessary for competitors to combine unbundled network elements into telecommunications services of their own design); Vartec comments at 7-8 (competitors will be unable to compete unless incumbent LECs provide access to unbundled billing and collection functions).

[1179] *See, e.g.*, ACSI comments at 47; MCI comments at 24.

[1180] TCC comments at 56 (section 251(c)(3) requires that unbundled network elements be provided at nondiscriminatory rates, terms and conditions, and section (c)(4) requires that services for resale be provided free of any "unreasonable or discriminatory conditions or limitations"); CompTel comments at 37 (Commission should set an aggressive, firm deadline for compliance); GCI comments at 16.

incumbent LECs will not have met the requirements of either section 251(c)(3) or (c)(4) and therefore BOCs cannot be deemed to have met the requirements of section 271(c)(2)(B)(i).[1181]

506. In contrast, most incumbent LECs argue that operations support systems do not qualify as network elements under the 1996 Act.[1182] Ameritech argues that competitors have not demonstrated that they need access to such systems in order to provide telecommunications services.[1183] Several incumbent LECs assert that an incumbent LEC may negotiate with a competitor to provide such support services, but that the 1996 Act does not require them to unbundle these systems as network elements.[1184] Other parties argue that such access is not currently technically feasible and should be resolved through the negotiations process.[1185] SBC contends that its provisioning processes are neutral with respect to competing providers of service and that provisioning for competitors does not take longer than provisioning for its own customers.[1186]

507. Several potential local competitors, including most large IXCs, urge the Commission to require incumbent LECs to provide access to their operation support systems through real-time "electronic interfaces" or "electronic bonding."[1187] AT&T argues that virtually every incumbent LEC uses automated interfaces internally to support and coordinate

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[1181] TCC comments at 56-57.

[1182] BellSouth comments at 45; GTE comments at 44; U S West comments at 48; Lincoln Tel. reply at 12-14; Ameritech reply at 19-20 (only for routing, terminating, billing or providing telecommunications service); Bell Atlantic reply at 12-23 n.15 (not necessary to offer service and numerous resellers have operated in Bell Atlantic territory without such direct access); BellSouth reply at 24, n.45; GTE reply at 23; NYNEX reply at 33-34; PacTel reply at 22 (operations support systems not used in the provision of a telecommunications service). Letter from Michael Glover, General Attorney, Bell Atlantic, to William Kennard, General Counsel, FCC, April 15, 1996 (Bell Atlantic April 15 *Ex Parte*).

[1183] Ameritech comments at 19-20; NYNEX comments at 33-34 (administrative databases are not used in routing or completion of calls); Bell Atlantic reply at 14; U S West reply at 27.

[1184] NYNEX comments at 33-34; Ameritech reply at 19-20; Lincoln Tel. reply at 14 (competitors must provide their own ordering systems); Bell Atlantic April 15 *Ex Parte* at 9.

[1185] Lincoln Tel. comments at 9 (re-engineering customer service systems only for purpose of supporting competitors would be extremely profligate); GVNW comments at 10-12.

[1186] Letter from Sandra Wagner, Director, Federal Regulatory, SBC Communications, Inc. to William Caton, Acting Secretary, FCC, June 4, 1996 (SBC June 4 *Ex Parte*).

[1187] ACTA comments at 14-15; AT&T comments at 33-39; MCI comments at 33-34; Sprint comments at viii, 17-19, 22; Teleport comments at 38-39; Texas Commission comments at 19; TCC comments at 56-58 Appendix D; AT&T reply at 20-21.

functionalities such as ordering, provisioning, maintenance, and billing.[1188] TCC argues that the availability of such operational interface standards for external interaction are limited, and that incumbent LECs have powerful disincentives to develop and implement such interfaces in the absence of clear rules requiring them.[1189] Parties commented that such interfaces are necessary so that carriers relying on interconnection, unbundled network elements, or resale from the incumbent LEC can offer their customers services of the same quality as those offered by the incumbent LEC.[1190] AT&T argues that incumbent LECs must provide such access for competitors at the same level of quality and within the same intervals as they do for their own end-users so that customers do not "perceive any differences in the quality of service provided by one carrier as compared to another."[1191] Competitors contend that such interfaces need to be similar to the PIC conversion process, so that it is as easy for consumers to switch local service providers as it is to switch interexchange carriers.[1192] Teleport argues that it would be at a competitive disadvantage if it was required to use slower, more expensive manual systems while the incumbent LEC continued to use its modern and efficient systems.[1193]

508. AT&T and TCC commented on AT&T's experience in the Rochester, New York market as a reseller of Rochester Telephone's services under Rochester Telephone's Open

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[1188] AT&T comments at 36-37.

[1189] TCC comments at 55.

[1190] ACTA comments at 14-15; AT&T comments at 33-39; MCI comments at 33-34; Sprint comments at viii, 17-19, 22; Teleport comments at 38-39; TCC comments at 55 (a competitor must be able to seamlessly deliver services, add features, and bill "as if it owned the facilities").

[1191] AT&T comments at 35. AT&T argues that such a requirement is supported by Commission precedent including *Policy and Rules Concerning the Furnishing of Customer Premises Equipment, Enhanced Services and Cellular Communications Services by the Bell Operating Companies*, Report and Order, 95 F.C.C. 2d 1117, 1135-36 (1983) (adopting safeguards to prevent BOCs from providing superior access, installation, and maintenance services to themselves than to competitive providers of CPE, enhanced services and cellular services); *Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, Report and Order, 104 F.C.C. 2d 958, 1026-27 (1986) (requiring BOCs to provide competing enhanced service providers with comparably efficient interconnection "to control potential discrimination" by BOCs in favor of their own offerings); *id.* at 1041 (time periods for installation, maintenance, and repair must be the same for competing carriers as for BOC's own offerings).

[1192] ACTA comments at 16; AT&T comments at 35-36; CompTel comments at 3, 37; TCC comments at 54 (should be as easy for consumers to switch local service providers as it is currently to switch long distance providers). *See* Letter from Mary Brown, Director, Corporate Rates & Federal Regulatory Analysis, MCI, to William Kennard, General Counsel, FCC, Mar. 20, 1996 (*LXCs Joint Ex Parte*) at 6.

[1193] Teleport comments at 39; *accord* TCC comments at 55 (for example, an incumbent LEC could enter its own service orders electronically, but require the competing carrier to submit such orders manually via a multiple page form faxed or e-mailed to the incumbent for subsequent processing).

Market Plan.[1194] Parties noted that AT&T was required to submit a detailed order form, initially through a facsimile machine and later through e-mail, in order to resell Rochester Telephone services.[1195] AT&T asserts that it was signing up between one and two hundred new customers daily and therefore had to fax up to 1400 pages daily to Rochester Telephone.[1196] AT&T and TCC contend that such a manual process is clearly discriminatory and in violation of the 1996 Act because it creates additional delay and the potential for human error, resulting in customer dissatisfaction.[1197] TCC argues further that such a disparity in systems allows for the incumbent LEC to schedule service commencement and issue new phone numbers during the initial contact with a customer, while the competitor, at best, must put the customer on hold while it calls the incumbent LEC to obtain such information.[1198]

509. Several parties argue that electronic interfaces should provide competitors with transparent access to the underlying information rather than the individual databases necessary for ordering and provisioning, installation, maintenance and repair, recording and billing, and monitoring service.[1199] Commenters assert that large incumbent LECs may have, for example, certain information necessary for billing, stored among several databases systems, each with individual operating systems.[1200] AT&T asserts that it will be difficult and expensive for a

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[1194] *See* Petition of Rochester Telephone Corp. for Approval of Proposed Restructuring Plan, Opinion and Order Approving Joint Stipulation and Agreement, Case 93-C-0103, Opinion No. 94-25 (NY Pub. Serv. Comm'n) (Nov. 10, 1994); *In the Matter of Rochester Telephone Corp., Petition for Waivers to Implement its Open Market Plan*, 10 FCC Rcd 6776 (1995); *see also* Big Boys Come Calling, N.Y. Times, Oct. 19, 1995 at 1.

[1195] AT&T comments at 34-35 (AT&T had to complete a multi-page form for every individual customer that wanted to switch to AT&T and Rochester Telephone would not change a customer's service until AT&T faxed multiple documents to it); TCC comments at 55.

[1196] AT&T comments at 34 (AT&T estimated that for each customer it ordered services for, it took at least four hours for Rochester to complete and respond to AT&T).

[1197] AT&T comments at 34 (AT&T argues that the problems with a manual process were "intolerable" in the Rochester market, and would be significantly magnified in larger or more heavily populated areas); TCC comments at 55.

[1198] TCC comments at 55-56 (at worst the competing carrier must hang up with the customer and call back later with the necessary information).

[1199] AT&T comments at 33-39; Telecommunications Resellers Ass'n comments at 22 n.52-53; TCC comments at 56 -57 (electronic interface capabilities should allow competitors, *inter alia*, to enter customer trouble reports, obtain report commitments, schedule customer site visits and receive notification of network conditions affecting service); Letter from Antoinette Cook Bush, Counsel, Ameritech to William Caton, Acting Secretary, FCC, July 10, 1996 (Ameritech July 10 *Ex Parte*). Ameritech argues that, once operational interfaces are in place, it will be unnecessary for carriers to provide competitors with direct access to the underlying systems or databases providing such functions. *Id.* at 5.

[1200] AT&T comments at 33-39.

competing carrier to individually access multiple systems and that the difficulty and expense will be compounded for parties wishing to compete in several incumbent LECs' territories.[1201] AT&T contends, therefore, that incumbent LECs should create and deploy a "gateway" to all of their internal operations support systems and databases so that a competing carrier could use one method of access to the underlying information.[1202] U S West contends that competitors must develop systems that are compatible with incumbent LEC electronic interfaces and argues that incumbent LECs should not be required to develop individualized systems for each competing carrier.[1203]

510. Since the passage of the 1996 Act, several states have proceeded to implement rules for local competition, several of which include provisions concerning electronic interfaces.[1204] The Georgia Commission ordered BellSouth to establish electronic operational interfaces by July 15, 1996, and ordered both incumbent BellSouth and requesting carrier AT&T to submit a joint report to the commission within thirty days concerning the implementation schedule necessary to deploy such interfaces.[1205] After a motion for reconsideration, the Georgia Commission provided BellSouth with an additional month to establish these interfaces and added additional deadlines for the deployment and operation of such interfaces.[1206] The Illinois Commission ordered Ameritech and Centel to provide competitors with "all operational interfaces at parity with those provided their own retail

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[1201] *Id.*

[1202] *Id.*

[1203] Letter from Cyndie Eby, Executive Director – Federal Regulatory, U S West to Robert Tanner, Attorney Advisor, FCC, July 9, 1996 (U S West July 9 *Ex Parte*).

[1204] Letter from Bruce Cox, Government Affairs Director, AT&T to William Caton, Acting Secretary, FCC, July 11, 1996 (AT&T July 11 *Ex Parte*). AT&T submitted orders or rules from eight states that have taken action on the issue of electronic interfaces. *Id.*

[1205] Petition of AT&T for the Commission to Establish Resale Rules, Rates, Terms and Conditions and the Initial Unbundling of Services, Docket No. 6352-U at 11-12, 15 (Georgia Commission May 29, 1996). The Georgia Commission ordered BellSouth to establish interfaces for "pre-service ordering, service ordering and provisioning, directory listing and line information databases, service trouble reporting, and daily usage data." *Id.* at 15.

[1206] Motion for Reconsideration in Docket No. 6352-U (Georgia Commission July 2, 1996). The Georgia Commission directed that most electronic interfaces must be fully operational by the end of 1996, and established March 31, 1997 as an absolute deadline. *Id.*

customers."[1207] The Louisiana Commission has proposed rules on local competition that require incumbent LECs to deploy systems for competitors that are equivalent to those used by incumbents for their own retail exchange services.[1208] Under those rules, such access must be equal to that provided to an incumbent LECs' own personnel.[1209] The California Commission adopted interim rules ordering incumbent LECs to deploy automated on-line systems for access by competitors.[1210] The Indiana Commission concluded that a competitor's ability to utilize "electronic access, technical interfaces, or access to databases to place service orders, receive phone number assignments, receive information necessary to bill [its] customers and to inform the incumbent LEC of cases of trouble" is essential to the development of resale competition.[1211] Indiana ordered incumbent LECs to provide all operational interfaces at parity with those the incumbent provides to its own retail customers.[1212] The Ohio Commission's rules on local competition require all LECs to provide "nondiscriminatory, automated operational support systems" that support access by competing carriers to such functions as pre-ordering, ordering, provisioning, repair and maintenance, number assignment, and billing.[1213] The Oklahoma Commission has proposed rules that require an incumbent LEC, to the extent it provides itself, its affiliates or subsidiaries,

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[1207] *Illinois Wholesale Order*. The Illinois Commission ordered both incumbent LECs, to the extent they could not "fully and immediately" implement operational parity, to submit a plan with specific timetables for achieving compliance. *Id.* at 51.

[1208] Substitute Proposed Regulations for Competition in the Local Telecommunications Market, Docket No. U-20883 (Louisiana Commission March 5, 1996). The Louisiana Commission further requires "direct on-line access" to incumbent LECs' mechanized order entry system, number administration system, trouble reporting and monitoring system, customer usage data, and local listing databases. *Id.*

[1209] *Id.*

[1210] Order Instituting Rulemaking on the Commission's Own Motion into Competition for Local Exchange Service, R. 95-04-043 and I. 95-04-044 (California Commission April 26, 1995). The California Commission ordered such access for "service ordering and implementation scheduling." *Id.* at Appendix E, 14.

[1211] In the Matter of the Investigation on the Commission's Own Motion into Any and All Matters Relating to Local Telephone Exchange Competition Within the State of Indiana, Cause No. 39983, Interim Order on Bundled Resale and Other Issues (Indiana Commission July 1, 1996).

[1212] *Id.* at 49. The Commission also ordered incumbents Ameritech and GTE, to the extent they contend that they are unable to fully and immediately implement operational parity, to submit a comprehensive plan with specific timetables for achieving compliance. *Id.*

[1213] In the Matter of the Commission Investigation Relative to the Establishment of Local Exchange Competition and Other Competitive Issues, Case No. 95-845-TP-COI (Ohio Commission June 12, 1996).

automated interfaces for the purpose of service ordering, maintenance or repair, to make such interfaces available to competitors.[1214]

511. A few incumbent LECs commented on their own efforts to develop and implement electronic interfaces, including development of a single gateway for competing carrier access. Ameritech contends that "operational interfaces are essential to promote viable competitive entry."[1215] Bell Atlantic states that it currently provides ordering and repair information to IXCs and is working on implementing similar electronic interfaces for competing local carriers.[1216] GTE commented that it supports access to its trouble administration information for AT&T and MCI.[1217] U S West also supports trouble administration electronic access for AT&T and MCI and is developing access to all of its operations support systems for IXCs.[1218] U S West also states that it expects to build on such access for IXCs to develop access to meet the needs of local competitors.[1219] NYNEX also provides currently for electronic access for IXCs to its operations support systems for presubscription, ordering and provisioning, trouble administration, and access billing.[1220] NYNEX, which has been ordered by the New York Commission to provide electronic

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[1214] All Sources Proposed Rules,Docket No. RM9500000019 (Local Telephone Competition) (Oklahoma Commission March 7, 1996). Oklahoma rules clarify that such interfaces should not permit competitors to directly access the incumbent's underlying systems. *Id.* at 79.

[1215] Ameritech July 10 *Ex Parte*.

[1216] Letter from Patricia Koch, Assistant Vice President, Federal External Affairs and Regulatory Relations, Bell Atlantic, to William Caton, Acting Secretary, FCC, June 21, 1996 (Bell Atlantic June 21 *Ex Parte*).

[1217] GTE reply at 23 n.31 (GTE provides electronic bonding for trouble administration to both AT&T and MCI).

[1218] Letter from Cyndie Eby, Executive Director-Federal Regulatory to William Caton, Acting Secretary, FCC, June 28, 1996 (U S West June 28 *Ex Parte*). U S West supports a mediated electronic interface for IXCs to submit trouble reports to U S West. *Id.*

[1219] U S West July 9 *Ex Parte*.

[1220] Letter from Alan Cort, Director, Federal Regulatory Matters, NYNEX to William Caton, Acting Secretary, FCC, July 12, 1996 (NYNEX July 12 *Ex Parte*). Such electronic access can be achieved through "a stand alone PC with a dial up modem, or through a customer's [IXC's] network to allow network to network connectivity." *Id.*

interfaces for local competitors by October 1, 1996,[1221] recently proposed to expand the use of its current electronic access for IXCs to local competitors.[1222]

512. Sprint and MCI argue that current use of electronic interfaces, including the Customer Account Record Exchange (CARE) system used by LECs and IXCs to exchange subscriber account information electronically, is evidence of the technical feasibility of electronic bonding.[1223] TCC urges the Commission to require the provision of timely and accurate CARE by all local service providers to all IXCs.[1224] Vartec asserts that incumbent LECs and IXCs already share access to the Billing Name and Address (BNA) database.[1225] TCC argues that all local service providers should be required to continue to support the standard interface that exists today for IXCs to request BNA information to complete the billing process for its customers.[1226] In addition, TCC notes that competing carriers purchasing unbundled local switching from the incumbent LEC will require access to billing data to bill IXCs for exchange access.[1227]

513. Several commenters advocate national standards for electronic interfaces.[1228] Ameritech asserts that "[t]he ability to do business between multiple local exchange carriers and incumbent LECs dictates that these electronic interfaces adhere to national or industry-based standards where available."[1229] Sprint proposes that the Commission require industry to

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[1221] Order Declaring Resale Prohibitions Void and Establishing Tariff Terms, Case 94-C-0095, *et. al.* (New York Commission June 25, 1996).

[1222] Letter from Alan Cort, Director, Federal Regulatory Matters, NYNEX to William Caton, Acting Secreary, FCC July 17, 1996 (NYNEX July 17 *Ex Parte*). NYNEX will provide competing providers with access to its Direct Customer Access System. It is currently testing local service applications with potential new entrants. *Id.*

[1223] MCI comments at 18; Sprint comments at 17; TCC comments at 58 n.60 (currently there are approxinately 56 million CARE transactions annually).

[1224] TCC comments at 58 (CARE information includes a customer's billing telephone number, working teephone number, billing address and service address).

[1225] Vartec comments at 8-9.

[1226] TCC comments at 58-59.

[1227] TCC comments at 59.

[1228] AT&T comments at 36-39; Cable & Wireless comments at 36-37; Teleport comments at 38-39.

[1229] Ameritech July 10 *Ex Parte* at 5.

develop such standards and incumbent LECs to implement those standards within twelve months.[1230] AT&T argues that, while industry has primary responsibility for developing standards, section 256(b)(1) establishes an "oversight" responsibility for the Commission in the development of such industry standards.[1231] American Communications Services argues that such standards should conform to Bellcore and ANSI requirements as well as relevant industry guidelines and manufacturer specifications.[1232] Ameritech asserts that, if an ANSI or other national or industry-based standard exists, incumbent LECs should have a duty to conform their electronic interfaces to those standards within a reasonable period of time.[1233] Sprint reports that industry has been working on developing standards for electronic interfaces in the Electronic Communications Implementation Committee (ECIC),[1234] a working committee in the Telecommunications Industry Forum of the Alliance for Telecommunications Industry Solutions (ATIS).[1235] The ECIC defines electronic bonding as "interactive electronic information exchange involving application-to-application communications between telecommunications jurisdictions" supporting operations, administration, maintenance, and provisioning.[1236] The ECIC has already developed guidelines for a "Trouble Administration" application and is close to completing those for an "Interexchange Carrier/Customer Account

[1230] Sprint comments at 18. *See also* AT&T comments at 38. AT&T urges the Commission to direct industry to work towards developing such standards, set a date for their implementation and make it clear to incumbent LECs that such standards are a necessary part of meeting the requirements of sections 251(c)(3) and (c)(4). *Id.*

[1231] AT&T comments at 38.

[1232] ACSI comments at 47; *see* Ameritech July 10 *Ex Parte* at 5. Ameritech adds that the telecommunications industry has the responsibility to develop its own standards through existing bodies such as ANSI. *Id.*

[1233] Ameritech July 10 *Ex Parte* at 5.

[1234] ECIC was formerly known as the Electronic Bonding Implementation Team (EBIT) before becoming a working committee of ATIS.

[1235] Letter from Jay Keithley, Vice President, Law & External Affairs, Sprint , to William F. Caton, Acting Secretary, FCC, June 25, 1996 (Sprint June 25 *Ex Parte*). Current active members of the ECIC include: Ameritech, AT&T, Bell Atlantic, BellSouth, Cincinnati Bell, DSET, GTE, MCI, NYNEX, Objective Systems Integrators, OpenCon Systems, Pacific Bell, Pirelli Cable, SNET, Southwestern Bell, Sprint, Touch of Gray Engineering, Telegenics, Teleport, and U S West. *Id. See also* Letter from Todd Silbergeld, Director--Federal Regulatory, SBC Communications to William Caton, Acting Secretary, FCC (July 12, 1996) (SBC July 12 *Ex Parte*).

[1236] Sprint June 25 *Ex Parte*.

Record Exchange" application.[1237] A few incumbent LECs identified the "Electronic Data Interchange (EDI)" standard as a potential basis for electronic interfaces.[1238] Several parties also commented that the Ordering and Billing Forum (OBF) is working on developing standards for electronic interfaces.[1239] SBC and NYNEX note that ECIC, OBF, EDI and the T1M1 standards committees[1240] are all working in conjunction to develop electronic interfaces for inter-telecommunications company transactions.[1241]

514. AT&T argues that a national standard for electronic interfaces should provide for a uniform method of access to underlying information by competing carriers to all incumbent LECs. As envisioned by AT&T, such a gateway would provide transparent access for all competing local exchange providers to incumbent LEC administrative and back office databases. Bell Atlantic and AT&T together agree that, given "appropriate guidance from the Commission, the industry can achieve consensus on sufficient data elements and formatting conventions to facilitate that 95% of all inter-telecommunications company transactions may be processed via electronic gateways within twelve months."[1242] Bell Atlantic and AT&T argue that "transaction sets"[1243] to facilitate the exchange of information across electronic

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[1237] Sprint June 25 *Ex Parte*. The ECIC will next work on a "Ordering/Provisioning" application. It has identified but not yet established priorities for other applications including: Performance Monitoring, Alarm Monitoring, Network Management, Traffic Management, Testing and Reporting, Ordering Competitive LEC Services (including Resale), Ordering SONET, Product Availability/Capability, Electronic Bonding for Government and Large Customers, and Intercompany Billing. *Id. See also* U S West July 9 *Ex Parte*.

[1238] Ameritech July 10 *Ex Parte* at 5-6. EDI is defined by the Telecommunications Industry Forum. *Id. at 6.*

[1239] AT&T comments at 38; BellSouth reply at 27; Ameritech July 10 *Ex Parte* at 5. An electronic ordering interface could be based on the "access service request" defined by OBF. Billing information could be exchanged via the "exchange message interface" or the "exchange message record" also defined by OBF. Ameritech July 10 *Ex Parte* at 5-6.

[1240] T1M1 is a standards committee under the T1 Telecommunications committee, and is a part of ATIS.

[1241] SBC July 12 *Ex Parte*; NYNEX July 17 *Ex Parte*.

[1242] Letter from Bruce Cox, Government Affairs Director to William Caton, Acting Secretary, FCC, July 3, 1996 (*AT&T-Bell Atlantic Joint Ex Parte*). This language was also supported by Beechwood Data Systems, a systems integrator company working with, among others, AT&T and NYNEX on electronic interfaces.

[1243] A "transaction set" refers to a set of standard data elements necessary to support any electronic exchange of information for a particular function, like provisioning.

interfaces need to be created to support the functions of pre-ordering and ordering,[1244] provisioning,[1245] repair and maintenance,[1246] and billing.[1247] AT&T commented that electronic interfaces are scalable to different size entities, so that any phone company with at least a PC computer and a modem can utilize one of their applications.[1248]

515. Several state commissions commented that they are not opposed to national standards but want the flexibility to implement additional or different state standards.[1249] The Colorado Commission believes national technical standards are a worthy goal, but they must carefully consider differences in regional and network conditions.[1250] The California Commission, however, contends that incumbent LEC provisioning systems vary considerably by company and region.[1251] Incumbent LECs argue that there should be no national standards for the provision, maintenance and repair of network elements because operating and administrative systems differ between incumbent LECs.[1252]

[1244] Pre-ordering and ordering includes the exchange of information between LECs about current or proposed customer products and services or unbundled network elements or some combination thereof. *AT&T-Bell Atlantic Joint Ex Parte*. TCC includes such information as customer data on current services, and credit and payment history. TCC comments at 57 n.58, Appendix D.

[1245] Provisioning involves the exchange of information between LECs where one executes a request for a set of products and services or unbundled network elements or combination thereof from the other with attendant acknowledgements and status reports. *AT&T-Bell Atlantic Joint Ex Parte*.

[1246] Maintenance [and repair] involves the exchange of information between LECs where one initiates a request for repair of existing products and services or unbundled network elements or combination thereof from the other with attendant acknowledgements and status reports. *AT&T-Bell Atlantic Joint Ex Parte*.

[1247] Billing involves the provision of appropriate usage data by one LEC to another to facilitate customer billing with attendant acknowledgements and status reports. It also involves the exchange of information between LECs to process claims and adjustments. *AT&T-Bell Atlantic Joint Ex Parte*.

[1248] Letter from Bruce Cox, Government Affairs Director, AT&T to William Caton, Acting Secretary, FCC, July 1, 1996 (AT&T July 1 *Ex Parte*).

[1249] Pennsylvania Commission comments at 25; *but see* California Commission comments at 26-28 (standards could hinder innovation and efficiency).

[1250] Colorado Commission comments at 24-25, 27.

[1251] California Commission comments at 27 (the two biggest incumbent LECs in California have significant differences in how they provision and operate their network).

[1252] Bell Atlantic comments at 31; PacTel comments at 40-44 (Commission could order standards for similarly situated networks but there will be many differences between incumbent LECs' ordering and billing systems); NYNEX reply comments at 32-33 (arguing that there are also differences in incumbent LECs' test equipment).

c. Discussion

516. We conclude that operations support systems and the information they contain fall squarely within the definition of "network element" and must be unbundled upon request under section 251(c)(3), as discussed below. Congress included in the definition of "network element" the terms "databases" and "information sufficient for billing and collection or used in the transmission, routing, *or other provision* of a telecommunications service."[1253] We believe that the inclusion of these terms in the definition of "network element" is a recognition that the massive operations support systems employed by incumbent LECs, and the information such systems maintain and update to administer telecommunications networks and services, represent a significant potential barrier to entry. It is these systems that determine, in large part, the speed and efficiency with which incumbent LECs can market, order, provision, and maintain telecommunications services and facilities. Thus, we agree with Ameritech that "[o]perational interfaces are essential to promote viable competitive entry."[1254]

517. Nondiscriminatory access to operations support systems functions can be viewed in at least three ways. First, operations support systems themselves can be characterized as "databases" or "facilit[ies] . . . used in the provision of a telecommunications service," and the functions performed by such systems can be characterized as "features, functions, and capabilities that are provided by means of such facilit[ies]."[1255] Second, the information contained in, and processed by operations support systems can be classified as "information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service."[1256] Third, nondiscriminatory access to the functions of operations support systems, which would include access to the information they contain, could be viewed as a "term or condition" of unbundling other network elements under section 251(c)(3), or resale under section 251(c)(4). Thus, we conclude that, under any of these interpretations, operations support systems functions are subject to the nondiscriminatory access duty imposed by section 251(c)(3), and the duty imposed by section 251(c)(4) to provide resale services under just, reasonable, and nondiscriminatory terms and conditions.

518. Much of the information maintained by these systems is critical to the ability of other carriers to compete with incumbent LECs using unbundled network elements or resold services. Without access to review, *inter alia*, available telephone numbers, service interval

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[1253] 47 U.S.C. § 153(29) (emphasis added).

[1254] Ameritech July 10 *Ex Parte* at 5.

[1255] 47 U.S.C. § 153(29).

[1256] *Id.*

information, and maintenance histories, competing carriers would operate at a significant disadvantage with respect to the incumbent. Other information, such as the facilities and services assigned to a particular customer, is necessary to a competing carrier's ability to provision and offer competing services to incumbent LEC customers.[1257] Finally, if competing carriers are unable to perform the functions of pre-ordering, ordering, provisioning, maintenance and repair, and billing for network elements and resale services in substantially the same time and manner that an incumbent can for itself, competing carriers will be severely disadvantaged, if not precluded altogether, from fairly competing. Thus providing nondiscriminatory access to these support systems functions, which would include access to the information such systems contain, is vital to creating opportunities for meaningful competition.

519. As noted in the comments above, several state commissions have ordered real-time access or have ongoing proceedings working to develop and implement it within their jurisdictions. The New York Commission, building on its pioneering experience with the Rochester Telephone "Open Market Plan," has facilitated a working group on electronic interfaces comprised of both incumbent LECs and potential competitors.[1258] The New York Commission focused on these issues in response to the frustrations and concerns of resellers in the Rochester market.[1259] In particular, AT&T alleged that it was "severely disadvantaged due to the fact that [Rochester Telephone] has failed to provide procedures for resellers to access [their] databases for on-line queries needed to perform basic service functions [such] as scheduling customer appointments."[1260] The New York Commission has concluded that wherever possible NYNEX will provide new entrants with real-time electronic access to its systems.[1261] As another example, the Georgia Commission recently ordered BellSouth to provide electronic interfaces such that resellers have the same access to operations support systems and informational databases as BellSouth does, including interfaces for pre-ordering,

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[1257] For these reasons, it is most important that incumbent LECs, which currently own the overwhelming majority of local facilities in any market, provide this information to those new entrants who initially will rely to varying degrees on incumbent LEC facilities. *See e.g.*, AT&T comments at 33-34.

[1258] Order Declaring Resale Prohibitions Void and Establishing Tariff Terms, Case 94-C-0095, *et. al.* (New York Commission June 25, 1996).

[1259] Order Declaring Resale Prohibitions Void and Establishing Tariff Terms, Case 94-C-0095, *et. al.* (New York Commission June 25, 1996). In New York proceeding, resellers argued that interfaces were as important to competition as the level of the wholesale discount. *Id.*

[1260] AT&T Communications of New York, Inc. Complaint, Petition for Declaratory Judgement and for Reconsideration of Opinion No. 94-25 New York Commission, page 12.

[1261] *Id.* at 13-14. The New York Commission operations working group has focused on five areas for implementation: (1) service ordering, (2) trouble administration, (3) credit and collection, (4) billing and usage detail, (5) local exchange company requirements. *Id.* at 13-17.

ordering and provisioning, service trouble reporting, and customer daily usage.[1262] In testimony before the Georgia Commission, a BellSouth witness acknowledged that "[n]o one is happy, believe me, with a system that is not fully electronic."[1263] As noted above, Georgia ordered BellSouth to establish these interfaces within two months of its order (by July 15, 1996), but recently extended the deadline an additional month (to August 15th).[1264] Both the Illinois and Indiana Commissions ordered incumbent LECs immediately to provide to competitors access to operational interfaces at parity with those provided to their own retail customers, or submit plans with specific timetables for achieving such access.[1265] Several other states have passed laws or adopted rules ordering incumbent LECs to provide interfaces for access equal to that the incumbent provides itself.[1266] We recognize the lead taken by these states and others, and we generally rely upon their conclusions in this Order.

520. We conclude that providing nondiscriminatory access to operations support systems functions is technically feasible. Incumbent LECs today provide IXCs with different types of electronic ordering or trouble interfaces that demonstrate the feasibility of such access, and perhaps also provide a basis for adapting such interfaces for use between local service providers.[1267] Further, as discussed above, several incumbent LECs, including NYNEX and Bell Atlantic, are already testing and operating interfaces that support limited functions, and are developing the interfaces to support access to the remaining functions identified by most potential competitors.[1268] Some incumbent LECs acknowledge that

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[1262] *See* In Re Petition of AT&T for the Commission to Establish Resale Rules, Rates, Terms and Conditions and the Initial Unbundling of Services, Docket 6352, (Georgia Commission May 29, 1996).

[1263] *Id.*

[1264] Motion for Reconsideration in Docket No. 6352-U (Georgia Commission July 2, 1996).

[1265] In the Matter of the Investigation on the Commission's Own Motion into Any and All Matters Relating to Local Telephone Exchange Competition Within the State of Indiana, Cause No. 39983, Interim Order on Bundled Resale and Other Issues (Indiana Commissions July 1, 1996); *Illinois Wholesale Order*.

[1266] *See e.g.*, Texas Commission comments at 19; In the Matter of the Commission Investigation Relative to the Establishment of Local Exchange Competition and Other Competitive Issues, Case No. 95-845-TP-COI (Ohio Commission June 12, 1996); Order Instituting Rulemaking on the Commission's Own Motion into Competition for Local Exchange Service, R. 95-04-043 and I. 95-04-044 (California Commission April 26, 1995).

[1267] *See, e.g.*, Bell Atlantic June 21 *Ex Parte*; NYNEX July 12 *Ex Parte*; NYNEX July 17 *Ex Parte*; U S West June 28 *Ex Parte*; U S West July 9 *Ex Parte*.

[1268] Bell Atlantic June 21 *Ex Parte*; NYNEX July 17 *Ex Parte*.

nondiscriminatory access to operations support systems functions is technically feasible.[1269] Finally, several industry groups are actively establishing standards for inter-telecommunications company transactions.[1270]

521. Section 251(d)(2)(A) requires the Commission to consider whether "access to such network elements as are proprietary in nature is necessary."[1271] Incumbent LECs argue that there are proprietary interfaces used to access these databases and information. Parties seeking to compete with incumbent LECs counter that access to such databases and information is vitally important to the ability to broadly compete with the incumbent. As discussed above, competitors also argue that such access is necessary to order, provision, and maintain unbundled network elements and resold services, and to market competing services effectively to an incumbent LEC's customers. We find that it is absolutely necessary for competitive carriers to have access to operations support systems functions in order to successfully enter the local service market.

522. Section 251(d)(2)(B) requires the Commission to consider whether "the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer."[1272] As mentioned above, parties identified access to operations support systems functions as critical to the provision of local service. We find that such operations support systems functions are essential to the ability of competitors to provide services in a fully competitive local service market. Therefore, we conclude that competitors' ability to provide service successfully would be significantly impaired if they did not have access to incumbent LECs' operations support systems functions.

523. We thus conclude that an incumbent LEC must provide nondiscriminatory access to their operations support systems functions for pre-ordering, ordering, provisioning, maintenance and repair, and billing available to the LEC itself.[1273] Such nondiscriminatory

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[1269] *See* NYNEX reply at 33-34; GTE reply at 23 n.28; Bell Atlantic reply at 14.

[1270] Industry standards committees include ECIC, EDI, OBF and T1M1. *See* Ameritech July 10 *Ex Parte*, Sprint June 25 *Ex Parte*, NYNEX July 17 *Ex Parte*.

[1271] 47 U.S.C. § 251(d)(2)(A).

[1272] 47 U.S.C. § 251(d)(2)(B).

[1273] We adopt the definition of these terms as set forth in the *AT&T-Bell Atlantic Joint Ex Parte* as the minimum necessary for our requirements. We note, however, that individual incumbent LEC's operations support systems may not clearly mirror these definitions. Nevertheless, incumbent LECs must provide nondiscriminatory access to the full range of functions within pre-ordering, ordering, provisioning, maintenance and repair and billing enjoyed by the incumbent LEC.

access necessarily includes access to the functionality of any internal gateway systems[1274] the incumbent employs in performing the above functions for its own customers. For example, to the extent that customer service representatives of the incumbent have access to available telephone numbers or service interval information during customer contacts, the incumbent must provide the same access to competing providers. Obviously, an incumbent that provisions network resources electronically does not discharge its obligation under section 251(c)(3) by offering competing providers access that involves human intervention, such as facsimile-based ordering.[1275]

524. We recognize that, although technically feasible, providing nondiscriminatory access to operations support systems functions may require some modifications to existing systems necessary to accommodate such access by competing providers.[1276] Although, as discussed above, many incumbent LECs are actively developing these systems, even the largest and most advanced incumbent LECs have not completed interfaces that provide such access to all of their support systems functions. State commissions such as Georgia, Illinois, and Indiana, however, have ordered that such access be made available to requesting carriers in the near term. As a practical matter, the interfaces developed by incumbents to accommodate nondiscriminatory access will likely provide such access for services and elements beyond a particular state's boundaries, and thus we believe that requirements for such access by a small number of states representing a cross-section of the country will quickly lead to incumbents providing access in all regions.

525. In all cases, however, we conclude that in order to comply fully with section 251(c)(3) an incumbent LEC must provide, upon request, nondiscriminatory access to operations support systems functions for pre-ordering, ordering, provisioning, maintenance and repair, and billing of unbundled network elements under section 251(c)(3) and resold services under section 251(c)(4). Incumbent LECs that currently do not comply with this requirement of section 251(c)(3) must do so as expeditiously as possible, but in any event no later than January 1, 1997.[1277] We believe that the record demonstrates that incumbent LECs and several national standards-setting organizations have made significant progress in developing

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[1274] A gateway system refers to any electronic interface the incumbent LEC has created for its own use in accessing support systems for providing pre-ordering, ordering, provisioning, repair and maintenance, and billing.

[1275] Such access was all that Rochester Telephone provided to AT&T, when AT&T attempted to compete as a reseller of Rochester Telephone service. *See* Letter from Bruce Cox, Government Affairs Director, AT&T to William Caton, Acting Secretary, FCC, July 10, 1996 (AT&T July 10 *Ex Parte*).

[1276] *See supra*, Section V.G. regarding accommodation of unbundling.

[1277] *See infra*, Section VII.B. for a discussion of exemptions and suspensions for small and rural incumbent LECs.

such access. This progress is also reflected in a number of states requiring competitor access to these transactional functions in the near term. Thus, we believe that it is reasonable to expect that by January 1, 1997, new entrants will be able to compete for end user customers by obtaining nondiscriminatory access to operations support systems functions.

526. We have considered the economic impact of our rules in this section on small incumbent LECs. For example, RTC urges us to recognize the differences between carriers in regards to computerized network administration and operational interfaces. Our requirement of nondiscriminatory access to operations support systems recognizes that different incumbent LECs possess different existing systems. We also note, however, that section 251(f) of the 1996 Act provides relief for certain small LECs from our regulations implementing section 251.

527. Ideally, each incumbent LEC would provide access to support systems through a nationally standardized gateway. Such national standards would eliminate the need for new entrants to develop multiple interface systems, one for each incumbent. We believe that the progress made by standards-setting organizations to date evidences a strong national movement toward such a uniform standard.[1278] For example, both AT&T and Bell Atlantic agree that, given appropriate guidance from the Commission, the industry can achieve consensus on national standards such that within 12 months 95% of all inter-telecommunications company transactions may be processed via nationally standardized electronic gateways.[1279]

528. In order to ensure continued progress in establishing national standards, we propose to monitor closely the progress of industry organizations as they implement the rules adopted in this proceeding. Depending upon the progress made, we will make a determination in the near future as to whether our obligations under the 1996 Act require us to issue a separate notice of proposed rulemaking or take other action to guide industry efforts at arriving at appropriate national standards for access to operations support systems.

6. Other Network Elements

a. Background

529. In the NPRM, we requested comment on other network elements the Commission should require incumbent LECs to unbundle. We tentatively concluded that

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[1278] *See* Sprint June 25 *Ex Parte*; AT&T comments at 38; BellSouth reply at 27.

[1279] *AT&T-Bell Atlantic Joint Ex Parte*.

"subscriber numbers" and "operator call completion services" should be unbundled.[1280] We also, under our discussion of section 251(b)(3), sought comment on nondiscriminatory access to telephone numbers, operator services, and directory assistance.[1281]

b. Comments

530. Many parties support the Commission's tentative conclusion that incumbent LECs should be required to unbundle "operator call completion services" as a separate network element.[1282] AT&T argues that such a network element would be more correctly described as the "operator systems" used to provide these services.[1283] Some state commissions have proposed or required unbundling of operator services because they are critical to new entrants' ability to enter the local exchange market.[1284] Several incumbent LECs, however, argue that they should not be required to unbundle operator services as a network element, because both alternative providers and incumbent LECs provide them on a nondiscriminatory basis.[1285] Some incumbent LECs also advance the argument that Congress did not intend for operator services to be treated as a network element, instead requiring

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[1280] NPRM at para. 116.

[1281] NPRM at paras. 214-217.

[1282] ACSI comments at 44; ALTS comments at 32 (competitors must have nondiscriminatory access to busy line verification and call interrupt as these functionalities are currently only available from the incumbent LEC); AT&T comments at 26; Continental comments at 19; MCI comments at 18-20; Cable & Wireless comments at 20; Citizens Utilities comments at 15; Colorado Commission comments at 24; Comcast comments at 20; Competition Policy Institute comments at 16; DOJ comments at 21; Frontier comments at 17 n.32; GCI comments at 12; Telecommunications Resellers Ass'n comments at 36; TIA comments at 13 (special toll, public telephone and other calls requiring operator assistance); Wyoming Commission comments at 21; Jones Intercable reply at 30.

[1283] AT&T comments at 26 n.32; *see also* Competition Policy Institute comments at 16 (defined operator services as the live or mechanized systems which provide customers with operator services, such as call intercept, directory assistance and call completion); Jones Intercable reply at 30 n.51.

[1284] Wyoming comments at 22; *Illinois Wholesale Order*; AT&T reply 20-21 n.34. *See* Letter from Daniel Brenner, Vice President,for Law & Regulatory Policy, NCTA, to Regina Keeney, Chief, Common Carrier Bureau, FCC, April 15, 1996 (NCTA April 15 *Ex Parte*).

[1285] Bell Atlantic comments at 30 (operator services is a competitive market with over 145 operator services providers in the United States); GTE comments at 44; USTA comments at 17 (incumbent LECs already provide operator services on a contract or tariff basis); U S West comments at 46 n.103.

BOCs to provide nondiscriminatory access to such services as one of the conditions for BOC entry into in-region interLATA services under section 271.[1286]

531. Commenters advance different proposals as to how to unbundle access to operator call completion services. Some competitors advocate defining the entire service as a network element so that a competitor could provide its own operator services by interconnecting at the incumbent LEC's switch.[1287] AT&T argues that such services are not necessary for competitors that have their own comparable systems.[1288] Some competitors argue that incumbent LECs must make subscriber name and number and billing and collection services available so that a competitor can provide call completion and directory assistance with its own operators.[1289] Other parties, mostly incumbent LECs, state that such a proposal is not technically feasible.[1290] MCI further states that it needs access to incumbent LEC subscriber number information for the provision of directory assistance and call completion services by its own operator systems.[1291] Other competitors want the incumbent LEC to provide them with unbranded operator call completion services,[1292] much as some of the larger incumbent LECs and IXCs do now for smaller carriers.[1293]

[1286] Ameritech reply at 12 n.15; Bell Atlantic comments at 30; Cincinnati Bell comments at 19 (arguing that unbundling of operator services would impose large costs on smaller incumbent LECs); GTE comments at 44 (section 271 requires nondiscriminatory access to call completion services, not unbundled access to the relevant databases); PacTel reply at 21; SBC comments at 83-84; USTA reply at 17-18.

[1287] MCI comments at 37; AT&T reply at 21 (incumbent LECs must unbundle operator systems so that a competitor providing its own does not have to pay for the incumbent LECs' services).

[1288] AT&T comments at 26.

[1289] ACSI comments at 44.

[1290] *See* SBC reply at 22-23.

[1291] MCI comments at 37.

[1292] Unbranded or rebranded operator services involve the provision of such services by the incumbent LEC for the requesting carrier either: (1) without any identification to the customer that it is the incumbent LEC actually providing such services; or (2) in a manner that the incumbent LEC identifies itself to the customer solely as the requesting carrier for the provision of these services.

[1293] ACSI comments at 47-48; AT&T comments at 26; GCI comments at 12.

532. Many commenters argue that directory assistance and the databases used to provide such services should be separately unbundled as a network element.[1294] Some commenters advocate requiring incumbent LECs to provide unbranded directory assistance as a network element.[1295] MCI notes that Pacific Bell operates a joint directory assistance database for itself and GTE, and argues that competing carriers should be able to participate in a similar type arrangement with incumbent LECs.[1296]

533. Some commenters argue that access to "subscriber numbers" should be unbundled and that access to the Number Assignment database should be unbundled.[1297] MCI advocates that the Commission require incumbent LECs to provide unbundled access to their subscriber number information sufficient for the provision of directory assistance and call completion service by competing carriers using their own operators.[1298] Other parties argue that such access should not be required.[1299]

c. Discussion

(1) Operator Services and Directory Assistance

534. We conclude that incumbent LECs are under the same duty to permit competing carriers nondiscriminatory access to operator services and directory assistance facilities as all LECs are under section 251(b)(3).[1300] We further conclude that, if a carrier requests an incumbent LEC to unbundle the facilities and functionalities providing operator services and directory assistance as separate network elements, the incumbent LEC must provide the

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[1294] NCTA comments at 42; Teleport comments at 37; GST comments at 25; GCI comments at 12; MCI comments at 37 (MCI further recognizes directory assistance and directory listings).

[1295] Comcast comments at 20; Citizens Utilities comments at 15.

[1296] MCI comments at 33, 38 (California Commission ruling adopting this requirement is published at *Re GTE California Incorporated*, 31 CPUC 2d, 370 (1989)).

[1297] MCI comments at 19-20; ACSI comments at 43.

[1298] MCI comments at 37.

[1299] GTE comments at 43 (to the extent "subscriber numbers" means number administration, nondiscriminatory access is assured by industry guidelines and the Commission's intent to establish a number administration entity); Cincinnati Bell comments at 19 (subscriber numbers and information sufficient for billing and collection should be addressed in the bona fide request process).

[1300] *See NPRM* at paras. 203-219.

competing provider with nondiscriminatory access to such facilities and functionalities at any technically feasible point. We believe that these facilities and functionalities are important to facilitate competition in the local exchange market. Further, the 1996 Act imposes upon BOCs, as a condition of entry into in-region interLATA services the duty to provide nondiscriminatory access to directory assistance services and operator call completion services.[1301] We therefore conclude that unbundling facilities and functionalities providing operator services and directory assistance is consistent with the intent of Congress.

535. As discussed in our section on nondiscriminatory access under section 251(b)(3),[1302] the provision of nondiscriminatory access to operator services and directory assistance must conform to the requirements of section 222, which restricts carrier's use of CPNI.[1303] In particular, access to directory assistance and underlying directory information does not require incumbent LECs to provide access to unlisted or unpublished telephone numbers, or other information that the incumbent LEC's customer has requested the LEC not to make available. In conforming to section 222, we anticipate that incumbent LECs will provide such access in a manner that will protect against the inadvertent release of unlisted customer names and numbers.

536. We note that several competitors advocate unbundling the facilities and functionalities providing operator services and directory assistance from particular resold services or the unbundled local switching element, so that a competing provider can provide these services to its customers supported by its own systems rather than those of the incumbent LEC.[1304] Some incumbent LECs argue that such unbundling, however, is not technically feasible because of their inability to route individual end user calls to multiple systems.[1305] We find that unbundling both the facilities and functionalities providing operator services and directory assistance as separate network elements will be beneficial to competition and will aid the ability of competing providers to differentiate their service from the incumbent LECs. We also note that the Illinois Commission has recently ordered such

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[1301] 47 U.S.C. § 271(c)(2)(B)(vii)(II)-(III).

[1302] *See NPRM* at paras. 203-219.

[1303] *See Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and other Customer Information*, CC Docket No. 96-115, Notice of Proposed Rulemaking, FCC 96-221 (rel. May 17, 1996).

[1304] *See, e.g.*, AT&T comments at 26; Cable & Wireless comments at 20; Colorado Commission comments at 24; DOJ comments at 21; Frontier comments at 17 n.32; MCI comments at 18-20; Jones Intercable reply at 30.

[1305] SBC reply at 22-23.

access.[1306] We therefore find that incumbent LECs must unbundle the facilities and functionalities providing operator services and directory assistance from resold services and other unbundled network elements to the extent technically feasible. As discussed above in our section on unbundled switching, we require incumbent LECs, to the extent technically feasible, to provide customized routing, which would include such routing to a competitor's operator services or directory assistance platform.[1307]

537. We also note that some competitors seek access to operator services and directory assistance in order to serve their own customers.[1308] Some of these parties argue that nondiscriminatory access to such network elements requires incumbent LECs to provide rebranded operator call completion services and directory assistance to the competing carrier's customers.[1309] Incumbent LECs argue that the provision of these services on an unbranded or rebranded basis is not technically feasible because of their inability at the operator services or directory assistance platforms to identify the carrier serving the end user.[1310] As we concluded in our discussion on section 251(b)(3), we find that incumbent LECs must permit nondiscriminatory access to both operator services and directory assistance in the same manner required of all LECs.[1311] We make no finding on the technical feasibility of providing branded or unbranded service to competitors based on the record before us. We note, however, that the Illinois Commission has ordered incumbent LECs to provide rebranded operator call completion services and directory assistance to requesting competitive carriers.[1312]

538. As discussed above, incumbent LECs must provide access to databases as unbundled network elements.[1313] We find that the databases used in the provision of both operator call completion services and directory assistance must be unbundled by incumbent

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[1306] *See Illinois Wholesale Order.*

[1307] *See infra*, Section V.I.2.

[1308] AT&T comments at 26.

[1309] ACSI comments at 47-48; AT&T comments at 26; Comcast comments at 20; GCI comments at 12.

[1310] SBC reply at 22-23.

[1311] *See NPRM* at paras. 203-219.

[1312] *See Illinois Wholesale Order.*

[1313] *See supra*, Section V.J.

LECs upon a request for access by a competing provider. In particular, the directory assistance database must be unbundled for access by requesting carriers.[1314] Such access must include both entry of the requesting carrier's customer information into the database, and the ability to read such a database, so as to enable requesting carriers to provide operator services and directory assistance concerning incumbent LEC customer information. We clarify, however, that the entry of a competitor's customer information into an incumbent LEC's directory assistance database can be mediated by the incumbent LEC to prevent unauthorized use of the database. We find that the arrangement ordered by the California Commission concerning the shared use of such a database by Pacific Bell and GTE is one possible method of providing such access.[1315]

539. Section 251(d)(2)(A) requires the Commission to consider whether "access to such network elements as are proprietary in nature is necessary."[1316] Parties generally did not identify proprietary concerns with unbundling access to operator call completion services or directory assistance. Incumbent LECs generally did not claim a proprietary interest in their directory assistance databases. Many parties contend that proprietary interests leading to restrictions on use or sharing of such database information would injure their ability to compete effectively for local service.[1317] For the reasons described below, we find that access to the systems supporting both operator call completion services and directory assistance is necessary for new entrants to provide competing local exchange service.

540. Section 251(d)(2)(B) requires the Commission to consider whether "the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer."[1318] Parties identified access to operator call completion services and directory assistance as critical to the provision of local service.[1319] Therefore we conclude that competitors' ability to provide service would be significantly impaired if they did not have access to incumbent LECs' operator call completion services and directory assistance.

[1314] We find the joint directory assistance database used by Pacific Bell and GTE to be one method of such access. MCI comments at 38.

[1315] *See Re GTE California Incorporated*, 31 CPUC 2d 370 (1989).

[1316] 47 U.S.C. § 251(d)(2)(A).

[1317] MCI comments at 37-38.

[1318] 47 U.S.C. § 251(d)(2)(B).

[1319] MCI comments at 37-38.

(2) Subscriber Numbers

541. Some commenters argue that the Commission should require incumbent LECs to unbundle access to subscriber numbers. We conclude that no Commission action under section 251(b)(3) is required at this time to ensure nondiscriminatory access to subscriber numbers. Issues regarding access to subscriber numbers will be addressed by our implementation of section 251(e).[1320]

[1320] *See Number Portability Order.*

VI. METHODS OF OBTAINING INTERCONNECTION AND ACCESS TO UNBUNDLED ELEMENTS

542. In this section, we address the means of achieving interconnection and access to unbundled network elements that incumbent LECs are required to make available to requesting carriers.

A. Overview

1. Background

543. Section 251(c)(2) requires incumbent LECs to provide interconnection with the LEC's network "for the facilities and equipment of any requesting telecommunications carrier."[1321] Section 251(c)(6) imposes upon incumbent LECs "the duty to provide . . . for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the [LEC], except that the carrier may provide for virtual collocation if the [LEC] demonstrates to the State commission that physical collocation is not practical for technical reasons or because of space limitations."[1322] In the NPRM, we noted that section 251(c)(6) does not expressly limit the Commission's authority under section 251(c)(2) to establish rules requiring incumbent LECs to make available a variety of methods of interconnection, except in situations where the incumbent can demonstrate to the state commission that physical collocation is not practical for technical reasons or space limitations. We tentatively concluded that the Commission has the authority to require any reasonable method of interconnection, including physical collocation, virtual collocation, and meet point interconnection arrangements.[1323]

[1321] 47 U.S.C. § 251(c)(2).

[1322] 47 U.S.C. § 251(c)(6).

[1323] NPRM at para. 64. Under the Commission's *Expanded Interconnection* rules, LECs are not required to offer a collocating carrier a choice between physical and virtual collocation. *Special Access Order*, 7 FCC Rcd at 7407; *Switched Transport Order*, 8 FCC Rcd at 7404; *see also Physical Collocation Designation Order*, 8 FCC Rcd 4589 (under our *Expanded Interconnection* rules, LECs must provide virtual collocation where: virtual collocation is available on an intrastate basis; a LEC has negotiated an interstate virtual collocation arrangement; LECs are exempted from providing physical collocation because of space constraints; or a state commission has granted a waiver). Also, *see* Section VI.B.1.b. regarding the definitions of physical and virtual collocation.

2. Comments

544. Many parties agree with our tentative conclusion that we have the authority to require any reasonable method of interconnection.[1324] The Illinois Commission states that the purpose of 251(c)(6) is to eliminate any question about the Commission's authority to require physical collocation, and not to limit the type of interconnection incumbent LECs are required to provide under 251(c)(2).[1325]

545. CAPs and IXCs argue that incumbent LECs should be required to offer competitive entrants the choice between physical and virtual collocation, regardless of whether it is practical to offer physical collocation at a particular LEC premises.[1326] Consumer Federation of America and the Consumers Union argue that the Commission can and should order physical and virtual collocation.[1327] MCI contends that interconnectors have the right to choose virtual or physical collocation, or both, and should have the right to switch from one arrangement to another while paying only the actual costs of such a change.[1328] Sprint argues that the authority to require physical collocation necessarily includes the authority to require less invasive forms of collocation, such as virtual.[1329] Hyperion contends that small carriers lack the financial resources to make the economic investment necessary for physical collocation at every end office. Hyperion suggests that permitting new entrants to request virtual or physical collocation, depending upon their requirements would encourage

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[1324] *See, e.g.*, MFS comments at 17-18 (if Congress meant that 251(c)(6) collocation was the exclusive means of obtaining interconnection or access to unbundled elements, then subsections (c)(2) and (c)(3) would not have been required); Teleport comments at 26; Citizens Utilities comments at 11; Illinois Commission comments at 33; Pennsylvania Commission comments at 22; Sprint reply at 21.

[1325] Illinois Commission comments at 33; MFS comments at 18 (no inference can be drawn that Congress intended any limitation on the Commission's authority to require forms of interconnection other than physical collocation, especially in light of section 251(i)).

[1326] *See, e.g.*, AT&T comments at 41; Hyperion comments at 14; MFS comments at 23.

[1327] CFA/CU comments at 14.

[1328] MCI comments at 56.

[1329] Sprint Comments at 19.

competition.[1330] ACTA asserts that the cost of converting existing virtual collocation arrangements to physical should be borne by the incumbent LEC.[1331]

546. Several parties urge the Commission to require interconnection at "meet points."[1332] Teleport states that incumbent LECs currently provide meet point interconnection arrangements between one another's facilities and are thus obligated to provide such arrangements to others.[1333] Teleport also claims that requiring meet point arrangements would be pro-competitive because it would allow competitors the flexibility to construct more efficient networks by eliminating the need to match the incumbent LEC's network.[1334]

547. Incumbent LECs respond that the statute does not give the Commission authority to require virtual collocation in addition to physical collocation.[1335] Ameritech argues that Congress specifically addressed collocation in section 251(c)(6), and that it would be inappropriate to mandate virtual collocation pursuant to the general duty under section 251(c)(2) to provide interconnection. It contends that, under principles of statutory construction, the specific language of section 251(c)(6), which provides for virtual collocation only where physical collocation is not practical, should govern the general language of section 251(c)(2).[1336]

548. GTE claims that section 251(c)(2) does not provide for any Commission role in specifying acceptable forms of interconnection.[1337] Bell Atlantic and BellSouth claim that meet point interconnection arrangements are very complex and should not be mandated by the

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[1330] Hyperion comments at 15.

[1331] ACTA comments at 16.

[1332] A meet point is a point, designated by two carriers, at which one carrier's responsibility for service begins and the other carrier's responsibility ends.

[1333] Teleport reply at 25; Sprint reply 21-22 (argues for a "mid-span" meet arrangement whereby two carriers' fiber optic cables would be spliced together at a point between two repeaters).

[1334] Teleport reply at 25.

[1335] *See, e.g.*, Bell Atlantic comments at 34; PacTel comments at 36.

[1336] Ameritech comments at 24.

[1337] GTE comments at 22.

Commission or the states, but rather left to the negotiation process.[1338] PacTel argues that incumbent LECs should not be required to develop new network capabilities or expand current network facilities to interconnect with competitors.[1339]

3. Discussion

549. We conclude that, under sections 251(c)(2) and 251(c)(3), any requesting carrier may choose any method of technically feasible interconnection or access to unbundled elements at a particular point. Section 251(c)(2) imposes an interconnection duty at any technically feasible point; it does not limit that duty to a specific method of interconnection or access to unbundled elements.

550. Physical and virtual collocation are the only methods of interconnection or access specifically addressed in section 251. Under section 251(c)(6), incumbent LECs are under a duty to provide physical collocation of equipment necessary for interconnection unless the LEC can demonstrate that physical collocation is not practical for technical reasons or because of space limitations. In that event, the incumbent LEC is still obligated to provide virtual collocation of interconnection equipment. Under section 251, the only limitation on an incumbent LEC's duty to provide interconnection or access to unbundled elements at any technically feasible point is addressed in section 251(c)(6) regarding physical collocation. Unless a LEC can establish that the specific technical or space limitations in subsection (c)(6) are met with respect to physical collocation, we conclude that incumbent LECs must provide for any technically feasible method of interconnection or access requested by a competing carrier, including physical collocation.[1340] If, for example, we interpreted section 251(c)(6) to limit the means of interconnection available to requesting carriers to physical and virtual collocation, the requirement in section 251(c)(2) that interconnection be made available "at any technically feasible point" would be narrowed dramatically to mean that interconnection was required only at points where it was technically feasible to collocate equipment. We are not pursuaded that Congress intended to limit interconnection points to locations only where collocation is possible.

551. Section 251(c)(6) provides the Commission with explicit authority to mandate physical collocation as a method of providing interconnection or access to unbundled elements. Such authority was previously found lacking by the U.S. Court of Appeals for the

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[1338] Bell Atlantic comments at 22; BellSouth comments at 23.

[1339] PacTel comments at 19.

[1340] Because we require incumbent LECs to offer virtual collocation in addition to physical collocation, we reject the suggestion of ACTA that the cost of converting from virtual to physical collocation be borne by the incumbent LEC. *See* ACTA comments at 16.

D.C. Circuit in *Bell Atlantic v. FCC*,[1341] which was decided prior to enactment of the 1996 Act. While section 251(c)(6) limits an incumbent LEC's duty to provide physical collocation in certain circumstances, we find that it does not limit our authority to require, under sections 251(c)(2) and (c)(3), the provision of virtual collocation. We note that under our *Expanded Interconnection* rules, that were amended subsequent to the Bell Atlantic decision, competitive entrants using physical collocation were required by many incumbent LECs to convert to virtual collocation. If the Commission concluded that subsection (c)(6) places a limitation on our authority to require virtual collocation, competitive providers would be required to undertake costly and burdensome actions to convert back to physical collocation even if they were satisfied with existing virtual collocation arrangements. We conclude that Congress did not intend to impose such a burden on requesting carriers that wish to continue to use virtual collocation for purposes of section 251(c). Further, the record indicates that this requirement would be costly and would delay competition.[1342] In short, we conclude that, in enacting section 251(c)(6), Congress intended to expand the interconnection choices available to requesting carriers, not to restrict them.

552. We also conclude that requiring incumbent LECs to provide virtual collocation and other technically feasible methods of interconnection or access to unbundled elements is consistent with Congress's desire to facilitate entry into the local telephone market by competitive carriers. In certain circumstances, competitive carriers may find, for example, that virtual collocation is less costly or more efficient than physical collocation. We believe that this may be particularly true for small carriers which lack the the financial resources to physically collocate equipment in a large number of incumbent LEC premises.[1343] Moreover, since requesting carriers will bear the costs of other methods of interconnection or access, this approach will not impose an undue burden on the incumbent LECs.

553. Consistent with this view, other methods of technically feasible interconnection or access to incumbent LEC networks, such as meet point arrangements, in addition to virtual

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[1341] *Bell Atlantic Telephone Companies v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994) (Bell Atlantic v. FCC).

[1342] *See* Teleport comments at 32; ALTS comments at 23; Time Warner comments at 42-44 (objecting to non-recurring charges for the reconnection of existing interconnected virtual collocation services to a replacement physical collocation arrangement).

[1343] *See* Hyperion comments at 15.

and physical collocation, must be available to new entrants upon request.[1344] Meet point arrangements (or mid-span meets), for example, are commonly used between neighboring LECs for the mutual exchange of traffic, and thus, in general, we believe such arrangements are technically feasible.[1345] Further, although the creation of meet point arrangements may require some build out of facilities by the incumbent LEC, we believe that such arrangements are within the scope of the obligations imposed by sections 251(c)(2) and 251(c)(3). In a meet point arrangement, the "point" of interconnection for purposes of sections 251(c)(2) and 251(c)(3) remains on "the local exchange carrier's network"[1346] (*e.g.*, main distribution frame, trunk-side of the switch), and the limited build-out of facilities from that point may then constitute an accommodation of interconnection.[1347] In a meet point arrangement each party pays its portion of the costs to build out the facilities to the meet point. We believe that, although the Commission has authority to require incumbent LECs to provide meet point arrangements upon request, such an arrangement only makes sense for interconnection pursuant to section 251(c)(2) but not for unbundled access under section 251(c)(3). New entrants will request interconnection pursuant to section 251(c)(2) for the purpose of exchanging traffic with incumbent LECs. In this situation, the incumbent and the new entrant are co-carriers and each gains value from the interconnection arrangement. Under these circumstances, it is reasonable to require each party to bear a reasonable portion of the economic costs of the arrangement. In an access arrangement pursuant to section 251(c)(3), however, the interconnection point will be a part of the new entrant's network and will be used to carry traffic from one element in the new entrant's network to another. We conclude that in a section 251(c)(3) access situation, the new entrant should pay all of the economic costs of a meet point arrangement. Regarding the distance from an incumbent LEC's premises that an incumbent should be required to build out facilities for meet point arrangements, we believe that the parties and state commissions are in a better position than the Commission to determine the appropriate distance that would constitute the required reasonable accommodation of interconnection.

[1344] *See* Teleport comments at 26-30; *see also* Washington Utilities and Transportation Commission, *Fourth Supplemental Order Rejecting Tariff Filings and Ordering Refiling*, Granting Complaints, in Part, (Washington Commission Oct. 31, 1995), Docket No. UT-941464, at 45; *Application of Electric Lightwave, Inc., MFS Intelnet of Oregon, Inc., and MCI Metro Access Transmission Services, Inc.*, Public Utility Commission of Oregon Order, Order No. 96-021, (Oregon Commission Jan. 12, 1996), at 68-69; *Rules for Telecommunications Interconnection and Unbundling*, Arizona Corporation Commission Order, Decision No. 59483, (Arizona Commission Jan. 11, 1996), Proposed Rule R14-2-1303 (Attachment E hereto).

[1345] The Michigan Commission recently required Ameritech to provide meet point interconnection. Michigan Public Service Commission, Case No. U-10860 (Michigan June 5, 1996) at 18 n.4.

[1346] 47 U.S.C. § 251(c)(2).

[1347] *See, supra* Section IV.E., above, discussing accommodation of interconnection.

554. Finally, in accordance with our interpretation of the term "technically feasible," we conclude that, if a particular method of interconnection is currently employed between two networks, or has been used successfully in the past, a rebuttable presumption is created that such a method is technically feasible for substantially similar network architectures. Moreover, because the obligation of incumbent LECs to provide interconnection or access to unbundled elements by any technically feasible means arises from sections 251(c)(2) and 251(c)(3), we conclude that incumbent LECs bear the burden of demonstrating the technical infeasibility of a particular method of interconnection or access at any individual point.

B. Collocation

1. Collocation Standards

a. Adoption of National Standards

(1). Background

555. In the NPRM we tentatively concluded that we should adopt national rules for virtual and physical collocation. This tentative conclusion was based on the belief that national standards would help to speed the development of competition.[1348] We also sought comment on specific national standards that we might adopt, and on whether any specific state approaches would serve as an appropriate model.[1349]

(2). Comments

556. Incumbent LECs and state commissions argue that collocation is a state matter and that terms and conditions for collocation should be negotiated between the parties[1350] or determined by the states.[1351] Some parties recommend that, to the extent national guidelines are necessary, the Commission should readopt the standards established in the *Expanded*

[1348] NPRM at para. 24.

[1349] NPRM at para. 70.

[1350] BellSouth comments at 23; SBC comments at 64; USTA comments at 19; PacTel comments at 34.

[1351] *See, e.g.*, New York Commission comments at 13-14; *see also* Ohio Commission comments at 29; Florida Commission comments at 22; Oregon Commission comments at 23.

Interconnection proceeding.[1352] Teleport and the New York Commission suggest that, if we adopt rules, we should use the New York Commission's "comparably efficient interconnection" standard as a model.[1353] The Alabama and Missouri Commissions support the approach to interconnection that each adopted in their respective states.[1354] Pacific Telesis supports California's "preferred outcomes approach."[1355]

557. Competitive providers generally favor national standards for collocation.[1356] MFS argues that Congress did not intend for the states to have a policy role in collocation matters, and that unambiguous national guidelines are needed to prevent incumbent LECs from engaging in discriminatory practices and to avoid duplicative litigation in multiple forums.[1357]

(3). Discussion

558. We conclude that we should adopt explicit national rules to implement the collocation requirements of the 1996 Act. We find that specific rules defining minimum requirements for nondiscriminatory collocation arrangements will remove barriers to entry by potential competitors and speed the development of competition. Our experience in the *Expanded Interconnection* proceeding indicates that incumbent LECs have an economic

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[1352] USTA comments at 19; Bell Atlantic comments at 32-33; Sprint reply at 22; California Commission comments at 24, Texas Commission comments at 13-14; District of Columbia Commission comments at 20.

[1353] Teleport comments at 30 (this standard is consistent with, if not demanded by, the requirements for nondiscriminatory interconnection in section 251(c)(2)(C)); New York Commission comments at 34 (the Commission should not set specific rules, but should adopt guidelines that incumbent LECs offer comparably efficient interconnection).

[1354] Alabama Commission comments at 17 (under Alabama's interconnection model, parties negotiate collocation arrangements and may petition the Alabama commission to require collocation under specific terms and conditions should negotiations fail); Missouri Commission comments at 12 (The Missouri Commission requires the incumbent LEC to provide the type of interconnection that the interconnecting carrier requests, either physical or virtual. The Commission also requires that large incumbent LECs tariff their interconnection arrangements, and that collocators pay a deposit).

[1355] PacTel comments at 36.

[1356] Intermedia comments at 6; Teleport comments at 30; ALTS comments at 21; Hyperion comments at 14; ACSI comments at 14; NCTA comments at 34; Telecommunications Resellers Ass'n comments at 46; Time Warner comments at 32; MFS comments at 20-21; AT&T comments at 39.

[1357] MFS comments at 20-21.

incentive to interpret regulatory ambiguities to delay entry by new competitors.[1358] We and the states should therefore adopt, to the extent possible, specific and detailed collocation rules. We find, however, that states should have flexibility to apply additional collocation requirements that are otherwise consistent with the 1996 Act and our implementing regulations.

b. Adoption of *Expanded Interconnection* Terms and Conditions for Physical and Virtual Collocation under Section 251

(1). Background

559. In our *Expanded Interconnection* proceeding, we required LECs to offer expanded interconnection to all interested parties, which allowed competitors and end users to terminate their own special access and switched transport access transmission facilities at LEC central offices.[1359] We required Tier 1 LECs[1360] to offer physical collocation, with the interconnecting party paying the LEC for central office floor space.[1361] We required that LECs provide space to interested parties on a first-come first-served basis, and that they

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[1358] Our review of the LECs' initial physical and virtual collocation tariffs raised significant concerns regarding the implementation of our *Expanded Interconnection* requirements and resulted in the designation of numerous issues for investigation. The Commission has not yet reached decisions on most of these issues, though it has found that certain rates for virtual collocation were unlawful. *See Local Exchange Carriers' Rates, Terms, and Conditions for Expanded Interconnection Through Virtual Collocation for Special Access and Switched Transport*, 10 FCC Rcd 6375 (Com. Car. Bur. 1995)(*Phase I Report and Order*); *see also Local Exchange Carriers' Rates, Terms, and Conditions for Expanded Interconnection for Special Access*, 8 FCC Rcd 6909 (Com. Car. Bur. 1993) (*Physical Collocation Designation Order*); *Local Exchange Carriers' Rates, Terms, and Conditions for Expanded Interconnection Through* Virtual Collocation for Special Access and Switched Transport, 10 FCC Rcd 11116 (Com. Car. Bur. 1995)(*Virtual Collocation Designation Order*).

[1359] *Expanded Interconnection with Local Telephone Company Facilities, First Report and Order*, 7 FCC Rcd 7369 (1992)(*Special Access Order*), *vacated in part and remanded, Bell Atlantic*, 24 F.3d 1441 (1994); *First Reconsideration*, 8 FCC Rcd 127 (1993); *vacated in part and remanded, Bell Atlantic*, 24 F.3d 1441; *Second Reconsideration*, 8 FCC Rcd 7341 (1993); *Second Report and Order*, 8 FCC Rcd 7374 (1993)(*Switched Transport Order*), *vacated in part and remanded, Bell Atlantic Telephone Cos., v. FCC*, 24 F.3d 1441; *Remand Order*, 9 FCC Rcd 5154 (1994)(*Virtual Collocation Order*), *remanded for consideration of 1996 Act, Pacific Bell, et al. v. FCC*, 81 F.3d 1147 (1996) (collectively referred to as *Expanded Interconnection*). Interstate access is a service traditionally provided by local telephone companies and enables IXCs and other customers to originate and terminate interstate telephone traffic. Special access is a form of interstate access that uses dedicated transmission lines between two points, without switching the traffic on those lines. Switched transport is another form of interstate access comprising the transmission of traffic between interexchange carriers' (or other customers') points of presence and local telephone companies' end offices, where the traffic is switched and routed to end users.

[1360] Tier 1 LECs are local exchange carriers having $100 million or more in "total company annual regulated revenues." *Commission Requirements for Cost Support Material to be Filed with 1990 Annual Access Tariffs*, 5 FCC Rcd 1364, 1364 (Com. Car. Bur. 1990)(*1990 Cost Support Order*).

[1361] The interconnecting party uses the space to locate equipment necessary to terminate its transmission links for interconnection with the LEC's network. The interconnector has physical access to this space in the LEC central office to install, maintain, and repair its transmission equipment. *Special Access Order*, 7 FCC Rcd at 7391.

provide virtual collocation when space for physical collocation is exhausted.[1362] Under virtual collocation, interconnectors are allowed to designate central office transmission equipment dedicated to their use, as well as to monitor and control their circuits terminating in the LEC central office. Interconnectors, however, do not pay for the incumbent's floor space under virtual collocation arrangements and have no right to enter the LEC central office. Under our virtual collocation requirements, LECs must install, maintain, and repair interconnector-designated equipment under the same intervals and with the same or better failure rates for the performance of similar functions for comparable LEC equipment.[1363]

560. In the *Expanded Interconnection* proceeding, we required the LECs to file tariffs to implement our virtual and physical collocation requirements. Our initial review of the LECs' tariffs raised significant concerns regarding the LECs' provision of physical and virtual collocation.[1364] Consequently, the Bureau partially suspended the rates proposed by many of the LECs and allowed these rates to take effect subject to investigation and an accounting order.

561. In 1994, the U.S. Court of Appeals for the District of Columbia Circuit found that the FCC lacked the authority under section 201 of the 1934 Communications Act to require physical collocation and remanded all other issues to the Commission.[1365] On remand, we adopted rules for both special access and switched transport that required LECs to provide either virtual or physical collocation, at the LECs' option.[1366] Those rules currently are in place, although the court of appeals remanded the *Remand Order* to us to consider the impact of the 1996 Act on those rules.[1367] In the 1996 Act, Congress specifically directed incumbent LECs to provide physical collocation for interconnection and access to unbundled network

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[1362] 7 FCC Rcd at 7391.

[1363] *Special Access Order*, 7 FCC Rcd at 7394; *Switched Transport Order*, 8 FCC Rcd at 7393.

[1364] *See Special Access Physical Collocation Designation Order*, 8 FCC Rcd 6909; *Virtual Collocation Designation Order*, 10 FCC Rcd 11116; *see also supra*, note 1358.

[1365] *Bell Atlantic v. FCC*, 24 F.3d 1441.

[1366] *Remand Order*, 9 FCC Rcd 5154.

[1367] *Pacific Bell et al. v. FCC*, 81 F.3d 1147 (D.C. Cir. 1996). As discussed in Section VI.B.2.a, below, we find that the 1996 Act does not supplant or otherwise alter our *Expanded Interconnection* rules for interstate interconnection services provided pursuant to section 201 of the Communications Act.

elements, absent technical or space constraints, pursuant to section 251(c)(6) of the Communications Act.[1368]

562. We sought comment in the NPRM on whether, for purposes of implementing physical and virtual collocation under section 251, we should readopt the standards set out in our *Expanded Interconnection* proceeding and, if so, how to adapt those standards to reflect the new statutory requirements and other policy considerations of the 1996 Act.[1369]

(2). Comments

563. To the extent parties addressed the substantive content of national rules, most favor readoption of the *Expanded Interconnection* rules. Assuming that national standards are to be adopted, several state commissions and a number of incumbent LECs generally favor readoption of our *Expanded Interconnection* requirements because they were developed based on an extensive record.[1370] BellSouth, in contrast, argues that the Commission's *Expanded Interconnection* rules are no longer necessary under the 1996 Act, because parties should be free to negotiate agreements between themselves without being governed by FCC rules.[1371] SBC and Pacific Telesis argue that physical collocation should be negotiated in order to allow parties to address unique requirements.[1372] Cincinnati Bell argues that the FCC should not establish regulations regarding services that are ancillary to collocation such as rent, insurance, and equipment maintenance, because they are not activities within the purview of Title II of the Communications Act.[1373]

[1368] 47 U.S.C. § 251(c)(6).

[1369] NPRM at para. 71.

[1370] Bell Atlantic comments at 33; Cincinnati Bell comments at 15; PacTel comments at 35; NYNEX comments at 66; Roseville Tel. comments at 2-3; SNET comments at 15; GTE comments at 24 (*Expanded Interconnection* rules should be readopted if used to identify acceptable outcomes and not to dictate behavior); *see also* Alabama Commission comments at 17; Texas Commission comments at 14; Illinois Commission comments at 35.

[1371] BellSouth comments at 24 (the Act sets up a new framework under which the parties must be free to negotiate arrangements "unencumbered by excessive rules and regulations").

[1372] PacTel reply at 12; SBC comments at 64 (collocation should be negotiated and should not be subject to uniform requirements because of the differing conditions at each location).

[1373] Cincinnati Bell comments at 15.

564. CAPs and IXCs also generally favor readoption of our *Expanded Interconnection* requirements.[1374] Several commenters advocate specific amendments that they believe are required by the 1996 Act or by intervening circumstances.[1375] MFS, however, argues that the purposes of the 1996 Act are much broader than those of the *Expanded Interconnection* proceedings and that the collocation standards under section 251 should reflect this difference.[1376] MCI contends that existing collocation rules, terms, and conditions should be significantly modified.[1377] Teleport asserts that the Commission should require all incumbent LECs to refile with the FCC their most recent physical collocation tariffs, subject to the previously applicable accounting orders.[1378]

(3). Discussion

565. We conclude that we should adopt the existing *Expanded Interconnection* requirements, with some modifications, as the rules applicable for collocation under section 251.[1379] Those rules were established on the basis of an extensive record in the *Expanded Interconnection* proceeding, and are largely consistent with the requirements of section 251(c)(6). Adoption of those requirements for purposes of collocation under section 251, moreover, has substantial support in the record of this proceeding. Thus, the standards established for physical and virtual collocation in our *Expanded Interconnection* proceeding will generally apply to collocation under section 251. The most significant requirements of *Expanded Interconnection* are specifically set out in rules we adopt here. We address pricing and rate structure issues separately, in section VII below.

566. We find, however, that certain modifications to our *Expanded Interconnection* requirements are necessary to account for specific provisions of section 251(c)(6) and service

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[1374] *See, e.g.*, Sprint comments at 21; Time Warner comments at 38; Intermedia comments at 6.

[1375] ALTS comments at 24; Telecommunications Resellers Ass'n comments at 47; Intermedia comments at 9 (incumbent LECs must tariff cross-connect elements for services not currently offered, such as packet switching, frame relay, ATM, and SONET services); ACSI comments at 16 (revised *Expanded Interconnection* rules should reflect resolution of issues raised in designation orders).

[1376] MFS comments at 22; *see also* MCI comments at 54.

[1377] MCI comments at 58.

[1378] Teleport comments at 31; Intermedia comments at 7 (arguing that LECs must establish terms and conditions for physical collocation within 30 days).

[1379] *See Remand Order*, 9 FCC Rcd at 5168-69, 5174-83.

arrangements that differ from those contemplated in our *Expanded Interconnection* orders.[1380] For example, the *Expanded Interconnection* requirements apply to Tier 1 LECs that are not NECA pool members, and section 251 applies to "incumbent LECs," though there is an exemption for certain rural carriers.[1381] *Expanded Interconnection* also allows end-users to interconnect their equipment, while section 251 requires that interconnection and access to unbundled network elements be provided to "any requesting telecommunications carrier."[1382] Accordingly, we set forth below several modifications to the terms and conditions for collocation as they are described in our *Expanded Interconnection* orders for application in implementing section 251. We believe that, in light of the expedited statutory time frame for this rulemaking and limited record addressing the specific terms and conditions for collocation under section 251 in this proceeding, it would be impractical and imprudent to develop a large number of new substantive collocation requirements in this order. We may consider the need for additional or different requirements in a subsequent proceeding, if we determine that such action is warranted.

567. The most significant difference between the *Expanded Interconnection* rules and the collocation rules we adopt to implement the 1996 Act concerns the collocation tariffing requirement. As discussed below, the 1996 Act does not require that collocation be federally tariffed.[1383] We thus do not adopt, under section 251, the *Expanded Interconnection* tariffing requirements originally adopted under section 201 for physical and virtual collocation. The existing tariffing requirements of *Expanded Interconnection* for interstate special access and switched transport will continue to apply for use by customers that wish to subscribe to those interstate services.[1384]

568. We reject SBC's contention that we may not adopt any terms and conditions in this proceeding that differ from those in the *Expanded Interconnection* proceeding. SBC argues that Congress intended, in section 251(c)(6), to use the term "physical collocation" as a term of art, and thereby to adopt wholesale the terms and conditions for physical collocation that the Commission adopted in the *Expanded Interconnection* proceeding. A variety of terms and conditions for physical collocation are possible and section 251(c)(6) makes no reference to the Commission's decisions on these issues in the *Expanded Interconnection* proceeding. If

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[1380] *See supra*, note 1358, 1359.

[1381] *See infra*, Section XII.

[1382] *See* 47 U.S.C. § 251(c)(2), (3).

[1383] *See infra*, Section VI.B.2.a.

[1384] *See infra*, Section VI.B.2.a.

Congress had intended to readopt those rules wholesale without permitting the Commission any flexibility in the matter, we believe that Congress would have been more explicit rather than merely using the phrase "physical collocation." Thus, we believe that we can and should modify our preexisting standards, as set forth below, for purposes of implementing the provisions of section 251(c)(6). In the following sections (c. - i.) we address comments filed by interested parties concerning application of our existing *Expanded Interconnection* requirements for purposes of collocation under section 251.[1385]

569. Finally, our experience reviewing the tariffs that incumbent LECs filed to implement our requirements for physical and virtual collocation suggests that rates, terms, and conditions under which incumbent LECs propose to provide these arrangements pursuant to section 251(c)(6) bear close scrutiny.[1386] We strongly urge state commissions to be vigilant in their review of such arrangements.[1387] We will review this issue and revise our requirements as necessary.

c. The Meaning of the Term "Premises"

(1). Background

570. In the *Expanded Interconnection* proceeding, we required collocation at end offices, serving wire centers, and tandem switches, as well as at remote distribution nodes and any other points that the LEC treats as a "rating point."[1388] Section 251(c)(6) requires physical collocation "at the premises of the local exchange carrier."[1389] In the NPRM, we tentatively concluded that the term "premises" includes, in addition to LEC central offices and tandem offices, all buildings or similar structures owned or leased by the incumbent LEC that house LEC network facilities. We sought comment on whether structures that house LEC

[1385] In a number of instances, we decline to adopt proposals for modifications to our *Expanded Interconnection* requirements.

[1386] *See Special Access Physical Collocation Designation Order*, 8 FCC Rcd 6909; *Virtual Collocation Designation Order*, 10 FCC Rcd 11116.

[1387] Some areas our investigations have found problematic in the past include channel assignment, letters of agency, charges for repeaters, and placement of point-of-termination bays.

[1388] *See Remand Order*, 9 FCC Rcd at 5168; *Special Access Order*, 7 FCC Rcd at 7418; *Switched Transport Order*, 8 FCC Rcd at 7409. A rating point is a point used in calculating the length of interoffice special access links.

[1389] 47 U.S.C. § 251(c)(6).

network facilities on public rights-of-way, such as vaults containing loop concentrators or similar structures, should be deemed to be LEC "premises."[1390]

(2). Comments

571. Incumbent LECs generally argue that collocation is infeasible at locations other than central offices, tandem switching locations, and remote nodes, and that only such locations should be included in the interpretation of the word "premises."[1391] Pacific Telesis argues that points for collocation cannot be determined until the Commission determines the points of interconnection and access to unbundled network elements.[1392] Ameritech contends that we should define the term "premises" as only those portions of central office buildings in which the LEC has the exclusive right of occupancy and in which the technically feasible point of interconnection or access to unbundled elements is located.[1393] The Rural Tel. Coalition asks that interconnection and collocation points be established in a flexible manner to recognize size and volume differences among carriers.[1394]

572. CAPs and IXCs generally favor an expansive definition of the term "premises" that includes "structures housing LEC network facilities on public rights-of-way including vaults containing loop concentrators or similar structures."[1395] These commenters argue that physical collocation should be offered at any incumbent LEC location where physical collocation is technically feasible, including central offices, cable vaults, manholes, cross-connect points, loop carrier, and building closets.[1396] ALTS and MFS contend that assertions of technical infeasibility should be addressed in fact-specific situations and should not narrow

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[1390] NPRM at para. 72.

[1391] *See, e.g.*, USTA comments at 20; NYNEX comments at 66; Cincinnati Bell comments at 15; Ameritech comments at 22 (the term "premises" should only include central offices housing network facilities in which the incumbent LEC has the exclusive right of occupancy).

[1392] Bell Atlantic comments at 37.

[1393] Ameritech comments at 22.

[1394] Rural Tel. Coalition comments at 31.

[1395] *See, e.g.*, AT&T comments at 40; *see also* Telecommunications Resellers Ass'n comments at 46; Hyperion comments at 14.

[1396] *See, e.g.*, MFS comments at 23.

the general application of section 251(c)(6).[1397] The Illinois Commission supports our tentative conclusion and argues that collocation should not be restricted to central and tandem offices.[1398]

(3). Discussion

573. The 1996 Act does not address the definition of premises, nor is the term discussed in the legislative history. Therefore, we look to the purposes of the 1996 Act and general uses of the term "premises" in other contexts in order to define this term for purposes of section 251(c)(6). The term "premises" is defined in varying ways, according to the context in which it is used.[1399] In light of the 1996 Act's procompetitive purposes, we find that a broad definition of the term "premises" is appropriate in order to permit new entrants to collocate at a broad range of points under the incumbent LEC's control. A broad definition will allow collocation at points other than those specified for collocation under the existing *Expanded Interconnection* requirements. We find that this result is appropriate because the purposes of physical and virtual collocation under section 251 are broader than those established in the *Expanded Interconnection* proceeding. We therefore interpret the term "premises" broadly to include LEC central offices, serving wire centers and tandem offices, as well as all buildings or similar structures owned or leased by the incumbent LEC that house LEC network facilities. We also treat as incumbent LEC premises any structures that house LEC network facilities on public rights-of-way, such as vaults containing loop concentrators or similar structures.

574. As discussed below, we conclude that section 251(c)(6) requires collocation only where technically feasible. In light of this conclusion, we find that adoption of a definition of "premises" that depends on whether interconnection or access to unbundled network elements at a particular point is "technically feasible," as suggested by Ameritech and Pacific Telesis, would be superfluous. We also conclude that it is not appropriate to adopt a definition of "premises," as suggested by several parties, that is dependent on whether it is "practical" to collocate equipment at a particular point. We note however, that neither

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[1397] ALTS reply at 35; MFS reply at 29.

[1398] Illinois Commerce Commission at 33.

[1399] *See Gibbons v. Brandt*, 170 F.2d 385, 387 (7th Cir. 1948) ("the word 'premises' does not have one fixed and absolute meaning. It is to be determined always by its context . . .").

physical nor virtual collocation is required at points where not technically feasible.[1400] We therefore decline to adopt specific requirements regarding collocation at particular points in the LEC network, as suggested by GVNW and others. Because collocation is only required where technically feasible, the approach we here adopt will enable competitors to take advantage of opportunities to collocate equipment without imposing undue burdens on incumbent LECs, whether large or small.

575. We also address the impact on small incumbent LECs. For example, the Rural Tel. Coalition asks that interconnection and collocation points be established in a flexible manner. We have considered the economic impact of our rules in this section on small incumbent LECs. For example, we do not adopt rigid requirements for locations where collocation must be provided. Incumbent LECs are not required to physically collocate equipment in locations where not practical for technical reasons or because of space limitations, and virtual collocation is required only where technically feasible. We also note, however, that section 251(f) of the 1996 Act provides relief to certain small LECs from our regulations implementing section 251.[1401]

d. Collocation Equipment

(1). Background

576. In the *Expanded Interconnection* proceeding, we allowed collocation for central office equipment needed to terminate basic transmission facilities between LEC central offices and third-party premises. Acceptable equipment included optical terminating equipment and multiplexers. We did not require the LECs to permit collocation of enhanced services equipment or customer premises equipment because such equipment was not necessary to foster competition in the provision of basic transmission services. We also did not require LECs to allow the collocation of switches.[1402] Section 251(c)(6) requires incumbent LECs to allow collocation of "equipment necessary for interconnection or access to unbundled elements

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[1400] Incumbent LECs are required to permit the collocation of equipment for the purpose of interconnection under section 251(c)(2) or access to unbundled network elements under section 251(c)(3). Interconnection and access to unbundled network elements are only required under these sections at technically feasible points. 47 U.S.C. § 251(c)(2) and (3).

[1401] *See infra*, Section XII.

[1402] *See generally Remand Order*, 9 FCC Rcd at 5178-81 (paras. 82-94); *see also Special Access Order*, 7 FCC Rcd at 7412-16, *Switched Transport Order*, 8 FCC Rcd at 7411-16.

. . . ."[1403] We sought comment in the NPRM on what types of equipment competitors should be permitted to collocate on LEC premises.[1404]

(2). Comments

577. BOCs and other incumbent LECs generally favor limiting the type of equipment allowed to be collocated to transmission equipment necessary to interconnect to LEC networks.[1405] Sprint argues that incumbent LECs should be permitted to limit the amount of space they have to provide to that needed for equipment necessary for the particular type of interconnection that is taking place.[1406] IXCs and CAPs argue that any type of equipment may be collocated absent demonstrable harm to the LEC, and that any arbitrary limit on the types of equipment to be collocated could foreclose efficient methods of interconnection and/or access to unbundled elements.[1407] MFS contends that competing providers should not be required to demonstrate affirmatively that equipment is "necessary" before allowing it to be collocated. The Illinois Commission supports a policy that would not restrict the type of equipment to be collocated except where necessary to prevent harm to the network. The Colorado Commission supports limiting allowable equipment to that used to provide a telecommunications service.[1408] The Association of Telemessaging Services International urges the Commission to require collocation of equipment used to provide enhanced services.[1409]

578. WinStar argues that the 1996 Act establishes its right to place its microwave facilities on the roofs of incumbent LEC buildings in which its termination equipment is to be

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[1403] 47 U.S.C. § 251(c)(6).

[1404] NPRM at para.72.

[1405] *See, e.g.*, SBC comments at 63-64; Bell Atlantic comments at 34; GTE reply at 14; PacTel comments at 38, reply at 13.

[1406] Sprint reply at 23.

[1407] *See, e.g.*, MFS comments at 24; MCI comments at 54-55; Time Warner comments at 39; GCI comments at 10.

[1408] Illinois Commission comments at 34; Colorado Commission comments at 23.

[1409] Association of Telemessaging Services International reply at 16.

collocated in order to ensure that wireline facilities are not favored over wireless, and therefore urges the Commission to adopt a collocation standard that is technology neutral.[1410]

(3). Discussion

579. We believe that section 251(c)(6) generally requires that incumbent LECs permit the collocation of equipment used for interconnection or access to unbundled network elements. Although the term "necessary," read most strictly, could be interpreted to mean "indispensable," we conclude that for the purposes of section 251(c)(6) "necessary" does not mean "indispensable" but rather "used" or "useful." This interpretation is most likely to promote fair competition consistent with the purposes of the Act. (We note that this view is consistent with the findings of the Colorado Commission).[1411] Thus, we read section 251(c)(6) to refer to equipment used for the purpose of interconnection or access to unbundled network elements.[1412] Even if the collocator could use other equipment to perform a similar function, the specified equipment may still be "necessary" for interconnection or access to unbundled network elements under section 251(c)(6). We can easily imagine circumstances, for instance, in which alternative equipment would perform the same function, but with less efficiency or at greater cost. A strict reading of the term "necessary" in these circumstances could allow LECs to avoid collocating the equipment of the interconnectors' choosing, thus undermining the procompetitive purposes of the 1996 Act.

580. Consistent with this interpretation, we conclude that transmission equipment, such as optical terminating equipment and multiplexers, may be collocated on LEC premises. We also conclude that LECs should continue to permit collocation of any type of equipment currently being collocated to terminate basic transmission facilities under the *Expanded Interconnection* requirements. In addition, whenever a telecommunications carrier seeks to collocate equipment for purposes within the scope of section 251(c)(6), the incumbent LEC shall prove to the state commission that such equipment is not "necessary," as we have defined that term, for interconnection or access to unbundled network elements. State commissions may designate specific additional types of equipment that may be collocated pursuant to section 251(c)(6).

[1410] WinStar comments at 4, reply at 4.

[1411] Colorado Public Utilities Commission, *Proposed Rules Regarding Implementation of §§ 40-15-101* et. seq., *Requirements Relating to Interconnection and Unbundling*. Docket No. 95R-556T, (Colorado Commission, March 29, 1996) at 19-20.

[1412] *Cf. National Railroad Passenger Corporation v. Boston and Maine Corp.*, 503 U.S. 407, 417 (1992) (upholding the ICC's interpretation of the word "required" as "useful or appropriate," rather than "indispensable"); *McCulloch v. Maryland*, 4 Wheat. 316, 413 (1819) (Chief Justice Marshall read the word "necessary" to mean "convenient, or useful," rejecting a stricter reading of the term).

581. We do not find, however, that section 251(c)(6) requires collocation of equipment used to provide enhanced services, contrary to the arguments of the Association of Telemessaging Services International.[1413] We also decline to require incumbent LECs to allow collocation of any equipment without restriction.[1414] Section 251(c)(6) requires collocation only of equipment "necessary for interconnection or access to unbundled elements." Section 251(c)(2) requires incumbent LECs to provide "interconnection" for the "transmission and routing of telephone exchange service and exchange access," and section 251(c)(3) requires incumbent LECs to provide access to unbundled network elements "for the provision of a telecommunications service."[1415] Section 251(c)(6) therefore requires incumbent LECs to provide physical or virtual collocation only for equipment "necessary" or used for those purposes. We find that section 251(c)(6) does not require collocation of equipment necessary to provide enhanced services.[1416] At this time, we do not impose a general requirement that switching equipment be collocated since it does not appear that it is used for the actual interconnection or access to unbundled network elements.[1417] We recognize, however, that modern technology has tended to blur the line between switching equipment and multiplexing equipment, which we permit to be collocated. We expect, in situations where the functionality of a particular piece of equipment is in dispute, that state commissions will determine whether the equipment at issue is actually used for interconnection or access to unbundled elements. We also reserve the right to reexamine this issue at a later date if it appears that such action would further achievement of the 1996 Act's procompetitive goals. Finally, because we lack an adequate record on the issue, we decline to adopt AT&T's

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[1413] ATSI reply at 16.

[1414] *See, e.g.*, MFS comments at 24.

[1415] 47 U.S.C. § 251(c)(3).

[1416] We note that we declined to require collocation of enhanced services equipment in our *Computer III* and *ONA* proceedings. *See Third Computer Inquiry*, Report and Order, 104 FCC 2d 958, 1037-38 (1986); *Computer III Remand*, 6 FCC Rcd 7571 (1991). Enhanced services are defined as services that "employ computer processing applications which act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information." 47 C.F.R. § 64.702. This definition appears not to include the provision of "telecommunications services." *See* 47 U.S.C. § 153(43), (46).

[1417] If switching equipment is located at the collocated space, generally the only equipment used for interconnection or access to unbundled elements is the cross-connect equipment. The switching equipment generally performs other functions.

proposal that we require that incumbent LECs allow collocated equipment to be used for "hubbing."[1418]

582. In response to WinStar's suggestion that we require collocation of microwave transmission facilities, we note that collocation of microwave transmission equipment was required where reasonably feasible by the *Special Access Order*.[1419] We also require the collocation of microwave equipment under section 251, although we modify the *Expanded Interconnection* standard we adopt under section 251 for when such collocation is required slightly to conform to the standard for the provision of physical collocation in section 251(c)(6). We therefore require that incumbent LECs allow competitors to use physical collocation for microwave transmission facilities except where this is not practical for technical reasons or because of space limitations, in which case virtual collocation is required where technically feasible.[1420]

e. Allocation of Space

(1). Background

583. In the *Expanded Interconnection* proceeding, we required LECs to allocate space for physical collocation on a first-come, first-served basis. We also required LECs to take into account interconnector demand for collocation space when reconfiguring space or building new central offices, and we found that imposing reasonable restrictions on warehousing of space by collocating carriers was appropriate.[1421] The NPRM sought comment on whether national guidelines would deter anticompetitive behavior through the manipulation or unreasonable allocation of space by either incumbent LECs or new entrants.[1422]

(2). Comments

[1418] AT&T advocates requiring LECs to allow new entrants to "connect additional equipment of their own to their collocated equipment in the collocated space." Letter from Betsy Brady, Federal Government Affairs Director and Attorney, to Robert McDonald, Common Carrier Bureau, July 12, 1996, at 3, n.2 (AT&T July 12, 1996 *Ex Parte*). *See also* AT&T comments at 40 n. 51.

[1419] *Special Access Order*, 7 FCC Rcd at 7416; *see also Remand Order*, 9 FCC Rcd at 5178-79.

[1420] Under our technical feasibility standard, the costs of any construction necessary to accommodate the proposed interconnection arrangement are to be borne by the party seeking to interconnect. *See supra*, Section IV.E.

[1421] *Special Access Order*, 7 FCC Rcd at 7408.

[1422] NPRM at para.72.

584. CAPs and IXCs support adoption of rules governing incumbent LEC space allocation. AT&T asserts that incumbent LECs should be required to consider the needs of collocators when remodeling or building new facilities.[1423] MFS and Teleport contend that incumbent LECs should not be able to limit the amount of space that may be occupied by an interconnector's equipment unless the incumbent LEC demonstrates that space is nearing exhaustion.[1424] MCI asserts that we should prohibit an incumbent LEC from denying a collocator use of available space unless the incumbent demonstrates that it had plans for such space prior to the request for collocation.[1425] In locations where space is scarce, MCI argues that incumbent LECs should be required to file reports with the FCC on the status and planned increase and use of space.[1426] Bell Atlantic counters that such a policy could prevent it from serving its customers efficiently.[1427] Pacific Telesis suggests that the Commission reiterate its policy of allowing "reasonable restrictions on warehousing of unused space by interconnectors."[1428] The Pennsylvania Commission asserts that it is not necessary for the FCC to adopt national guidelines regarding space allocation.[1429] GVNW argues that collocation should be required in rural areas only where there is space available.[1430]

(3). Discussion

585. We believe that incumbent LECs have the incentive and capability to impede competitive entry by minimizing the amount of space that is available for collocation by competitors. Accordingly, we adopt our *Expanded Interconnection* space allocation rules for purposes of section 251, except as indicated herein. LECs will thus be required to make space available to requesting carriers on a first-come, first-served basis. We also conclude

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[1423] AT&T comments at 41-42 (where space is unavailable incumbent LECs should be required to provide trunking at no extra cost and enable the interconnector to connect to designated equipment elsewhere, with a timetable for moving the interconnector to the incumbent LEC's premises when space becomes available).

[1424] MFS comments at 34; Teleport comments at 33.

[1425] MCI comments at 56.

[1426] MCI comments at 56.

[1427] Bell Atlantic reply at 16.

[1428] PacTel comments at 36.

[1429] Pennsylvania Commission comments at 22.

[1430] GVNW comments at 8.

that collocators seeking to expand their collocated space should be allowed to use contiguous space where available. We further conclude that LECs should not be required to lease or construct additional space to provide physical collocation to interconnectors when existing space has been exhausted. We find such a requirement unnecessary because section 251(c)(6) allows incumbent LECs to provide virtual collocation where physical collocation is not practical for technical reasons or because of space limitations. Consistent with the requirements and findings of the *Expanded Interconnection* proceeding, we conclude that incumbent LECs should be required to take collocator demand into account when renovating existing facilities and constructing or leasing new facilities, just as they consider demand for other services when undertaking such projects. We find that this requirement is necessary in order to ensure that sufficient collocation space will be available in the future. We decline, however, to adopt a general rule requiring LECs to file reports on the status and planned increase and use of space. State commissions will determine whether sufficient space is available for physical collocation, and we conclude that they have authority under the 1996 Act to require incumbent LECs to file such reports. We expect individual state commissions to determine whether the filing of such reports is warranted.

586. We also agree with Pacific Telesis that restrictions on warehousing of space by interconnectors are appropriate.[1431] Because collocation space on incumbent LEC premises may be limited, inefficient use of space by one competitive entrant could deprive another entrant of the opportunity to collocate facilities or expand existing space. In the *Expanded Interconnection* proceeding, we allowed "reasonable restrictions on warehousing of space,"[1432] and will adopt this provision for purposes of section 251. As discussed below, we also adopt measures to ensure that incumbent LECs themselves do not unreasonably "warehouse" space, although we do permit them to reserve a limited amount of space for specific future uses.[1433] Incumbent LECs, however, are not permitted to set maximum space limitations without demonstrating that space constraints make such restrictions necessary, as such maximum limits could constrain a collocator's ability to provide service efficiently.

587. We also address the impact on small incumbent LECs. For example, GVNW argues that we should require collocation in rural areas only where there is space available. We have considered the impact of our rules in this section on small incumbent LECs and do not require physical collocation at any point where there is insufficient space available. We decline, however, to adopt rules regarding space availability that apply differently to small, rural carriers because the rules we here adopt are sufficiently flexible. We also note,

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[1431] PacTel comments at 36.

[1432] *Special Access Order*, 7 FCC Rcd at 7408; *see also Remand Order*, 9 FCC Rcd at 187-88.

[1433] *See infra*, Section VI.B.1.i.

however, that section 251(f) of the 1996 Act provides relief to certain small LECs from our regulations implementing section 251.[1434]

f. Leasing Transport Facilities

(1). Background

588. Our *Expanded Interconnection* rules require LECs to provide collocation for the purpose of allowing collocators to terminate their own transmission facilities for special access or switched transport service.[1435] We did not require that collocation be made available for other purposes, for example, when the interconnecting party wished only to connect incumbent LEC transmission facilities to collocated equipment. We sought comment in the NPRM on whether we should modify the standards of the *Expanded Interconnection* proceeding in light of the new statutory requirements and disputes that have arisen in the investigations regarding the incumbent LECs' physical and virtual collocation tariffs.[1436]

(2). Comments

589. MCI and others argue that collocators should not be prohibited from leasing transport facilities from the incumbent LEC to connect equipment in the collocated space to any other point in the incumbent LEC's network.[1437] Pacific Telesis contends that LECs should not be required to permit collocation of equipment that will be connected to a LEC's transmission facilities because such a policy would result in exhaustion of central office space and is outside the purposes of the 1996 Act.[1438] Bell Atlantic argues that permitting such interconnection is not advisable, because it would allow resellers to obtain lower-priced interconnection and access to unbundled elements without providing any facilities of their own.[1439]

[1434] *See infra*, Section XII.

[1435] *See Remand Order*, 9 FCC Rcd at 5180-81, 5183; *Special Access Order*, 7 FCC Rcd at 7403; *Switched Transport Order*, 8 FCC Rcd at 7402.

[1436] NPRM at para. 73.

[1437] MCI comments at 55; ACTA comments at 16; Telecommunications Resellers Ass'n comments at 47.

[1438] PacTel comments at 39, reply at 14.

[1439] Bell Atlantic reply at 16.

(3). Discussion

590. Although in *Expanded Interconnection* the Commission required that interested parties interconnect collocated equipment with their own transmission facilities,[1440] we conclude that it would be inconsistent with the provisions of the 1996 Act to adopt that requirement under section 251. Rather, we conclude that a competitive entrant should not be required to bring transmission facilities to LEC premises in which it seeks to collocate facilities. Entrants should instead be permitted to collocate and connect equipment to unbundled network transmission elements obtained from the incumbent LEC. The purpose of the *Expanded Interconnection* requirement was to foster competition in the market for interstate switched and special access transmission facilities.[1441] The purposes of section 251 are broader. Section 251(c)(3) requires that competitive entrants be given access to unbundled elements and that they be permitted to combine such elements.[1442] Prohibiting competitors from connecting unbundled network elements to their collocated equipment would appear contrary to the provisions of section 251(c)(3).

591. Finally, we find that Bell Atlantic's opposition to this requirement is without merit. Bell Atlantic argues that collocators should be required to provide their own transmission facilities because otherwise new entrants could compete without providing any of their own facilities. Section 251(c)(3) specifically states that unbundled elements are to be provided in a manner that allows requesting carriers to combine elements in order to provide telecommunications service. As stated above, requiring collocators to supply their own transmission facilities would amount to a prohibition on connecting unbundled transmission facilities to other unbundled elements connected to equipment in the collocation space. Although such interconnection arrangements were not required by our *Expanded Interconnection* requirements, we conclude that they are required by section 251 when collocated equipment is used to achieve interconnection or access to unbundled network elements.

g. Co-Carrier Cross-Connect

(1). Background

592. In the most common collocation configuration under existing requirements, the designated physical collocation space of several competitive entrants is located close together

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[1440] *Special Access Order*, 7 FCC Rcd at 7403; *Switched Transport Order*, 8 FCC Rcd at 7402.

[1441] *See Special Access Order*, 7 FCC Rcd at 7372; *Switched Transport Order*, 8 FCC Rcd at 7377.

[1442] 47 U.S.C. 251(c)(3).

within the LEC premises. Since carriers connect to the collocation space via high-capacity lines, different competitive entrants seeking to interconnect with each other may find connecting between their respective collocation spaces on the LEC premises the most efficient means of interconnecting with each other. We sought comment in the NPRM on whether we should adopt any requirements in addition to those adopted in the *Expanded Interconnection* proceeding in order to fulfill the mandate of the 1996 Act.[1443]

(2). Comments

593. Several CAPs and IXCs argue that we should adopt as an additional requirement that interconnectors be allowed to connect directly to other collocators located at the collocation space.[1444] Incumbent LECs generally object to such a configuration on the basis that such access is not expressly required by the statute and that we therefore lack authority to impose such a requirement.[1445]

(3). Discussion

594. We believe that it serves the public interest and is consistent with the policy goals of section 251 to require that incumbents permit two or more collocators to interconnect their networks at the incumbent's premises. Parties opposed to this proposal have offered no legitimate objection to such interconnection. Allowing incumbent LECs to prohibit collocating carriers from interconnecting their collocated equipment would require them to interconnect collocated facilities by routing transmission facilities outside of the LECs' premises. We find that such a policy would needlessly burden collocating carriers. To the extent equipment is collocated for the purposes expressly permitted under section 251(c)(6), the statute does not bar us from requiring that incumbent LECs allow connection of such equipment to other collocating carriers located nearby. We find that requiring LECs to allow such interconnection of collocated equipment will foster competition by promoting efficient operation. It is also unlikely to have a significant effect on space availability. We find authority for such a requirement in section 251(c)(6), which requires that collocation be provided on "terms and conditions that are just, reasonable, and nondiscriminatory" and in section 4(i), which permits the Commission to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the

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[1443] NPRM at para. 73.

[1444] *See, e.g.*, MCI comments at 55; MFS comments at 24; GGI comments at 10; Telecommunications Resellers Ass'n comments at 47; Intermedia comments at 9.

[1445] *See, e.g.*, GTE reply at 15; Bell Atlantic reply at 15; PacTel reply at 14; Sprint reply at 23.

execution of its functions."[1446] We therefore will require that incumbent LECs allow collocating telecommunications carriers to connect collocated equipment to such equipment of other carriers within the same LEC premises so long as the collocated equipment is used for interconnection with the incumbent LEC or access to the LEC's unbundled network elements.

595. We clarify that we here require incumbent LECs to provide the connection between the equipment in the collocated spaces of two or more collocating telecommunications carriers unless they permit the collocating parties to provide this connection for themselves. We do not require incumbent LECs to allow placement of connecting transmission facilities owned by competitors within the incumbent LEC premises anywhere outside of the actual physical collocation space.

h. Security Arrangements

(1). Background

596. Under our *Expanded Interconnection* requirements, incumbent LECs typically require that physically collocated equipment be placed inside a collocation cage within the incumbent LEC facility. Such cages are intended to separate physically the competitors' facilities from those of the incumbent and to prevent access by unauthorized personnel to any parties' equipment. Such cages frequently add considerably to the cost of establishing physical collocation at a particular LEC premises and could constitute a barrier to entry in certain circumstances.

(2). Comments

597. Teleport argues that cage construction is one of the most expensive items associated with physical collocation and that we should modify our *Expanded Interconnection* requirements to allow new entrants to subcontract construction of their physical collocation security arrangements with contractors approved by the incumbent LEC.[1447] ALTS and MCI argue that security measures should only be provided at the request of the entrant and at the cost the entrant would have incurred if it performed the construction itself.[1448] GVNW

[1446] 47 U.S.C. § 154(i).

[1447] Teleport comments at 32.

[1448] ALTS comments at 23; MCI comments at 58; *contra* PacTel reply at 15.

argues that incumbent LECs need to ensure that a competitor's personnel do not cause breaches of security and therefore should be subject to minimum proficiency requirements.[1449]

(3). Discussion

598. Based on the comments in this proceeding and our previous experience with physical collocation in the *Expanded Interconnection* docket, we will continue to permit LECs to require reasonable security arrangements to separate an entrant's collocation space from the incumbent LEC's facilities. The physical security arrangements around the collocation space protect both the LEC's and competitor's equipment from interference by unauthorized parties. We reject the suggestion of ALTS and MCI that security measures be provided only at the request of the entrant since LECs have legitimate security concerns about having competitors' personnel on their premises as well. We conclude that the physical separation provided by the collocation cage adequately addresses these concerns. At the same time, we recognize that the construction costs of physical security arrangements could serve as a significant barrier to entry, particularly for smaller competitors. We also conclude that LECs have both an incentive and the capability to impose higher construction costs than the new entrant might need to incur. We therefore conclude that collocating parties should have the right to subcontract the construction of the physical collocation arrangements with contractors approved by the incumbent LEC. Incumbent LECs shall not unreasonably withhold such approval of contractors. Approval by incumbent LECs of such contractors should be based on the same criteria as such LECs use for approving contractors for their own purposes. We decline, however, to require that competitive entrants' personnel be subject to minimum training and proficiency requirements as suggested by GVNW. We find that such concerns are better resolved through negotiation and arbitration.

i. Allowing Virtual Collocation in Lieu of Physical

(1). Background

599. Section 251(c)(6) requires that incumbent LECs provide physical collocation unless the carrier "demonstrates to the state commission that physical collocation is not practical for technical reasons or because of space limitations . . . ."[1450] In the NPRM, we sought comment on whether the Commission should establish guidelines for states to apply

[1449] GVNW comments at 10; *accord* Rural Tel. Coalition comments at 31.

[1450] 47 U.S.C.§ 251(c)(6).

when determining whether physical collocation is not practical for "technical reasons or because of space limitations."[1451]

(2). Comments

600. Pacific Telesis argues that national standards to determine whether physical collocation is not practical at a specific LEC location are unnecessary. It further argues that "reduced reliability or other harm to the network" should be considered a technical reason that justifies refusal to allow physical collocation.[1452] IXCs and CAPs assert that the burden of showing that physical collocation is not practical should fall on the incumbent LEC.[1453] AT&T contends that an incumbent LEC should be required to show that there is no practical way of providing additional space before it is relieved of its obligation to provide physical collocation. If physical collocation is genuinely not practical, then AT&T argues that the incumbent should provide trunking at no cost to allow the entrant to interconnect.[1454] Time Warner asserts that, where physical collocation is not possible in a LEC central office, LECs should supply a substitute at cost.[1455] State commissions that comment on this issue generally oppose strict national rules and argue that, to the extent such rules are adopted, they should allow the states maximum flexibility.[1456]

601. Time Warner also asserts that the FCC should require LECs to offer a $1 sale and repurchase option for virtually collocated equipment.[1457] The Independent Cable and Telecommunications Association argues that incumbent LECs should be required to provide virtual collocation that is equal in all functional aspects to physical collocation in order to

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[1451] NPRM para. 72.

[1452] PacTel comments at 39.

[1453] *See, e.g.*, Hyperion comments at 14; ACSI comments at 16; AT&T comments at 41.

[1454] AT&T comments at 41-42.

[1455] Time Warner comments at 36, 40.

[1456] *See, e.g.*, Texas Commission comments at 14; Pennsylvania Commission comments at 22; Oregon Commission comments at 23.

[1457] Time Warner comments at 38.

avoid prejudicing small entities that may not have sufficient market share to justify a physical collocation arrangement.[1458]

(3). Discussion

602. Section 251(c)(6) clearly contemplates the provision of virtual collocation when physical collocation is not practical for technical reasons or because of space limitations.[1459] Section 251(c)(6) requires the incumbent LEC to demonstrate to the state commission's satisfaction that there are space limitations on the LEC premises or that technical considerations make collocation impractical. Because the space limitations and technical practicality issues will vary considerably depending on the location at which competitor equipment is to be collocated, we find that these issues are best handled on a case-by-case basis, as they were under our *Expanded Interconnection* requirements.[1460] In light of our experience in the *Expanded Interconnection* proceeding, we require that incumbent LECs provide the state commission with detailed floor plans or diagrams of any premises where the incumbent alleges that there are space constraints. Submission of floor plans will enable state commissions to evaluate whether a refusal to allow physical collocation on the grounds of space constraints is justified. We also find that the approach detailed by AT&T in its July 12 *Ex Parte* submission to be useful and believe that state commissions may find it a valuable guide.[1461]

603. Although section 251(c)(6) provides that incumbent LECs are not required to provide physical collocation where impractical for technical reasons or because of space limitations, our experience in the *Expanded Interconnection* proceeding has not demonstrated that technical reasons, apart from those related to space availability, are a significant impediment to physical collocation. We therefore decline to adopt any rules for determining when physical collocation should be deemed impractical for technical reasons.

604. Incumbent LECs are allowed to retain a limited amount of floor space for defined future uses. Allowing competitive entrants to claim space that incumbent LECs had

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[1458] ICTA reply at 13.

[1459] 47 U.S.C § 251(c)(6).

[1460] *See Special Access Order*, 7 FCC Rcd 7407.

[1461] AT&T describes a detailed proposed showing that would be required of an incumbent LEC that claims physical collocation is not practical because of space exhaustion. The proposed showing would require the specific identification of the space on incumbent LEC premises that is used for various purposes, as well as specific plans for rearrangement/expansion and identification of steps taken to avoid exhaustion. AT&T July 12, 1996 *Ex Parte*.

specifically planned to use could prevent incumbent LECs from serving their customers effectively.[1462] Incumbent LECs may not, however, reserve space for future use on terms more favorable than those that apply to other telecommunications carriers seeking to hold collocation space for their own future use.[1463]

605. We decline to adopt AT&T's suggestion that incumbent LECs should be required to lease additional space or provide trunking at no cost where they have insufficient space for physical collocation.[1464] In light of the availability of substitute virtual collocation arrangements, we find that requiring the type of "substitute" for physical collocation as advocated by AT&T is unnecessary. We similarly reject Time Warner's suggestion that incumbent LECs supply a "substitute" for physical collocation at cost, except to the extent we require virtual collocation. On the other hand, we will require incumbent LECs with limited space availability to take into account the demands of interconnectors when planning renovations and leasing or constructing new premises, as we have in the *Expanded Interconnection* proceeding.[1465]

606. Incumbent LECs are not required to provide collocation at locations where it is not technically feasible to provide virtual collocation. Although space constraints are a concern normally associated with physical collocation, given our broad reading of the term "premises,"[1466] we find that space constraints could preclude virtual collocation at certain LEC premises as well. State commissions will decide whether virtual collocation is technically feasible at a given point. We do, however, require that incumbent LECs relinquish any space held for future use before denying virtual collocation due to a lack of space unless the incumbent can prove to a state commission that virtual collocation at that point is not technically feasible. Moreover, when virtual collocation is not feasible, we require that incumbent LECs provide other forms of interconnection and access to unbundled network elements to the extent technically feasible.[1467]

[1462] *Special Access Order*, 7 FCC Rcd at 7409.

[1463] *See supra*, Section VI.B.1.e.

[1464] *See* AT&T comments at 41-42.

[1465] *See Special Access Order*, 7 FCC Rcd at 7408.

[1466] *See supra*, Section VI.B.1.e.

[1467] *See supra*, Section VI.A.

607. Finally, we decline to require that incumbent LECs provide virtual collocation that is equal in all functional aspects to physical collocation. Our *Expanded Interconnection* rules required a variety of standards for the virtual collocation and have been largely successful. In addition, Congress was aware of the differences between virtual and physical collocation when it adopted section 251(c)(6), and this section does not specify any requirements for virtual collocation.[1468] As discussed above, we adopt the *Expanded Interconnection* requirements for virtual collocation under section 251.[1469] We find, however, that a standard simply requiring equality in all functional aspects could be difficult to administrate and could lead to substantial disputes. We also decline to adopt the suggestion that we require LECs to offer virtual collocation under the "$1 sale and repurchase option."[1470] We do not find evidence that such a specific requirement is necessary at this time. We reserve the right to revisit these issues in the future, however, if we perceive that smaller entities would be disadvantaged by our existing standards.

2. Legal Issues

a. Relationship between *Expanded Interconnection* Tariffs and Section 251

(1). Background

608. The enactment of sections 251 and 252 raises the question of whether, and to what extent, the interconnection, access to unbundled network element, and collocation requirements set forth in those sections, and the delegation of specific rate-setting authority to the states under section 252(d)(1), as a matter of law supplant our section 201 *Expanded Interconnection* requirements. We tentatively concluded in the NPRM that our existing *Expanded Interconnection* policies for interstate special access and switched transport should continue to apply.[1471]

(2). Comments

[1468] *See Remand Order*, *9 FCC Rcd* at 5166-69.

[1469] *See supra*, Section VI.B.1.a.

[1470] This configuration is described as involving "the acquisition by the interconnectors of the equipment to be dedicated for interconnectors' use on the LEC premises and the sale of that equipment to the LECs for a nominal $1 sum while maintaining a repurchase option." Time Warner comments at 42.

[1471] NPRM at para. 73.

609. Although commenting parties have not addressed this question directly, some commenters appear to assume that LECs will be required to continue to tariff their collocation offerings with the FCC, as currently required under *Expanded Interconnection*.[1472] Other parties appear to assume that requirements to file federal tariffs are inconsistent with, and superseded by, the negotiation and arbitration provisions in section 252.

(3). Discussion

610. Our *Expanded Interconnection* rules require the largest incumbent LECs to file tariffs with the Commission to offer collocation to parties that wish to terminate interstate special access and switched transport transmission facilities. Section 252 of the 1996 Act, on the other hand, provides for interconnection arrangements rather than tariffs, for review and approval of such agreements by state commissions rather than the FCC, and for public filing of such agreements. Section 252 procedures, however, apply only to "request[s] for interconnection, services, or network elements *pursuant to section 251*."[1473] Such procedures do not, by their terms, apply to requests for service under section 201. Moreover, section 251(i) expressly provides that "[n]othing in this section shall be construed to limit or otherwise affect the Commission's authority under section 201,"[1474] which provided the statutory basis for our *Expanded Interconnection* rules. Thus, we find that the 1996 Act, as a matter of law, does not displace our *Expanded Interconnection* requirements, and, in fact, grants discretion to the FCC to preserve our existing rules and tariffing requirements to the extent they are consistent with the Communications Act.

611. We further conclude that it would make little sense to find that sections 251 and 252 supersede our *Expanded Interconnection* rules, because the two sets of requirements are not coextensive. For example, our *Expanded Interconnection* rules encompass collocation for interstate purposes for all parties, including non-carrier end users, that seek to terminate transmission facilities at LEC central offices.[1475] In comparison, section 251 requires collocation only for "any requesting telecommunications carrier."[1476] Certain competing carriers -- and non-carrier customers not covered by section 251 -- may prefer to take

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[1472] *See, e.g.*, MFS comments at 32; MCI comments at 58.

[1473] 47 U.S.C § 252(a)(1) (emphasis added).

[1474] Section 201 authorizes the Commission "to establish physical connections with other carriers . . ." 47 U.S.C. § 201.

[1475] *Special Access Order*, 7 FCC Rcd at 7403.

[1476] *See* 47 U.S.C. § 251(c)(2) and (3).

interstate expanded interconnection service under general interstate tariff schedules. We find that it would be unnecessarily disruptive to eliminate that possibility at this time. We also conclude that permitting requesting carriers to seek interconnection pursuant to our *Expanded Interconnection* rules as well as section 251 is consistent with the goals of the 1996 Act to permit competitive entry through a variety of entry strategies. Thus, a requesting carrier would have the choice of negotiating an interconnection agreement pursuant to sections 251 and 252 or of taking tariffed interstate service under our *Expanded Interconnection* rules.

612. Finally, we expect that, over time, sections 251 and 252 and our implementing rules may replace our *Expanded Interconnection* rules as the primary regulations governing interconnection for carriers. We note that section 251 is broader than our *Expanded Interconnection* requirements in certain respects. For example, section 251 requires incumbent LECs to offer collocation for purposes of accessing unbundled network elements, whereas our *Expanded Interconnection* rules require collocation only for the provision of interstate special access and switched transport.[1477] In addition, section 251(c)(6) requires incumbents to offer physical collocation subject to certain exceptions, whereas our existing *Expanded Interconnection* rules only require carriers to offer virtual collocation, although they may choose to offer physical collocation under Title II regulation in lieu of virtual collocation. In the future, we may review the need for a separate set of *Expanded Interconnection* requirements and revise our requirements if necessary. We believe that this approach is consistent with Congress' determination that the need for federal regulations will likely decrease as the provisions of the 1996 Act take effect and competition develops in the local exchange and exchange access markets.[1478]

b. Takings Issues

(1). Background

613. In *Bell Atlantic v. FCC*, the U.S. Court of Appeals for the D.C. Circuit found that the Commission lacked authority under the Communications Act to impose physical collocation on the LECs. The court found that this requirement implicated the Fifth Amendment takings clause.[1479] On remand, the Commission required LECs to provide virtual

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[1477] *See Special Access Order*, 7 FCC Rcd 7369; *Switched Transport Order*, 8 FCC Rcd 7372.

[1478] *See, e.g.*, 47 U.S.C. § 161 (requiring the Commission to "review all regulations . . . in effect at the time of the review that apply to the operations or activities of any provider of telecommunications service.").

[1479] *See Bell Atlantic v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994).

collocation. In *Pacific Bell v. FCC*,[1480] several LECs challenged the Commission's virtual collocation rules on essentially identical grounds, claiming that the virtual collocation rules also constituted an unauthorized taking. The court did not reach the merits of these claims. Instead, addressing the scope of section 251 immediately following enactment and before the FCC had yet exercised its interpretive authority with respect to the provision, the court stated that regulations enacted to implement the 1996 Act would render moot questions regarding the future effect of the virtual collocation order under review. The court did not vacate the order, but remanded to the Commission the issues presented in that case.[1481]

(2). Comments

614. U S West and BellSouth argue that virtual collocation is a taking and that the Commission lacks authority under section 201 to require virtual collocation under its *Expanded Interconnection* rules.[1482] U S West also argues that the Commission lacks authority to require virtual collocation under section 251.[1483] Some incumbent LECs and the Florida Commission also argue that physical collocation amounts to a taking in violation of the Fifth Amendment.[1484] In opposition, several competitive carriers argue that rates that recover incremental costs of collocation will satisfy constitutional "just compensation concerns."[1485]

(3). Discussion

615. We conclude that the ruling in *Bell Atlantic* does not preclude the rules we are adopting in this proceeding. The court in *Bell Atlantic* did not hold that an agency may never "take" property; the court acknowledged that, as a constitutional matter, takings are unlawful

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[1480] 81 F.3d 1147 (D.C. Cir. 1996).

[1481] *Id.*

[1482] U S West comments at 29-30; BellSouth comments at 25.

[1483] U S West comments at 30.

[1484] ALLTEL comments at 9; GTE comments at 66-68; US West comments at 29-31; Florida Commission comments at 15 (readoption of old physical collocation rules would be invalidated as a taking but should be readopted as model rules for the states to adopt if they chose).

[1485] MFS reply at 23; ACSI reply at 8-9; GST reply 14; ALTS reply at 8-11.

only if they are not accompanied by "just compensation."[1486] Instead, the court simply said that the Communications Act of 1934 should not be construed to permit the FCC to take LEC property without *express* authorization. Because the court concluded that mandatory physical collocation would likely constitute a taking,[1487] and that section 201 of the Act did not expressly authorize physical collocation, the court held that the Commission was without authority under section 201 to impose physical collocation requirements on LECs.[1488]

616. The question of statutory authority to impose (physical or virtual) collocation obligations on incumbent LECs largely evaporates in the context of the 1996 Act. New section 251(c)(6) *expressly* requires incumbent LECs to provide physical collocation, absent space or technical limitations. Where such limitations exist, the statute *expressly* requires virtual collocation. Thus, under the court's analysis in *Bell Atlantic*, there is no warrant for a narrowing construction of section 251 that would deny us the authority to require either form of collocation. Moreover, for the reasons stated in the *Virtual Collocation Order*,[1489] we continue to believe that virtual collocation, as we have defined it, is not a taking, and that our authority to order such collocation (under either section 251 or section 201) is not subject to the strict construction canon announced in *Bell Atlantic*.

617. Given that we now have express statutory authority to order physical and virtual collocation pursuant to section 251, any remaining takings-related issue necessarily is limited to the question of just compensation. As discussed in Section VII.B.2.a.(3).(c), below, we find that the ratemaking methodology we are adopting to implement the collocation obligations under section 251(c) is consistent with congressional intent and fully satisfies the just compensation standard. There is, therefore, no merit to the LECs' Fifth Amendment-based claims.

[1486] *Bell Atlantic*, 24 F.3d at 1445.

[1487] The Commission maintains the position that mandatory physical collocation should not properly be seen to create a takings issue. *See Remand Order*, 9 FCC Rcd at 5169.

[1488] *See Bell Atlantic*, 24 F.3d at 1447 ("we hold that the Act does not expressly authorize an order of physical co-location and thus the Commission may not impose it.").

[1489] *See* 9 FCC Rcd at 5161-66.

VII. PRICING OF INTERCONNECTION AND UNBUNDLED ELEMENTS

A. Overview

618. The prices of interconnection and unbundled elements, along with prices of resale and transport and termination, are critical terms and conditions of any interconnection agreement. If carriers can agree on such prices voluntarily without government intervention, these agreements will be submitted directly to the states for approval under section 252. To the extent that the carriers, in voluntary negotiations, cannot determine the prices, state commissions will have to set those prices. The price levels set by state commissions will determine whether the 1996 Act is implemented in a manner that is *pro-competitor* and favors one party (whether favoring incumbents or entrants) or, as we believe Congress intended, *pro-competition*. As discussed more fully in Section II.D. above, it is therefore critical to implementing Congress's pro-competitive, de-regulatory national policy framework to establish among the states a common, pro-competition understanding of the pricing standards for interconnection and unbundled elements, resale, and transport and termination. While such a common interpretation might eventually emerge through judicial review of state arbitration decisions, we believe that such a process could delay competition for years and require carriers to incur substantial legal costs.[1490] We therefore conclude that, to expedite the development of fair and efficient competition, we must set forth rules now establishing this common, pro-competition understanding of the 1996 Act's pricing standards. Accordingly, the rules we adopt today set forth the methodological principles for states to use in setting prices. This section addresses interconnection and unbundled elements, and subsequent sections address resale and transport and termination, respectively.

619. While every state should, to the maximum extent feasible, immediately apply the pricing methodology for interconnection and unbundled elements that we set forth below, we recognize that not every state will have the resources to implement this pricing methodology immediately in the arbitrations that will need to be decided this fall. Therefore, so that competition is not impaired in the interim, we establish default proxies that a state commission shall use to resolve arbitrations in the period before it applies the pricing methodology. In most cases, these default proxies for unbundled elements and interconnection are ceilings, and states may select lower prices. In one instance, the default proxy we establish is a price range. Once a state sets prices according to an economic cost study conducted pursuant to the cost-based pricing methodology we outline, the defaults cease to apply. In setting a rate pursuant to the cost-based pricing methodology, and especially when setting a rate above a default proxy ceiling or outside the default proxy range, the state must give full and fair effect to the economic costing methodology we set forth in this Order and must create a factual record, including the cost study, sufficient for purposes of review after notice and opportunity for the affected parties to participate.

[1490] For a discussion of our legal authority to adopt national pricing rules, *see supra*, Section II.D.

620. In the following sections, we first set forth generally, based on the current record, a cost-based pricing methodology based on forward-looking economic costs, which we conclude is the approach for setting prices that best furthers the goals of the 1996 Act. In dynamic competitive markets, firms take action based not on embedded costs, but on the relationship between market-determined prices and forward-looking economic costs. If market prices exceed forward-looking economic costs, new competitors will enter the market. If their forward-looking economic costs exceed market prices, new competitors will not enter the market and existing competitors may decide to leave. Prices for unbundled elements under section 251 must be based on cost under the law, and that should be read as requiring that prices be based on forward-looking economic costs. New entrants should make their decisions whether to purchase unbundled elements or to build their own facilities based on the relative economic costs of these options. By contrast, because the cost of building an element is based on forward-looking economic costs, new entrants' investment decisions would be distorted if the price of unbundled elements were based on embedded costs. In arbitrations of interconnection arrangements, or in rulemakings the results of which will be applied in arbitrations, states must set prices for interconnection and unbundled network elements based on the forward-looking, long-run, incremental cost methodology we describe below. Using this methodology, states may not set prices lower than the forward-looking incremental costs directly attributable to provision of a given element. They may set prices to permit recovery of a reasonable share of forward-looking joint and common costs of network elements.[1491] In the aftermath of the arbitrations and relying on the state experience, we will continue to review this costing methodology, and issue additional guidance as necessary.

621. We reject various arguments raised by parties regarding the recovery of costs other than forward-looking economic costs in section 251(c)(2) and (c)(3) prices, including the possible recovery of: (1) embedded or accounting costs in excess of economic costs; (2) incumbent LECs' opportunity costs; (3) universal service subsidies; and (4) access charges. As discussed in Section VII.B.2.a. below, certain portions of access charges may continue to be collected for an interim period in addition to section 251(c)(3) prices.

622. With respect to prices developed under the forward-looking, cost-based pricing methodology, we conclude that incumbent LECs' rates for interconnection and unbundled elements must recover costs in a manner that reflects the way they are incurred. We adopt certain rules that states must follow in setting rates in arbitrations. These rules are designed to ensure the efficient cost-based rates required by the 1996 Act.

623. In the next section of the Order, we establish default proxies that states may elect to use prior to utilizing an economic study and developing prices using the cost-based pricing methodology. We recognize that certain states may find it difficult to apply an

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[1491] We define these and other forward-looking cost concepts *infra*, Section VII.B.2.a. We define what we consider to be a reasonable share of forward-looking joint and common costs *infra*, Section VII.B.2.a.

economic costing methodology within the statutory time frame for arbitrating interconnection disputes. We therefore set forth default proxies that will be relatively easy to apply on an interim basis to interconnection arrangements. We discuss with respect to particular unbundled elements the reasonable rate structure for those elements and the particular default proxies we are establishing for use pending our adoption of a generic forward-looking cost model. Finally, we discuss the following additional matters: generic forward-looking costing models that we intend to examine further by the first quarter of 1997 in order to determine whether any of those models, with modifications, could serve as better default proxies; the future adjustment of rates; the relationship of unbundled element prices to retail prices; and the meaning of the statutory prohibition against discrimination in sections 251 and 252.

624. Those states that have already established methodologies for setting interconnection and unbundled rates must review those methodologies against the rules we are adopting in this Order. To the extent a state's methodology is consistent with the approach we set forth herein, the state may apply that methodology in any section 252 arbitration. However, if a state's methodology is not consistent with the rules we adopt today, the state must modify its approach. We invite any state uncertain about whether its approach complies with this Order to seek a declaratory ruling from the Commission.

B. Cost-Based Pricing Methodology

625. As discussed more fully in Section II.D. above, although the states have the crucial role of setting specific rates in arbitrations, the Commission must establish a set of national pricing principles in order to implement Congress's national policy framework. For the reasons set forth in the preceding section and as more fully explained below, we are adopting a cost-based methodology for states to follow in setting interconnection and unbundled element rates. In setting forth the cost-based pricing methodology for interconnection and access to unbundled elements, there are three basic sets of questions that must be addressed. First, does the 1996 Act require that the same standard apply to the pricing of interconnection provided pursuant to section 251(c)(2), and unbundled elements provided pursuant to section 251(c)(3)? Second, what is the appropriate methodology for establishing the price levels for interconnection and for each unbundled element, how should costs be defined, and is the price based on economic costs, embedded costs, or other costs? Third, what are the appropriate rate structures to be used to set prices designed to recover costs, including a reasonable profit? We address each of these questions in the following sections.

1. Application of the Statutory Pricing Standard

a. Background

626. In the NPRM, we proposed that any pricing principles we adopt should be the same for interconnection and unbundled network elements because sections 251(c)(2) and (c)(3) and 252(d)(1) use the same pricing standard.[1492] We invited parties to comment on this issue and to justify any proposed distinction in the pricing for interconnection and unbundled network elements. We also stated our belief that the same pricing rules that apply to interconnection and unbundled network elements should also apply to collocation under section 251(c)(6) of the 1996 Act.

b. Comments

627. Commenters generally agree that any pricing rules adopted by the Commission for interconnection and unbundled elements should be the same.[1493] These parties assert that any pricing rules the Commission ultimately adopts should not, therefore, create incentives to substitute or arbitrage one type of classification for another. Commenters also generally agree that the pricing rules the Commission adopts for interconnection and unbundled elements should also apply to collocation.[1494] Many of these parties agree that collocation is a subset of the interconnection arrangements contemplated by sections 251(c)(2) and 252(d)(1).[1495] On the other hand, a few parties contend that the pricing standards contained in section 252(d)(1) for interconnection and unbundled elements do not apply to collocation provided under section 251(c)(6).[1496] BellSouth argues that the Commission should not adopt any national standards for virtual collocation.[1497] Other commenters, including some that oppose the establishment of

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[1492] NPRM at para. 122.

[1493] *See, e.g.*, Citizens Utilities comments at 16 n.14; Ohio Commission comments at 42; Teleport comments at 46.

[1494] *E.g.*, ACSI comments at 16; ALTS comments at 34-35; Citizens Utilities comments at 16 n.14; Colorado Commission comments at 34; MCI comments at 54, 61; MFS comments at 30; NEXTLINK comments at 26; PacTel comments at 63; Sprint comments at 42; Teleport comments at 46.

[1495] *See, e.g.*, Citizens Utilities comments at 16 n.14; Colorado Commission comments at 34; MFS comments at 30; NEXTLINK comments at 26.

[1496] *See, e.g.*, SNET comments at 24 n.44.

[1497] BellSouth comments at 23.

pricing rules by the Commission, argue that, to the extent that the Commission adopts national standards for collocation, they should generally follow those established in the Commission's *Expanded Interconnection* proceeding in CC Docket No. 91-141.[1498]

c. Discussion

628. Sections 251(c)(2) and (c)(3) impose an identical duty on incumbent LECs to provide interconnection and access to network elements "on rates, terms, and conditions that are just, reasonable, and nondiscriminatory."[1499] In addition, both interconnection and unbundled network elements are made subject to the same pricing standard in section 252(d)(1). Based on the plain language of sections 251(c)(2), (c)(3), and section 252(d)(1), we conclude that Congress intended to apply the same pricing rules to interconnection and unbundled network elements. The pricing rules we adopt shall, therefore, apply to both.

629. We further conclude that, because section 251(c)(6) requires that incumbent LECs provide physical collocation on "rates, terms, and conditions that are just, reasonable, and nondiscriminatory," which is identical to the standard for interconnection and unbundled elements in sections 251(c)(2) and (c)(3), collocation should be subject to the same pricing rules.[1500] We also note that, because collocation is a method of obtaining interconnection and access to unbundled network elements, collocation is properly treated under the same pricing rules. This legal conclusion that there should be a single set of pricing rules for interconnection, unbundled network elements, and collocation provides greater consistency and guidance to the industry, regulators, and the courts. Moreover, it reduces the regulatory burdens on state commissions of developing and applying different pricing rules for collocation, interconnection, and unbundled network elements. We note that our adoption of this single set of pricing rules should minimize regulatory burdens, conflicts, and uncertainties associated with multiple, and possibly inconsistent rules, thus facilitating competition on a reasonable and efficient basis minimizing the economic impact of our rules for all parties, including small entities and small incumbent LECs.[1501]

[1498] *See, e.g.*, Bell Atlantic comments at 32-34.

[1499] 47 U.S.C. § 251(c)(2), (c)(3).

[1500] *See supra*, Section VI.B.

[1501] *See* Regulatory Flexibility Act, 5 U.S.C. §§ 601 *et seq.*

2. Rate Levels

a. Pricing Based on Economic Cost

(1) Background

630. We observed in the NPRM that economists generally agree that prices based on forward-looking long-run incremental costs (LRIC) give appropriate signals to producers and consumers and ensure efficient entry and utilization of the telecommunications infrastructure.[1502] We noted, however, that there was a lack of general agreement on the specifics of methodology for deriving prices based on LRIC or total service long-run incremental cost (TSLRIC). We invited parties to comment on whether we should require the states to employ a LRIC-based pricing methodology and to explain with specificity the costing methodology they support.[1503] We recognized, however, that prices based on LRIC might not permit recovery of forward-looking costs if there were significant forward-looking joint and common costs among network elements.[1504] We sought comment on how, if rates are set above incremental cost, to deal with the problems inherent in allocating common costs and any other overheads.[1505] We observed that, by defining the unbundled elements at a sufficiently aggregated level, it may be possible to reduce the costs to be allocated as joint and common by identifying a substantial portion of costs as incremental to a particular element. To the extent that joint and common costs cannot be entirely eliminated, we sought comment on various methodologies for assigning them, including the use of a fixed allocator or on the basis of inverse demand elasticity. We also sought comment on whether, regardless of the method of allocating common costs, we should limit rates to levels that do not exceed stand-alone costs.[1506] Finally, we invited parties to comment on whether a LRIC-based methodology would establish a price for interconnection and unbundled network elements that includes a reasonable profit and thus complies with section 252(d)(1).[1507]

631. A number of states already employ, or have plans to utilize, some form of LRIC

[1502] NPRM at para. 124.

[1503] *Id.* at para. 126.

[1504] *Id.* at para. 129.

[1505] *Id.* at para. 130.

[1506] *Id.* For a definition of stand-alone costs, *see* Section VII.B.2.a. *infra*.

[1507] 47 U.S.C. § 252(d)(1)(A)(i); NPRM at para. 129.

or TSLRIC methodology in their approach to setting prices for unbundled network elements,[1508] with several states choosing LRIC or TSLRIC as a price floor.[1509] For instance, the Connecticut Commission adopted a TSLRIC methodology to measure the cost of service of SNET, its principal incumbent LEC.[1510] Arizona also requires incumbent LECs to conduct TSLRIC cost studies to establish the underlying cost of unbundled services and facilities.[1511] The Ohio Commission has adopted Long Run Service Incremental Cost ("LRSIC"), which is closely related to TSLRIC.[1512] The Missouri and Wyoming Commissions are among a number of state commissions that have not yet adopted a pricing methodology, but are considering LRIC or TSLRIC.[1513] Oklahoma law provides for submission of LRIC cost studies and studies identifying a contribution to common costs for interconnection of facilities and access to network elements to the Oklahoma Commission during an arbitration.[1514] A number of

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[1508] *See, e.g.*, California Commission comments at 29 (California has adopted TSLRIC as the standard for developing the costs of unbundled elements and in a rulemaking this summer will determine the unbundled network elements and what level of shared and common costs should be included in the price of each); Michigan Commission comments at 13 (1996 prices for loops to remain at levels established by the Michigan Commission in its original interconnection order or at TSLRIC); Texas Commission comments at 22 (Texas Commission has employed LRIC-based pricing methodologies for many years; SWBT and GTE required to file LRIC cost studies to be used in pricing not later than November 1, 1996).

[1509] *See, e.g.*, Colorado Commission comments at Attachment (Rules Prescribing Principles for Costing and Pricing of Regulated Services of Telecommunications Service Providers) 4 CCR 723-30, Rules 4-5; Hawaii Administrative Rules, Sections 6-80-32-34 (setting out a three-tiered pricing regime with TSLRIC set as floor for pricing of competitive services); Louisiana Commission comments at Attachment (Louisiana Public Service Commission "Regulations for Competition in the Local Telecommunications Market"), p.30; Washington Commission comments at 25, Appendix B (*Washington Utilities and Transportation Commission v. U S West Communications*, Docket No. UT-950200 at 82 (Washington Commission, April 11, 1996)); Wisconsin Stat. Ann. section 196.204 (requiring the price of each network service or function to exceed TSLRIC).

[1510] Connecticut Commission comments at 4.

[1511] Arizona Commission comments, Exhibit V (Arizona Administrative Code R14-2-1101 *et seq.*), p.10.

[1512] *See* Ohio Commission comments at 43-45.

[1513] *See, e.g.*, Missouri Commission comments at 11 (supports LRIC for costing; LRIC is defined in pending state legislation); Wyoming Commission comments at 26-27 (draft rules propose use of TSLRIC as a price floor, with prices to include a contribution to shared, common, and joint costs, and the sum of prices for unbundled elements not to exceed retail for bundled services; incumbent LECs shall impute the prices of unbundled elements into the price floors of each of their own services that utilize the network elements).

[1514] Oklahoma Commission comments at Appendix A (Corporation Commission Telephone Rules OAC 165:55-17-25), pp.10-11.

states have yet to choose a pricing methodology. For instance, the New York Commission sets prices on a case-by-case basis.[1515] Unbundled element prices also exist in several states pursuant to negotiated interconnection agreements that have either already been approved by state commissions or are under consideration.[1516]

632. Section 252(d)(1) requires, *inter alia*, that rates for interconnection and unbundled network elements be based on "cost (determined without reference to a rate-of-return or other rate-based proceeding)."[1517] We tentatively concluded in the NPRM that this language precludes states from setting rates by use of traditional cost-of service regulation, with its detailed examination of historical carrier investment and expenses.[1518] Instead, we indicated our belief that the statute contemplates the use of other forms of cost-based price regulation, such as the setting of prices based on forward-looking economic cost methodologies (such as LRIC) that do not involve the use of an embedded rate base. We sought comment on whether section 252(d)(1) forecloses consideration of historical or embedded costs or merely prohibits state commissions from conducting a traditional rate-of-return proceeding to establish prices for interconnection and unbundled network elements. Embedded costs are the costs that the incumbent LECs carry on their accounting books that reflect historical purchase prices, regulatory depreciation rates, system configurations, and operating procedures. We invited parties to comment on whether incumbent LECs should be permitted to recover some portion of their historical or embedded costs over TSLRIC.[1519]

633. In the NPRM, we noted that certain incumbent LECs had advocated that interconnection and access to unbundled element prices be based on the "efficient component

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[1515] *Competition, The State Experience* at 80 (compilation of written responses by state commission staffs to questions by FCC staff, compiled by NARUC) (March 8, 1996).

[1516] According to information in our possession, such agreements have been negotiated in, among other states, Alabama, Florida, Georgia, Kentucky, Illinois, Louisiana, Mississippi, North Carolina, South Carolina, and Tennessee. Letter from W.W. Jordan, Executive Director -- Federal Regulatory, BellSouth, to William F. Caton, Acting Secretary, July 11, 1996 at Attachment (containing chart detailing agreements between BellSouth and new entrants in Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, and Tennessee); "Interconnection Agreement Under Sections 251 and 252 of the telecommunications Act of 1996, by and between, Ameritech Information Industry Services and MFS Intelenet of Illinois, Inc.," dated May 17, 1996 (filed July 25, 1996).

[1517] 47 U.S.C. § 252(d)(1)(B).

[1518] NPRM at para. 123.

[1519] *Id.* at para. 129.

pricing rule" (ECPR).[1520] Under this approach, an incumbent LEC that sells an essential input element, such as interconnection, to a competing network would set the price of that input element equal to "the input's direct per-unit incremental costs plus the opportunity cost to the input supplier of the sale of a unit of input."[1521] We tentatively concluded in the NPRM that ECPR or equivalent methodologies are inconsistent with the section 252(d)(1) requirement that rates be based on "cost," and we proposed to preclude the states from using this methodology.[1522]

634. Section 254 requires the Commission and the Joint Board established thereunder to ensure that "[a]ll providers of telecommunications service . . . make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service . . . ." That section further provides that "[t]here should be specific, predictable, and sufficient Federal and State mechanisms to preserve and advance universal service."[1523] The Conference Committee also explained that these provisions require any such universal service support payment to be, to the extent possible, "explicit, rather than implicit as many support mechanisms are today."[1524] In the NPRM, we sought comment on whether "it would be consistent with sections 251(d)(1) and 254 for states to include any universal service costs or subsidies in the rates they set for interconnection, collocation, and unbundled network elements."[1525] In particular, we discussed the "play or pay" system adopted by the state of New York in which interconnectors that agree to serve all customers in their self-defined service areas ("players") potentially pay a substantially lower interconnection rate than those that serve only selected customers ("payers") and are, therefore, liable to pay additional contribution charges.[1526] We noted that the statutory schedule for the completion of the

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[1520] *Id.* at para. 147. *See* William J. Baumol, *Some Subtle Issues in Railroad Deregulation*, 10 Int'l J. Trans. Econ. 341 (1983); William Baumol & Gregory Sidak, *Toward Competition in Local Telephony* (1994); William Baumol & Gregory Sidak, *The Pricing of Inputs Sold to Competitors*, 11 Yale J. on Reg. 171 (1994).

[1521] William Baumol & Gregory Sidak, *The Price of Inputs Sold to Competitors*, 11 Yale J. on Reg. 171, 178.

[1522] NPRM at para. 148.

[1523] 47 U.S.C. § 254(b)(4) and (b)(5).

[1524] Joint Explanatory Statement at 130-31. "In keeping with the conferees' intent that universal service support should be clearly identified, [section 254(e)] states that such support should be made explicit." *Id.* at 131; *see also* 47 U.S.C. § 254(e).

[1525] NPRM at para. 145.

[1526] *Id.*

universal service reform proceeding (15 months from the enactment of the 1996 Act) is different from that for this proceeding (6 months from the date of enactment of the 1996 Act). We asked whether the ability of states to take universal service support into account differs pending completion of the section 254 Joint Board proceeding or state universal service proceedings, pursuant to section 254(f), during any transition period that may be established in the section 254 proceeding or thereafter.[1527]

(2) Comments

635. *Forward-Looking Costs*. Most new entrants and IXCs agree that prices for interconnection and unbundled elements should be based on forward-looking, economic costs.[1528] Many state commissions also argue that, if federal pricing rules are adopted, forward-looking methodologies should serve as the basis for establishing rates in a competitive environment.[1529] The Department of Justice contends that pricing above forward-looking economic costs would subject competitors to substantial risk of a price squeeze because the real cost of a network element for the incumbent LEC will be its forward-looking economic cost, while the cost to the new entrant will be the higher price charged for the element by the LEC.[1530] Parties favoring a forward-looking, incremental cost methodology argue that it is the appropriate pricing standard for several reasons. First, such an approach simulates the prices for network elements that would result if there were a competitive market for the provision of such elements to other carriers.[1531] In such a market, these parties argue, competition would drive prices to forward-looking costs, even if such costs were lower than a firm's historical costs.[1532] Second, unbundled element prices based on forward-looking economic costs prevent incumbent LECs from exploiting their market power at the expense of

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[1527] *Id.*

[1528] *See, e.g.*, ACSI comments at 54-55; AT&T comments at 47; Jones Intercable comments at 25-26; LDDS comments at 60; MCI comments at 59, 61; NEXTLINK comments at 27; Sprint comments at 43-44; Teleport comments at 46; Telecommunications Resellers Ass'n comments 38-39; *see also* Ad Hoc Telecommunications Users Committee comments at 31-34; DoJ comments at 27-32; Frontier comments at 21-22; Texas Public Utility Counsel comments at 33-34; Attorneys General reply at 3; NCTA reply at 18-20; NTIA reply at 17-18 n.35.

[1529] *See, e.g.*, New York Commission comments at 3-4; Missouri Commission comments at 11; Kentucky Commission comments at 4-5; Wyoming Commission comments at 27-28; Ohio Commission comments at 41-43.

[1530] DoJ comments at 28-31.

[1531] *See, e.g.*, DoJ comments at 28-29.

[1532] *See, e.g.*, AT&T comments at Appendix C (Affidavit of William J. Baumol, Janusz A. Ordover, and Robert D. Willig), p.5; DoJ comments at 28-29.

their competitors that are dependent on the incumbent LEC's facilities.[1533] Third, a forward-looking incremental cost methodology creates the right investment incentives for competitive facilities-based entry and creates incentives for the market to move towards competition while preserving opportunities for competition even if some network elements prove to be resistant to competition.[1534] Fourth, a pricing methodology based on forward-looking economic costs minimizes the incumbent LECs' opportunities to engage in anticompetitive cross-subsidization that could delay the emergence of effective competition.[1535] Finally, these parties argue that pricing based on forward-looking economic costs will lead to lower prices for consumers.[1536]

636. While many commenters agree that the proper economic cost standard for interconnection and unbundled elements is one based on forward-looking LRIC, the record indicates a lack of consensus on the precise definition of such a methodology. While many parties, including some incumbent LECs, favor a pricing methodology based on TSLRIC,[1537] others contend that LRIC provides the appropriate basis for pricing interconnection and unbundled elements.[1538] AT&T argues that, because incumbent LECs will be providing access to unbundled network elements and interconnection, and not merely the individual services that use those elements, the relevant question is the incumbent LEC's cost of producing the

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[1533] *See, e.g.*, DoJ comments at 30.

[1534] *See, e.g.*, AT&T comments at Appendix C (Affidavit of William J. Baumol, Janusz A. Ordover, and Robert D. Willig), p.7; DoJ comments at 29; NCTA comments at Appendix B (Unbundling, Interconnection, and Traffic Exchange: The Pricing of Access to Local Exchange Networks), p. 22.

[1535] *See, e.g.*, DoJ comments at 30-31.

[1536] *See, e.g.*, DoJ comments at 28-31.

[1537] *See, e.g.*, Ad Hoc Telecommunications Users Committee comments at 34-36; AT&T comments at 47-48; ALTS comments at 35-36; Ameritech comments at 63-64 (but must include recovery of joint, common, and residual costs); CFA/CU comments at 26-32 (including a contribution to joint and common costs); Citizens Utilities comments at 18; Comcast comments at 23; CompTel comments at 67-71; Competition Policy Institute comments at 8; DoJ comments at 28-31 (including any joint and common costs); Frontier comments at 21-22; Intermedia comments at 14; LDDS comments at 56, 62; MCI comments at 60-61; NCTA comments at 49-50; Ohio Consumers' Counsel comments at 24-25 (including a markup over TSLRIC to reflect a reasonable allocation of joint and common costs); SNET reply at 5-7 (including a reasonable contribution to common costs); Sprint comments at 44 (plus a reasonable contribution to joint and common costs), reply at 28-32; TCC comments at 14.

[1538] *See, e.g.*, Texas Statewide Tel. Cooperative comments at 8-11, 14.

entire demand for network elements.[1539] Because TSLRIC defines a cost increment relative to a hypothetical situation in which the supplier does not currently provide the network element at all and thus must construct and operate all element-specific facilities necessary to produce the network element, AT&T believes that TSLRIC, unlike LRIC, includes all element-specific fixed costs.[1540]

637. The Consumer Federation of America argues that costs must be analyzed consistently across all major services using the same cost methodology, *i.e.*, individual functionalities or specific capacities must have similar costs across services.[1541] AT&T argues that TSLRIC should exclude all costs attributable to the incumbent LECs' retailing operations, and that all other cost allocations should be competitively-neutral and assigned on an equally proportional basis relative to attributable costs.[1542] ALTS argues that the underlying data from a TSLRIC study should be accessible for purposes of replicating the study methods and comparisons to other public data.[1543] NTIA contends that the Commission should require the states to consider recovery of only those costs that the incumbent can convincingly demonstrate are incurred in service provisioning.[1544] Supporters of a forward-looking economic cost methodology argue that TSLRIC studies can be prepared quickly to establish interconnection and unbundled element prices.[1545]

638. Incumbent LECs generally oppose the adoption of a forward-looking, long-run incremental costing methodology.[1546] At least five major reasons are offered in opposition. First, opponents of a forward-looking, long-run incremental costing methodology argue that setting the price of each discrete service based on LRIC will not recover the total costs of the

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[1539] AT&T comments at 47, Appendix C (Affidavit of William J. Baumol, Janusz A. Ordover, and Robert D. Willig), pp.6.

[1540] *Id.* at 48.

[1541] CFA/CU comments at 32.

[1542] AT&T comments at 61-62, 64-65.

[1543] ALTS comments at 36-37.

[1544] NTIA reply at 28.

[1545] *See, e.g.*, LDDS comments at 64-65.

[1546] *See, e.g.*, Matanuska comments at 3-4; NYNEX comments at 46-47; PacTel comments at 66-67; TCA comments at 8.

network because if prices are set equal to the cost of the last unit, total revenues will fall short of total costs.[1547] Second, PacTel argues that a forward-looking cost methodology also suffers from the "fallacy of perfect competition" because it does not account for the fact that, while it is true that competition drives the price of every product toward incremental cost, every multi-product firm must have some products priced far enough above incremental cost to recover its total costs and return a profit to investors.[1548] Third, incumbent LECs argue that setting prices based on the forward-looking economic cost of the element will not create incentives for new entrants to build their own facilities,[1549] and will discourage efficient entry and useful investment by both incumbent LECs and their competitors.[1550] Fourth, some opponents of a forward-looking, economic cost methodology contend that such an approach raises significant practical and administrative problems because LRIC studies are expensive to conduct, almost impossible to audit or review particularly for small entities seeking to enter the local exchange market, highly subjective, and the necessary data are under the exclusive control of the party subject to the agreement.[1551] USTA and other commenters also argue that use of LRIC cost studies would fail to capture differences in geographic regions, thereby denying small incumbent LECs a reasonable opportunity to recover their costs.[1552] Finally, many opponents of a forward-looking, economic cost approach to pricing interconnection and access to unbundled elements argue also that such a methodology precludes any contribution to joint and common costs and does not allow the recovery of historical costs.[1553] These parties contend that network providers must be permitted to recover their total costs of service, including a return on investment and a reasonable allocation of joint, common, and

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[1547] *See, e.g.*, Bell Atlantic comments at Attachment 1 (Affidavit of Jerry A. Hausman), pp.3-4; NECA comments at 8; Rural Tel. Coalition comments at 25.

[1548] PacTel comments at 68-69; *see also* Rural Tel. Coalition reply at 26-27.

[1549] *See, e.g.*, Bell Atlantic comments at 38; SBC comments at 91-92.

[1550] *See, e.g.*, PacTel comments at 70; SBC comments at 90-92; *see also* U S West comments at Exhibit A (Federal Implementation of the Telecommunications Act of 1996: Competition in the Local Exchange), p.9.

[1551] *See, e.g.*, Bell Atlantic comments at Attachment 2 (Declaration of Robert W. Crandall), p.8; MFS comments at 54, reply at 11-12; NECA comments at 8.

[1552] *E.g.*, USTA comments at 45-50; Bay Springs reply at 8.

[1553] *See, e.g.*, BellSouth comments at 56-57; NYNEX comments at 50-52; PacTel comments at 65-66; SBC comments at 88, reply at 24-25; U S West reply at 9, 12 (stating that depreciation expenses should be properly allocated); *see also* NECA comments at 8; TCA comments at 8-9. For a discussion of recovery of joint, common, and embedded costs, *see infra* Section VII.B.2.a.

historical costs.[1554]

639. Incumbent LECs generally contend that costs should be based on the individual incumbent LEC's existing network design and technology instead of the idealized least-cost, most efficient network design and technology.[1555] USTA argues that, if competitors want to use an incumbent LEC's embedded plant, competitors should pay for the existing plant, not some theoretical, more efficient plant.[1556] In addition, these parties argue that, if a new entrant can purchase the unbundled element from the incumbent LEC at a price no higher than the cost of the least-cost, most efficient provider, then the new entrant has little incentive to invest in its own facilities. Ameritech also contends that section 252(d)(1) addresses recovery of the incumbent LEC's costs of providing interconnection and unbundled network elements, not the costs of a hypothetical carrier.[1557]

640. On the other hand, several new entrants argue that a forward-looking economic cost methodology should be based on an efficient provider's costs of producing a service.[1558] These parties contend that, in a competitive market, prices are determined by the cost of efficient potential entrants, not the embedded costs of existing firms.[1559] In addition, a pricing standard based on the costs of the element using the most-efficient technology prevents incumbent LECs from charging competitors for the cost of facilities that would in fact be used in large part by the incumbent LECs themselves to compete in new markets such as

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[1554] *See, e.g.*, Ameritech comments at 60, reply at 30-33 (stating that residual cost recovery must also be permitted); Bell Atlantic comments at 35-36 (stating that the recovery of the total costs of constructing and operating the networks must also be permitted); NYNEX comments at 42-44; USTA comments at Attachment 1 (Affidavit of Jerry A. Hausman), pp.5-6.

[1555] *See, e.g.*, Ameritech reply at 32-33; Bell Atlantic reply at 17-18; Bellsouth reply at 36-37; *see also* GVNW comments at 36; USTA comments at 40, reply at 21-22.

[1556] USTA comments at 40.

[1557] Ameritech reply at 32.

[1558] *See, e.g.*, ACSI comments at 56; AT&T comments at 57-60 (optimally configured and sized assets with current technology and efficient operating practices); AT&T comments at Appendix C (Affidavit of William J. Baumol, Janusz A. Ordover, and Robert D. Willig), p. 10 (efficient, cost-minimizing competitor); GST comments at 26-27 (costs of an efficient LEC rather than the actual costs of an incumbent LEC); Teleport reply at 30 (best available technology at today's prices); *see also* DoJ reply at 9-11 (best generally available technology); Louisiana Commission comments at 4, 15; Telecommunications Resellers Ass'n comments at 38 (most efficient available technology).

[1559] *See, e.g.*, TCC comments at 17.

interexchange service.[1560] Sprint, however, argues that prices should be based on the incumbent LEC's average utilization and existing network design and technology, not on an idealized network and technology that may bear no relationship to the incumbent LECs existing operations.[1561]

641. USTA, Bell Atlantic, and BellSouth have asserted in various filings and *ex parte* presentations that TSLRIC-based pricing would not properly compensate incumbent LECs for certain factors that affect capital costs and economic depreciation rates.[1562] First, when technological progress lowers equipment costs, the replacement or forward-looking economic cost of certain durable sunk investments can be expected to decline over time. In this case the correct measure of cost over any period of time should include the expected decline in economic value during that period.[1563]

642. Second, these parties argue that, when investments in facilities needed to meet a specific level of demand are sunk and irreversible, an incumbent LEC may not be able to recover these costs over the physical life of the facility, because demand may decrease as new entrants elect to build their own facilities. When entry is possible using current technology, either competition from these entrants, or rate regulation can prevent retail service prices from rising significantly, which will place an effective ceiling on profits. If demand for a service falls in a market in which the incumbent LEC is the only supplier and owner of sunk facilities, however, there will be no corresponding exit of other carriers that will prevent prices and profits from falling. Because of this asymmetric effect of changing market conditions on an incumbent LEC's profits, these parties claim that increasing the uncertainty due to entry in the local exchange market will increase the cost of capital to the incumbent LEC. They then assert that the inability of TSLRIC to account for the risks associated with sunk facilities can lead to understating the true economic cost of an element by a factor of

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[1560] DoJ reply at 10.

[1561] Sprint reply at 31-32.

[1562] USTA reply comments at Attachment 1 (Reply Affidavit of Jerry A. Hausman); Bell Atlantic comments at Attachment 1 (Affidavit of Jerry A. Hausman); Letter from Robert T. Blau, Vice President, Executive and Federal Regulatory Affairs, BellSouth, to William F. Caton, Acting Secretary, FCC, July 25, 1996, at Attachment (Response to Hubbard and Lehr).

[1563] We note that USTA seems to present a contradictory argument regarding the expected effect of this issue -- here Hausman claims that prices will decrease rapidly, whereas in our price cap proceeding, USTA sponsored testimony by Christenson that claimed input prices would generally increase at the rate of inflation. USTA comments in CC Docket No. 94-1, at 25-27.

three.[1564] Finally they assert that empirical research that shows firms' hurdle rates in excess of the market cost of capital shows that the considerations of risk associated with sunk investment significantly raises a firm's cost of capital.[1565]

643. *Joint and Common Costs.* Several incumbent LECs contend that a forward-looking, economic cost methodology does not take into account either joint or common costs.[1566] Although a few parties contend that incumbent LECs do not need a mark-up over TSLRIC to recover joint and common costs because incumbents are presumably already recovering these costs,[1567] commenters generally agree that incumbent LECs should be permitted to recover some measure of forward-looking joint and common costs.[1568] These commenters argue that pricing at incremental cost without joint and common costs is economically inefficient because it permits competitors to offer the incumbent LECs' services without making a contribution to the common costs that the LECs incur in offering the service.[1569] They further contend that excluding recovery of joint and common costs will distort technological decisions because the LEC is encouraged to invest in less efficient technologies that have higher incremental costs and lower common costs, which would tend to destroy economies of scope.[1570] Finally, incumbent LECs fear that they will be forced to increase retail rates to recover these unrecovered common costs, while their competitors that do not face such costs will reduce their own prices and have little incentive to invest in

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[1564] *See* USTA reply at Attachment 1 (Reply Affidavit of Jerry A. Hausman), p.1.

[1565] *Id.* at 7.

[1566] *See, e.g.*, Bell Atlantic comments at Tab 2 (Declaration of Robert W. Crandall), p.9, reply at Attachment 1 (Declaration of Alfred E. Kahn and Timothy J. Tardiff), p.6; BellSouth comments at 51; Municipal Utilities comments at 19-21; SBC reply at 24-25; TDS comments at 18-19.

[1567] *See* Telecommunications Resellers Ass'n comments at 39-40; Texas Public Utility Counsel comments at 19-20; WinStar comments at 29, reply at 9-10.

[1568] *See, e.g.*, Ameritech comments at 60; Bell Atlantic comments at 36; Citizens Utilities comments at 19; Cincinnati Bell comments at 24-25; Colorado Commission comments 45-46; DoJ reply at 6; GTE Comments at 61-62; Kentucky Commission comments at 5; Lincoln Tel. comments at 13; Mass. Commission comments at 11-12; NCTA comments at 49-50; Ohio Consumers' Counsel comments at 24; SBC comments at 91; Sprint comments at 43-44; AT&T reply at 28; NTIA reply at 19-21; USTA reply at 19.

[1569] *E.g.*, BellSouth comments at 52-53; GTE comments at Attachment 3 (Affidavit of Edward C. Beauvais, Ph.D.), p.3.

[1570] *See, e.g.*, BellSouth comments at 53; Lincoln Tel. comments at 13.

facilities of their own.[1571]

644. There is no consensus in the record on the magnitude of the joint and common costs at stake. Although commenters argued that the amount of common costs varies dramatically due to differences in location, network construction, and equipment,[1572] several parties are skeptical that there are significant joint and common costs between network elements given the relative modularity of the network and associated functions.[1573] These parties contend that, if joint and common costs are incurred, incumbent LECs must quantify them so that a state commission can determine whether and precisely how much contribution is needed.[1574] The Department of Justice asserts that, when developing a TSLRIC for unbundled network elements, it is preferable, where possible, to focus on costs of facilities and network elements rather than services that use those facilities in order to arrive at a more accurate determination of economic costs and to reduce the amount of costs that must be treated as joint or common.[1575] The incumbent LECs disagree with the new entrants' characterization of these costs as *de minimis* and argue that there is no evidence that unrecovered joint and common costs are much lower in the TSLRIC rates for physical elements than a TSLRIC standard based on the cost of providing services.[1576]

645. There is considerable disagreement in the record over the appropriate method of allocating joint and common costs under a TSLRIC approach. AT&T contends that the vast majority of the relevant costs will be causally attributed to particular network elements in the calculation of TSLRIC, and that we should prescribe rigid allocators that limit the incumbents' ability to manipulate prices by imposing high markups on new entrants.[1577] This approach, it is argued, is more competitively neutral than Ramsey pricing, which allocates

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[1571] *E.g.*, BellSouth comments at 53-54.

[1572] *See, e.g.*, Municipal Utilities comments at 19-20; NARUC reply at 9.

[1573] *See, e.g.*, AT&T comments at Attachment or Appendix C (Affidavit of William J. Baumol, Janusz A. Ordover, and Robert D. Willig), pp.13-14; Competition Policy Institute comments at 19; DJ comments at 31-32, reply at 8; Texas Public Utility Counsel comments at 24-25.

[1574] Texas Public Utility Counsel comments at 17-28; Sprint comments at 47-50.

[1575] DoJ reply at 8; *see also* Competition Policy Institute comments at 19.

[1576] *E.g.*, PacTel reply at 27; *see also* Cincinnati Bell reply at 10.

[1577] *See* AT&T comments at 61-62.

costs based on inverse demand elasticity.[1578] In contrast, incumbent LECs advocate allocation of joint and common costs based on inverse demand elasticity,[1579] *i.e.*, according to Ramsey pricing principles.[1580] New entrants and other parties oppose the use of Ramsey pricing for interconnection and unbundled network elements for use in a market that is moving toward competition over the long-run.[1581] They contend that Ramsey pricing enables LECs to shift costs associated with entry into new competitive markets over to captive services.[1582] One state commission responds that the Commission's concern in this regard would be addressed by calculating demand elasticities on the basis of the total industry demand for the service, which would negate the influence of competition on demand elasticities.[1583]

646. Commenters suggested other means of allocating joint and common costs. For example, certain incumbent LECs argue that these costs must not be shifted from interconnection and unbundled elements to residential subscribers,[1584] while certain new entrants suggest that these costs should be recovered at the retail level.[1585] Many new entrants agree that the Commission should require allocation of joint and common costs that minimizes the opportunity for incumbent LECs to harm competitors through strategic pricing.[1586] For example, some new entrants argue that states should be required to minimize allocation of

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[1578] *See, e.g.*, Teleport comments at 47-48.

[1579] *See e.g.*, GTE comments at 63, comments at Attachment 3 (Affidavit of Edward C. Beauvais, Ph.D.), pp.4-6; *see also* Mass. Commission comments at 11-12.

[1580] *See* Frank P. Ramsey, *A Contribution to the Theory of Taxation*, 37 Econ. J. 47 (1927); *see generally* Kenneth E. Train, *Optimal Regulation: The Economic Theory of Natural Monopoly* 115-40 (1992) (discussing efficiency properties of Ramsey prices); Bridger M. Mitchell & Ingo Vogelsang, *Telecommunications Pricing: Theory and Practice* 43-61 (1991).

[1581] *See, e.g.*, Ad Hoc Telecommunications Users Committee comments at 39-41; CompTel comments at 79-80; MECA comments at 45; Teleport comments at 47-48; Texas Public Utility Counsel comments at 27; WinStar reply at 10-11.

[1582] *See, e.g.*, Ad Hoc Telecommunications Users Committee comments at 38-39.

[1583] *See, e.g.*, Mass. Commission comments at 12.

[1584] *See, e.g.*, Puerto Rico Tel. comments at 10; Rural Tel. Coalition comments at 27.

[1585] *E.g.*, MCI reply at 9-10.

[1586] *See, e.g.*, MCI reply at 9-10.

joint and common costs to bottleneck or essential network elements.[1587] MCI and Sprint assert that such costs should be spread across all services provided by a carrier in proportion to the TSLRIC for each service.[1588] A few commenters assert that the Commission should adopt a fixed mark-up over TSLRIC for allocation of joint and common costs.[1589] Cable & Wireless supports the adoption of a rule that allocates common costs uniformly for all services offered. It argues that a disproportionate allocation system, that for example, assigns common costs strictly to retail services purchased for resale by small companies, but not to unbundled network elements utilized by larger competitors, would prove detrimental to the development of local competition.[1590] Finally, certain parties suggested that regardless of the method ultimately used to allocate joint and common costs, TSLRIC should serve as the floor[1591] and prices should not exceed stand-alone costs.[1592]

647. *Reasonable Profit.* Commenters disagree over what should constitute a "reasonable profit." Numerous commenters argue that a TSLRIC-based methodology for the pricing of interconnection and unbundled network elements includes a reasonable profit and is, therefore, consistent with the 1996 Act.[1593] These commenters argue that economic

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[1587] *See, e.g.*, LCI comments at 4-5 (even under a TSLRIC methodology, it may be necessary to allocate joint direct costs among classes of service); Time Warner comments at 52-53 (only elements that can be duplicated by competitors or that are already available from other sources should include a reasonable markup over TSLRIC for shared and common costs); *see also* CFA/CU comments at 33-35 (allocation to such elements should be no more than the allocation of such costs to basic service).

[1588] *See* AT&T comments at 64; MCI reply at 9-10; Sprint comments at 47.

[1589] *See, e.g.*, Competition Policy Institute comments at 19 (suggesting an overhead loading of six percent); *see also* Sprint comments at 48-49 (joint and common costs should be no more than 15 percent of TSLRIC).

[1590] Cable & Wireless comments at 35.

[1591] *See, e.g.*, Citizens Utilities comments at 19; Florida Commission comments at 26; SBC comments at 93-94.

[1592] *See, e.g.*, AT&T comments at Appendix C (Affidavit of William J. Baumol, Janusz A. Ordover, and Robert D. Willig), pp.14-15; TDS comments at 21.

[1593] *See, e.g.*, CompTel comments at 69-70; LDDS comments at 61; MCI comments at 61-62; Texas Public Utility Counsel comments at 19-20; WinStar comments at 29; Ad Hoc Telecommunications Users' Committee reply at Appendix A (Interconnection Pricing Standards for Monopoly Rate Elements in a Potentially Competitive Local Telecommunications Market), p.12.

measures, such as TSLRIC, reflect a reasonable profit by including the cost of capital.[1594] Time Warner and NEXTLINK contend that permitting incumbent LECs to receive a profit above that contained within TSLRIC pricing would provide them with a greater return on facilities than was permitted under rate-of-return regulation by "double-counting" the profit.[1595] Furthermore, NEXTLINK rejects the notion that profit includes the recovery of embedded costs or is a means of recovering subsidies for universal service currently recovered through access charges such as the transport interconnection charge or carrier common line charge, or their intrastate equivalents.[1596] Similarly, LDDS believes that "reasonable profit" cannot be read to include contribution to costs having nothing to do with providing the network elements or interconnection that are the subject of a section 252 pricing standard.[1597]

648. Incumbent LECs, however, contend that setting rates on a TSLRIC-based methodology alone would violate section 252(d)(1) by precluding recovery of a reasonable profit.[1598] NYNEX and USTA state that profit is what a firm makes after it recovers its total costs of providing all of its services, including its investment-related costs.[1599] Ameritech similarly contends that the term "reasonable profit" means the ability to earn positive economic profits as an incentive for efficiency and innovation.[1600] PacTel argues that, in order to allow for a reasonable profit, rates for interconnection and unbundled elements must permit full recovery of historical accounting costs. PacTel charges that the federal courts have held that the determination of a "reasonable profit" should consider the effect on the carrier's whole enterprise and, therefore, the sum of the carrier's rates must enable it to

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[1594] *E.g.*, AT&T reply at 31; CompTel comments at 69-70, reply at 39; DoJ reply at 9; Frontier reply at 12-15; MCI comments at 61-62; Texas Public Utility Counsel comments at 19-20; WinStar comments at 29.

[1595] NEXTLINK comments at 28; Time Warner reply at 31-32.

[1596] NEXTLINK comments at 28-29.

[1597] LDDS comments at 61.

[1598] *See, e.g.*, GTE comments at 60; NYNEX comments at 51-52; PacTel comments at 69; SBC comments at 88; TCA comments at 9; TDS comments at 18; *see also* GTE comments at Attachment 3 (Affidavit of Edward C. Beauvais, Ph.D.), p.9.

[1599] *See* NYNEX comments at 42; USTA comments at 43.

[1600] *See* Ameritech comments at 70-71.

recover its total historical costs.[1601]

649. Several parties contend that the issue of what constitutes a reasonable profit should be left to the states. Citizens Utilities contends that the issue of whether profit is reasonable is a question of fact to be resolved, where necessary, in arbitration proceedings.[1602] Time Warner argues that what constitutes reasonable profit should, as a matter of policy, vary depending on the nature of the facilities or services being provided and should, therefore, be left to the states.[1603] The Illinois Commission argues that states may even use rate-of-return methodologies for the determination of reasonable profit.[1604]

650. There is also disagreement among the commenters regarding the force of the reasonable profit language in section 252. While many incumbent LECs interpret Section 252(d)(1) as *requiring* prices to include a reasonable profit,[1605] certain new entrants and other parties argue that the reasonable profit language is permissive, not mandatory.[1606] For example, several LECs contend that, to avoid confiscation of their property, LECs are entitled to full operating expenses as well as the capital costs of doing business and a reasonable profit.[1607] The Ohio Consumers' Counsel, however, argues that the language of section 252(d)(1) indicates that it is at the discretion of the state commissions to determine whether to allow rates to reflect a reasonable profit.[1608]

651. USTA contends that "purely forward-looking TSLRIC" should not be the price

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[1601] *See* PacTel comments at 65-66, *citing FPC v. Hope Natural Gas*, 320 U.S. 591 (1944) and *Jersey Central Power & Light v. FERC*, 810 F.2d 1168, 1172 (D.C. Cir. 1987).

[1602] Citizens Utilities comments at 17.

[1603] Time Warner comments at 52.

[1604] Illinois Commission reply at 15.

[1605] *See, e.g.*, PacTel comments at 65-66.

[1606] *See, e.g.*, AT&T reply at 31; Cox reply at 29; DoJ reply at 15.

[1607] *See, e.g.*, MECA comments at 44, 49; PacTel comments at 65-67.

[1608] Ohio Consumers' Counsel comments at 26.

for interconnection elements because "telecommunications networks are mostly sunk costs."[1609] It argues that, when investment in facilities requires sunk and irreversible costs, a firm may not be able to recover this investment over the physical life of the facilities due to the risks of decreases in value resulting from future competition. USTA contends that allowing other carriers into the provision of local exchange service will subject incumbent LECs to these types of risks. It then claims that TSLRIC calculations do not appropriately account for these additional risks.

652. USTA also argues that the risks to which the incumbent LECs will be subject as a result of competition in the local exchange market include the risks from facing new competition, technological change, change in demand, and interest rates. It further argues that these risks will result in many situations in which the incumbent LECs may face a reduction in profits (downside risk) and no situations in which the incumbent LECs may see an increase in their profits. Thus, incumbent LECs must be compensated for these additional risks, according to USTA. It concludes that TSLRIC calculations fail to provide this compensation, stating "TSLRIC can be biased downward by a factor of three."[1610]

653. Similarly, Bell Atlantic asserts that, in a market where input prices are declining, a TSLRIC standard is not the appropriate standard because, "in a world of continual technological progress, it would be irrational for firms constantly to update their facilities in order completely to incorporate today's lowest-cost technology."[1611] Thus, it argues that because a carrier would not replace its entire existing set of facilities (a sunk investment) with the best available technology at a given point, the price of the best available technology understates the cost of providing service.[1612]

654. The Consumer Federation of America, disputing the incumbent LECs' claims regarding risk premiums, argues that risk premiums are reflected in the large returns incumbent LECs have already earned.[1613]

655. *Embedded Costs.* IXCs, competitive local entrants, and others interpret section

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[1609] *See* USTA reply at Attachment 1 (Reply Affidavit of Professor Jerry A. Hausman), p.1.

[1610] *Id.* at 6. Presumably, by TSLRIC, Professor Hausman is referring to a TSLRIC assuming a risk free rate of return and a depreciation rate that encompasses the physical life of assets.

[1611] Bell Atlantic reply at Exhibit 1 (Declaration of Alfred E. Kahn and Timothy J. Tardiff), para.8a.

[1612] *Id.*

[1613] *See* CFA/CU comments at 61-63.

251(d)(1) as precluding states from setting rates by use of traditional cost-of-service regulation, with its detailed examination of historical accounting costs and reliance on an embedded rate base.[1614] These parties argue that some measure of forward-looking economic costs, not historical costs, should be the only basis for setting rates for interconnection and unbundled network elements because only forward-looking economic costs meet the statutory requirement in section 252(d)(1) that such rates be "determined without reference to a traditional rate-of-return or other rate-based proceeding." Potential new entrants and many other commenters argue that historical or embedded costs should not be included in the prices of interconnection and unbundled network elements.[1615] NTIA asserts that it is unwise to include in the prices for interconnection and unbundled elements an amount to recover historical costs when the size of any shortfall between historical costs and TSLRIC's forward-looking costs will not be determined for many years after interLATA entry.[1616] These parties contend that permitting incumbent LECs to recover embedded costs in the prices they charge competitors for interconnection and unbundled network elements, while the incumbents experience much lower incremental costs, will result in inefficiently high prices that will either cause new entrants to over-build existing systems instead of maximizing the efficient use of the existing incumbent LEC's network, or discourage entry and investment in the local markets altogether.[1617] Moreover, opponents of embedded cost recovery maintain that these costs reflect past inefficiencies and their recovery does not create any incentive for incumbent LECs to maximize their network and operational efficiencies.[1618] Commenters also argue that embedded cost recovery permits incumbents to engage in anticompetitive, strategic,

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[1614] *See, e.g.*, AT&T comments at 47; LDDS comments at 60; MCI comments at 61-62; MFS comments at 59; Sprint comments at 43; Teleport comments at 46; Time Warner comments at 51; Frontier comments at 21; Excel comments at 9; ACSI comments at 54-55; WinStar comments at 37-38; GST comments at 29-30; *see also* Ad Hoc Telecommunications Users Committee comments at 30-31; DoJ comments at 27-32, reply at 14; Kentucky Commission comments at 4; Texas Public Utility Counsel comments at 33-34; Telecommunications Resellers Ass'n comments at 38; Michigan Commission comments at 14; Pennsylvania Commission comments at 29; Ohio Commission comments at 42-43; Attorneys General reply at 7-8.

[1615] *See, e.g.*, AT&T comments at 47; CFA/CU reply at 18-19; DoJ comments at 27-32; N. Economides comments at 3; Frontier comments at 21-22, reply at 13; Jones Intercable comments at 25-26; LDDS comments at 60; MCI comments at 61-62; MFS comments at 59; Michigan Commission comments at 14; Sprint comments at 43; Teleport comments at 46; TCC comments at 15-16; Texas Public Utility Counsel comments at 33-34; Time Warner comments at 51; WinStar comments at 37-38; *see also* Ad Hoc Telecommunications Users' Committee reply at Appendix A (Interconnection Pricing Standards for Monopoly Rate Elements in a Potentially Competitive Local Telecommunications Market), pp.2-6;

[1616] *See* NTIA reply at 28-29.

[1617] *See, e.g.*, Competition Policy Institute comments at 8; TCC comments at 15-16.

[1618] *See, e.g.*, Ad Hoc Telecommunications Users Committee comments at 53-54.

or discriminatory pricing by manipulating the cost of individual rate elements.[1619]

656. In response to claims that the incumbent LECs are entitled to recover embedded costs incurred as a result of their regulation, opponents of embedded cost recovery argue that, at the state level, incumbent LECs have been opting for incentive-based regulation and so have foregone the right to claim entitlement to recovery of embedded costs in exchange for the flexibility to price their services to meet competition.[1620] AT&T argues that, because the majority of the incumbent LECs' embedded plant was installed after 1990, the forward-looking replacement costs of this old plant may in many cases be higher than the incumbent LECs' embedded costs.[1621] MCI disagrees with incumbent LECs' claims that excluding historical costs will discourage future investment by incumbent LECs and argues instead that incumbent LECs make investment decisions based upon expected future earnings.[1622]

657. Most incumbent LECs and some other parties dispute the claim that historical costs are precluded by the statute,[1623] asserting instead that section 252(d)(1) merely prohibits the use of a rate-of-return *proceeding* to determine such rates.[1624] Incumbent LECs argue that any pricing methodology the Commission adopts should permit recovery of historical or embedded costs in the prices of interconnection and unbundled network elements.[1625] NYNEX specifically proposes a cost-accounting pricing methodology that places the burden on the incumbent LEC to identify the specific accounting data that would be associated with the

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[1619] TCC comments at 15-16

[1620] *See, e.g.*, GST comments at 29-30; WinStar comments at 38.

[1621] *See* AT&T reply at 33. For a detailed discussion, *see* AT&T reply at Appendix C (Affidavit of Lee Selwyn and Patricia Kravtin), pp.1-4.

[1622] *See* MCI reply at 15-16.

[1623] *See, e.g.*, Bell Atlantic comments at 37; BellSouth reply at 35-37; Colorado Commission comments at 34-35; GVNW comments at 35-36; Municipal Utilities comments at 19; NYNEX comments at 46-47; Ohio Consumers' Counsel comments at 23; PacTel comments at 65; Roseville Tel. comments at 6-8; Rural Tel. Coalition comments at 26-28; SBC comments at 88; TDS comments at 17-18; Texas Statewide Telephone Coop. Inc. comments at 7; USTA comments at 40.

[1624] *See, e.g.*, Bell Atlantic comments at 37; Municipal Utilities comments at 19; Ohio Consumers' Counsel comments at 23; Texas Statewide Telephone Coop. comments at 7.

[1625] *See, e.g.*, Alaska Tel. Ass'n comments at 4-5; Ameritech comments at 60; Bell Atlantic comments at 36; Cincinnati Bell comments at 30; Lincoln Tel. comments at 11-12; Roseville Tel. comments at 7-8; SBC comments at 59; SNET comments at 29; USTA comments at 40; *see also* NECA comments at 6, reply at 8-9.

particular type of interconnection requested by the competing carrier under section 251.[1626]

658. USTA cites reports that estimate that embedded costs that would not be recouped under a solely forward-looking pricing methodology are between $13 billion and $18.4 billion.[1627] Incumbent LECs contend that, because incumbent LECs must offset this shortfall of revenues against total costs that is created by a failure to recover embedded costs, they will be discouraged from investing to maintain and upgrade their networks in order to avoid the risk of again being unable to recover embedded costs.[1628] In addition, they argue that they incurred these embedded costs under federal and state regulatory oversight, which imposed on incumbent LECs social policy obligations and uneconomic costing practices, and that they therefore should be permitted to recover them.[1629] Incumbent LECs also assert that past investments were made under the belief that costs would be recovered, and that rates collected in the past did not reflect the risk that embedded costs might not be recovered in future rates.[1630] Several commenters argue that the opportunity to recover embedded costs through rates for interconnection and unbundled elements is particularly important for small and rural incumbent LECs.[1631] Finally, some parties also contend that, if they are not permitted to recover embedded costs, these costs must be recouped elsewhere, thus putting pressure on the states to recover these costs through local rates.[1632]

659. Despite their objections to embedded cost recovery, some non-incumbent parties explain conditions under which some limited recovery should be permitted. For example, MCI argues that, although embedded costs should not be recovered, it would be appropriate to

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[1626] NYNEX comments 54-56, reply at 27.

[1627] USTA comments at 55.

[1628] *See, e.g.*, Bell Atlantic comments at Attachment 1 (Affidavit of Professor Jerry A. Hausman), p.2; Lincoln Tel. comments at 16-17; USTA reply at 23.

[1629] *See, e.g.*, Ameritech reply at 30-31; BellSouth comments at 57; Lincoln Tel. comments at 16-17.

[1630] *See* Bell Atlantic reply at Exhibit 2 (Declaration of Richard A. Epstein), p.4.

[1631] *E.g.*, Home Tel. comments at 4; NECA comments at 9; TCA comments at 8; Texas Statewide Tel. Cooperative, Inc. comments at 9; Bay Springs reply at 10.

[1632] *See, e.g.*, USTA comments at 56; Wyoming Commission comments at 31-32; *see also* New York Commission reply at 9; *cf.*, Alabama Commission comments at 24-25; Texas Commission comments at 23, 26.

allow incumbent LECs to recover any depreciation reserve deficiency,[1633] which MCI estimates is only a small percentage of the residual between existing revenues and the revenues generated by a forward-looking, TSLRIC pricing of unbundled network elements.[1634] The Ad Hoc Telecommunications Users Committee asserts that, at a minimum, any nominal losses in economic value attributed to stranded investment should be weighed against the appreciation in value that incumbent LECs have experienced as reflected in share prices and market-to-book ratios.[1635] The Consumer Federation of America proposes that stranded investment might be recovered through an industry-wide recovery fund, if incumbent LECs can satisfy a rigorous set of showings to ensure that ratepayers are fairly treated.[1636] Finally, AT&T argues that, if the Commission determines that some portion of the residual should be recovered, it should be recovered through a competitively neutral, transitional, funding and distribution mechanism that will not distort competition.[1637]

660. *Opportunity Cost -- ECPR.* Incumbent LECs are the primary advocates for ECPR pricing of interconnection and unbundled network elements.[1638] They argue generally that ECPR is the approach that most closely parallels the method a firm in a competitive market would employ when faced with the opportunity of selling inputs to firms that intend to compete with it in its final product market.[1639] GTE asserts that the ECPR's purpose is to reward efficient entry into the market for the end product by ensuring that the incumbent LEC

[1633] A reserve imbalance exists when the carrier's actual "book" depreciation reserve differs from its "theoretical" reserve, which is the reserve which would exist if service lives and salvage values had been accurately forecast in the past. When the theoretical reserve exceeds the book reserve, the imbalance is a reserve deficiency. For most LECs the reserve imbalance is an overall deficiency. *Amortization of Depreciation Reserve Imbalances of Local Exchange Carriers*, CC Docket No. 87-447, Report and Order, 3 FCC Rcd 984 (1988).

[1634] *See* MCI comments at 73-75.

[1635] Ad Hoc Telecommunications Users Committee comments at 26-27.

[1636] *See* CFA/CU comments at 67-68.

[1637] *See* AT&T comments at 70-73.

[1638] *See, e.g.*, Ameritech comments at 91-93; GTE reply at 36-38; MECA comments at 50-52; PacTel comments at 69-71; SBC comments at Appendix A (Efficient Component Pricing Rule), pp.1-5; *see also* PacTel reply at Appendix C (Declaration of Richard D. Emerson).

[1639] *See, e.g.*, Rural Tel. Coalition reply at 28-30.

sells network access to itself and to its rivals on the same, nondiscriminatory terms.[1640] Thus, GTE claims, the ECPR sets prices for network elements that provide incentives for efficient entry and compensates incumbent LECs for the economic costs associated with sale of such elements.[1641] GTE further argues that ECPR accomplishes these tasks regardless of the market structure and regardless of the presence or absence of economic rents.[1642] SBC argues that the ECPR is equivalent to the avoided cost rule used for setting the prices of resold services and equivalent to the efficient imputation rule for pricing of retail services.[1643] Supporters of ECPR pricing also argue that prices will continue to move toward competitive levels where competition is provided by a more efficient carrier than the incumbent LEC.[1644]

661. New entrants and many other commenters oppose the use of the ECPR to set prices for interconnection and access to unbundled network elements.[1645] These parties argue that ECPR does not comply with the statutory mandate that interconnection and network elements be based on costs. They assert that using ECPR would allow incumbent LECs to retain monopoly rents and protect the incumbent LECs from competitive disciplinary market forces.[1646] Opponents of ECPR contend that ECPR pricing does not replicate a competitive environment, but instead perpetuates inefficient and anticompetitive aspects of the current pricing structure. Other commenters argue that the incumbent LECs may use ECPR to exclude or marginalize a more efficient rival in the complementary market by forcing the rival

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[1640] GTE comments at Attachment 4 (An Empirical Analysis of Pricing Under Sections 251 and 252 of the Telecommunications Act of 1996), p.7.

[1641] *Id.* at p.I-i

[1642] *Id.* at p.III-7.

[1643] SBC comments at Appendix A (Efficient Component Pricing Rule), pp.1-5

[1644] *See, e.g.*, Ameritech comments at 93; GTE comments at Attachment 4 (An Empirical Analysis of Pricing Under Sections 251 and 252 of the Telecommunications Act of 1996), p.III-6-8.

[1645] *See, e.g.*, Ad Hoc Telecommunications Users Committee comments at 55; ALTS reply at 26-29; Cable & Wireless comments 35; California Commission reply at 20; CFA/CU comments at 41-45; CompTel reply at 40-49; Cox reply at 29; DoJ reply at 11-13; Frontier comments at 23; Mass. Attorney General comments at 6-9; MCI comments at 70-71, reply at 16; MFS comments at 60 n.67; Ohio Consumers' Counsel comments at 25 n.7, reply at 15; Sprint comments at 59 n.33; Texas Public Utility Counsel comments at 36; Time Warner comments at 56-58; Telecommunications Resellers Ass'n comments at 41-42; WinStar comments at 41.

[1646] *See, e.g.*, Cable & Wireless comments 35; California Commission reply at 20; CompTel reply at 40; Mass. Attorney General comments at 6-8; Time Warner comments 56-58; Telecommunications Resellers Ass'n comments at 41-42.

to operate on the higher end of its cost curve through higher interconnection charges. They also argue that prices based on ECPR create incentives for incumbent LECs to shift costs of their competitive services to their bottleneck services, which distorts competition.[1647] Finally, opponents of ECPR assert that ECPR pricing shields the largest share of costs possible from competition, preserves the status quo, and imposes a barrier to entry.[1648]

662. Baumol, Ordover, and Willig, principal authors of the theory, explain that ECPR is not applicable for pricing of interconnection and unbundled network elements because the existing end user rates for local telecommunications are not appropriate as a baseline for ECPR. They claim that cross-subsidies are common in the current rates, and rates depart systematically from pertinent costs. Baumol, Ordover, and Willig conclude that applying ECPR to existing rates would result in component prices that lock in the incumbent LECs' monopoly profits and pricing inefficiencies, and would attract inefficient entry, where rates are too high, and would preclude efficient entry where rates are too low.[1649]

663. *Universal Service Subsidies.* Most parties other than incumbent LECs and some state commissions agree that it would be inconsistent with both the cost-based rate requirements of section 252(d)(1) and the requirement in section 254(b)(5), that universal service support mechanisms "be specific [and] predictable. . ."[1650] for states to include any universal service subsidies in the rates they set for interconnection, collocation, and unbundled network elements.[1651] They argue that the 1996 Act requires that rates reflect the economic cost of providing network elements and interconnection and does not authorize subsidies that have nothing to do with economic costs.[1652] With regard to the requirements of section 254,

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[1647] *See, e.g.*, N. Economides comments at 4-6.

[1648] *See, e.g.*, CFA/CU comments at 42.

[1649] *See* AT&T comments at Appendix C (Affidavit of William J. Baumol, Janusz A. Ordover, and Robert D. Willig), pp.8-9.

[1650] 47 U.S.C. § 254(b)(5).

[1651] *See, e.g.*, ACTA comments at 23; AT&T comments at 70-73; Competition Policy Institute comments at 20; CompTel comments at 73-74; DoJ comments at 56-59; MCI comments at 75; NEXTLINK comments at 29; Sprint comments at 61-62; Telecommunications Resellers Ass'n comments at 39 n.76; Teleport comments at 48-49; WinStar comments at 40-41, reply at 13-14.

[1652] AT&T and CompTel further contend that to permit any universal service subsidies in the rates set for interconnection, collocation and unbundled network elements would be to base rates on the embedded costs of incumbent LEC expenditures rather than the forward-looking economic costs of providing a network element as mandated by section 252(d)(1). *See* AT&T comments at 70-73; CompTel comments at 72-74.

these parties argue that, to the extent rates need to be subsidized for universal service purposes, the subsidy should be collected from all carriers on a non-discriminatory and competitively neutral basis.[1653] The Washington Commission relates its own experience of rejecting US West's request for a per minute universal service charge to cover "carrier of last resort" obligations and its finding that residential rates were sufficient to cover the costs of residential service.[1654]

664. In contrast, several incumbent LECs and state public utility commissions maintain that incumbent LECs should be permitted to recover their embedded costs in the rates set for interconnection, collocation, and unbundled network elements. These commenters claim that rates based on incremental costs alone fail to account for certain costs historically incurred to accomplish carrier-of-last-resort and universal service social policy objectives.[1655] The Attorneys General caution the Commission not to classify legitimate contributions to joint and common costs as impermissible implicit universal service subsidies.[1656]

665. Several parties comment on the issue of how universal service funding should be handled during the interim period between the effective date of this order and the effective date of the Commission's order implementing the section 254 universal service requirements in May 1997. AT&T proposes that the Commission adopt a competitively-neutral funding and distribution mechanism.[1657] CompTel proposes that the Commission grant a blanket waiver of incremental cost pricing for exchange access. Under CompTel's plan, pending completion of the section 254 proceeding, the incumbent LECs would continue to provide exchange access pursuant to their intrastate and interstate carrier-to-carrier access charge tariffs. At the conclusion of the section 254 proceeding, the Commission would determine whether the incumbent LECs are entitled to recover any portion of those revenues from competitive carriers and, if so, devise appropriate mechanisms for doing so. CompTel asserts

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[1653] *See, e.g.*, ACTA comments at 23; AT&T comments at 69; Massachusetts Commission comments at 8-10; MCI comments at 75; Michigan Commission comments at 19.

[1654] Washington Commission reply at 6.

[1655] *See, e.g.*, Alabama Commission comments at 24-25; Bay Springs, *et al.* comments at 16; BellSouth comments at 57; Matanuska Tel. comments at 2-3; TDS comments at 20; SBC comments at 89; Western Alliance comments at 6-7; *but see* BellSouth comments at 57 (if the universal service proceeding establishes a federal fund or if the states establish explicit funds, there will be no need for subsidies to be built into interconnection and unbundled network element rates).

[1656] Attorneys General reply at 10-11.

[1657] AT&T comments at 73.

that, by preserving the status quo for exchange access until those issues are fully considered and resolved, the Commission would ensure that the 1996 Act does not cause any unnecessary short-term disruption to carriers or consumers.[1658]

666. The Western Alliance contends that states should have authority to order the recovery of lost contribution through access charges until explicit and competitively neutral support mechanisms are in place.[1659] Similarly, the Massachusetts Commission argues that the states should have authority to include universal service subsidies in the rates for interconnection during this period. The Massachusetts Commission further contends that prohibiting states from exercising this authority will promote inefficient competition and ultimately could result in confiscation claims being filed by incumbent LECs.[1660]

667. Some parties take the position that "play or pay" proposals incorporate implicit subsidies into rates for interconnection and unbundled network elements and are therefore inconsistent with the 1996 Act.[1661] They further argue that such programs violate the 1996 Act because they do not require all telecommunications carriers to contribute on an equitable and nondiscriminatory basis and do not qualify as "specific, predictable and sufficient mechanisms" to preserve and advance universal service.[1662]

668. Other commenters argue, however, that the 1996 Act permits reasonable differences in interconnection rates charged to carriers so long as similarly-situated carriers are treated alike. They maintain that the anti-discrimination provisions of the 1996 Act only prohibit unreasonable discrimination. Thus, they contend that "play or pay" schemes are consistent with the 1996 Act.[1663] Several parties also contend that such schemes are authorized by the reservation of state power to adopt and implement universal service measures in section 254.[1664] Moreover, the New York Commission argues that the section

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[1658] CompTel comments at 84.

[1659] Western Alliance comments at 6-7.

[1660] Mass. Commission comments at 9-10.

[1661] *See, e.g.*, Frontier comments at 23; Teleport comments at 48-49; Texas Public Utility Counsel comments at 35-36; WinStar reply at 14 n.20.

[1662] WinStar comments at 40; *see also* Texas Public Utility Counsel comments at 35.

[1663] *See, e.g.*, New York Commission comments at 15-18; NYNEX comments at 91-97.

[1664] NYNEX comments at 95-97; New York Commission reply at 6.

254(e) requirement that universal service funding must be explicit applies only to the federal Universal Service Fund, which is yet to be established, and not to state initiatives.[1665]

669. Some commenters urge the Commission to address universal service in the section 254 proceeding rather than in the section 251/252 interconnection proceeding.[1666] Other commenters suggest that universal service, access restructure, and interconnection issues should be addressed in a coordinated manner or in a consolidated proceeding.[1667]

670. *Fifth Amendment Issues.* Several incumbent LECs claim that use of a LRIC-based pricing methodology that does not permit recovery of at least joint and common costs and a reasonable profit constitutes unlawful confiscation in violation of the Fifth and Fourteenth Amendments.[1668] Other LECs further argue that, in order to avoid an unconstitutional taking, any pricing rules we adopt must enable them to recover total costs, including historical or embedded costs.[1669] Generally, these parties contend that prices limited by a forward-looking economic cost methodology do not permit an incumbent LEC to remain profitable over time because LRIC fails to recover total costs.[1670] They assert that, if the Commission decides now, long after those costs have been sunk, to bar compensatory returns, it will violate due process and undermine the incumbent LECs' legitimate, investment-backed expectations.[1671] Such interference with legitimate investor expectations, they contend, constitutes an unlawful taking.[1672] GTE contends that Commission adoption of a pure TSLRIC methodology would represent an unconstitutional taking, because it would require

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[1665] New York Commission reply at 6.

[1666] *See, e.g.*, Competition Policy Institute comments at 13-14; F. Williamson comments at 8; Texas Public Utility Counsel comments at 36; ALTS reply at 35.

[1667] *See, e.g.*, Ad Hoc Telecommunications Users Committee comments at 35; TDS comments at 20.

[1668] *See, e.g.*, GTE comments at 65-71; MECA comments at 42; Puerto Rico Telephone Company reply at 11-12; PacTel comments at 67.

[1669] *See, e.g.*, NYNEX comments at 43-44; PacTel comments at 65-66; SNET comments at 29; Roseville Tel. comments at 6-7.

[1670] *See, e.g.*, Ameritech comments at 62-70; GTE comments at 68-71, reply at 31-32; USTA comments at 39-42.

[1671] *See, e.g.*, GTE comments at 66-71, reply at 31-33; USTA comments at 40-45, reply at 21-25, 32-34.

[1672] *Id.*

use of the incumbent LEC's physical property, thus giving rise to an obligation to provide just compensation.[1673]

671. Other parties, including the Department of Justice and new entrants, contend that using a forward-looking cost-based pricing methodology for setting the rates for interconnection and unbundled elements does not constitute an unlawful taking.[1674] These commenters point out that many state commissions already utilize a forward-looking cost-based pricing methodology.[1675] They also argue that, because forward-looking cost-based rates capture all costs for interconnection and unbundled network elements, including the risk-adjusted cost of capital, such a methodology would not result in an unlawful taking.[1676] These parties further assert that the LECs' takings claims are premature, not demonstrated with sufficient specificity, and overstate the scope of the constitutional guarantee.[1677] Commenters note that no incumbent LEC has made any effort to demonstrate the actual impact of a LRIC-based pricing methodology on its "financial integrity."[1678] These parties contend that there is no unconstitutional impairment if the shortfall is not sufficient to jeopardize the operating and financial integrity of the utility. Finally, these commenters maintain that there is no constitutional right to a particular rate-setting methodology (*i.e.*, historical cost) and there are no general principles that require every component of an integral whole of a utility service to show a profit.[1679]

[1673] *See* GTE comments at 65-67.

[1674] *See, e.g.*, ALTS reply at 8-11; AT&T comments at 70-71; CompTel reply at 37-40; DoJ reply at 13, 16-19; MCI reply at 18-20.

[1675] *See, e.g.*, AT&T comments at 49-50; Cable & Wireless reply at 24-25; MCI reply at 19. AT&T also notes that when U S West and BellSouth have been new entrants into markets, they have advocated a LRIC approach. AT&T comments at 50-51 n.72.

[1676] *See, e.g.*, Frontier reply at 14; MCI reply at 18-19.

[1677] *See, e.g.*, DoJ reply at 16-18.

[1678] DoJ reply at 16-18; MCI reply at 18.

[1679] *See, e.g.*, Jones Intercable reply at 16-17.

(3) Discussion

672. *Overview*. Having concluded in Section II.D., above, that we have the requisite legal authority and that we should establish national pricing rules, we conclude here that prices for interconnection and unbundled elements pursuant to sections 251(c)(2), 251(c)(3), and 252(d)(1), should be set at forward-looking long-run economic cost. In practice, this will mean that prices are based on the TSLRIC of the network element, which we will call Total Element Long Run Incremental Cost (TELRIC), and will include a reasonable allocation of forward-looking joint and common costs. The 1996 Act encourages competition by removing barriers to entry and providing an opportunity for potential new entrants to purchase unbundled incumbent LEC network elements to compete efficiently to provide local exchange services. We believe that the prices that potential entrants pay for these elements should reflect forward-looking economic costs in order to encourage efficient levels of investment and entry.

673. In this section, we describe this forward-looking, cost-based pricing standard in detail. First, we define the terms we are using, explain how the methodology we are adopting differs from other costing approaches, and describe how it should be implemented. In particular, we explain that the price of a network element should include the forward-looking costs that can be attributed directly to the provision of services using that element, which includes a reasonable return on investment (*i.e.*, "profit"), plus a reasonable share of the forward-looking joint and common costs. Second, we address potential cost measures that must not be included in a TELRIC analysis, such as embedded (or historical) costs, opportunity costs, or universal service subsidies. Finally, we refute arguments that this methodology would violate the incumbent LECs' rights under the Fifth Amendment.

(a) Total Element Long Run Incremental Cost

674. *Definitions of Terms*. In light of the various possible definitions of a number of the critical economic terms used in this context, we begin by defining terms as we use them in this Order. Specifically, we provide definitions for the following terms: "incremental cost;" "economic cost;" "embedded or accounting cost;" "joint cost;" "common cost;" "long run incremental cost;" "total service long run incremental cost;" "total element long run incremental cost." In addition to defining these terms, we explain the economic rationale behind the concepts.

675. Incremental costs are the additional costs (usually expressed as a cost per unit) that a firm will incur as a result of expanding the output of a good or service by producing an additional quantity of the good or service.[1680] Incremental costs are forward-looking in the

[1680] *See* 1 Alfred Kahn *The Economics of Regulation* 66 (1971); William Baumol and Gregory Sidak, *Toward Competition in Local Telephony* 57 (1994).

sense that these costs are incurred as the output level changes by a given increment.[1681] The costs that are considered incremental will vary greatly depending on the size of the increment. For example, the incremental cost of carrying an additional call from a residence that is already connected to the network to its end office is virtually zero. The incremental cost of connecting a new residence to its end office, however, is the cost of the loop. Forward-looking incremental costs, plus a portion of the forward-looking joint and common costs, are sometimes referred to as "economic costs." Embedded or accounting costs are costs that firms incurred in the past for providing a good or service and are recorded as past operating expenses and depreciation. Due to changes in input prices and technologies, incremental costs may differ from embedded costs of that same increment. In competitive markets, the price of a good or service will tend towards its long-run incremental cost.

676. Certain types of costs arise from the production of multiple products or services. We use the term "joint costs" to refer to costs incurred when two or more outputs are produced in fixed proportion by the same production process (*i.e.*, when one product is produced, a second product is generated by the same production process at no additional cost). The term "common costs" refers to costs that are incurred in connection with the production of multiple products or services, and remains unchanged as the relative proportion of those products or services varies (*e.g.*, the salaries of corporate managers). Such costs may be common to all services provided by the firm or common to only a subset of those services or elements. If a cost is common with respect to a subset of services or elements, for example, a firm avoids that cost only by not providing each and every service or element in the subset. For the purpose of our discussion, we refer to joint and common costs as simply common costs unless the distinction is relevant in a particular context.

677. The term "long run," in the context of "long run incremental cost," refers to a period long enough so that all of a firm's costs become variable or avoidable.[1682] The term "total service," in the context of TSLRIC, indicates that the relevant increment is the entire quantity of the service that a firm produces, rather than just a marginal increment over and above a given level of production. Depending on what services are the subject of a study, TSLRIC may be for a single service or a class of similar services. TSLRIC includes the incremental costs of dedicated facilities and operations that are used by only the service in question. TSLRIC also includes the incremental costs of shared facilities and operations that are used by that service as well as other services.

678. While we are adopting a version of the methodology commonly referred to as

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[1681] William Baumol and Gregory Sidak, *Toward Competition in Local Telephony* 57 (1994).

[1682] *See, e.g.*, William Baumol, *Economic Theory and Operations Analysis* 290 (4th ed. 1977) ("The very long run is a period so long that all of the firm's present contracts will have run out, its present plant and equipment will have been worn out or rendered obsolete and will therefore need replacement, etc.").

TSLRIC as the basis for pricing interconnection and unbundled elements, we are coining the term "total element long run incremental cost" (TELRIC) to describe our version of this methodology. The incumbent LEC offerings to be priced using this methodology generally will be "network elements," rather than "telecommunications services," as defined by the 1996 Act.[1683] More fundamentally, we believe that TELRIC-based pricing of discrete network elements or facilities, such as local loops and switching, is likely to be much more economically rational than TSLRIC-based pricing of conventional services, such as interstate access service and local residential or business exchange service. As discussed in greater detail below, separate telecommunications services are typically provided over shared network facilities, the costs of which may be joint or common with respect to some services. The costs of local loops and their associated line cards in local switches, for example, are common with respect to interstate access service and local exchange service, because once these facilities are installed to provide one service they are able to provide the other at no additional cost. By contrast, the network elements, as we have defined them,[1684] largely correspond to distinct network facilities. Therefore, the amount of joint and common costs that must be allocated among separate offerings is likely to be much smaller using a TELRIC methodology rather than a TSLRIC approach that measures the costs of conventional services. Because it is difficult for regulators to determine an economically-optimal allocation of any such joint and common costs, we believe that pricing elements, defined as facilities with associated features and functions, is more reliable from the standpoint of economic efficiency than pricing services that use shared network facilities.

679. *Description of TELRIC-Based Pricing Methodology.* Adopting a pricing methodology based on forward-looking, economic costs best replicates, to the extent possible, the conditions of a competitive market. In addition, a forward-looking cost methodology reduces the ability of an incumbent LEC to engage in anti-competitive behavior. Congress recognized in the 1996 Act that access to the incumbent LECs' bottleneck facilities is critical to making meaningful competition possible. As a result of the availability to competitors of the incumbent LEC's unbundled elements at their economic cost, consumers will be able to reap the benefits of the incumbent LECs' economies of scale and scope, as well as the benefits of competition. Because a pricing methodology based on forward-looking costs simulates the conditions in a competitive marketplace, it allows the requesting carrier to produce efficiently and to compete effectively, which should drive retail prices to their competitive levels. We believe that our adoption of a forward-looking cost-based pricing methodology should facilitate competition on a reasonable and efficient basis by all firms in the industry by establishing prices for interconnection and unbundled elements based on costs similar to those incurred by the incumbents, which may be expected to reduce the regulatory

[1683] 47 U.S.C. §§ 3(29), 3(46).

[1684] *See supra* Section V.

burdens and economic impact of our decision for many parties, including both small entities seeking to enter the local exchange markets and small incumbent LECs.[1685]

680. We note that incumbent LECs have greater access to the cost information necessary to calculate the incremental cost of the unbundled elements of the network. Given this asymmetric access to cost data, we find that incumbent LECs must prove to the state commission the nature and magnitude of any forward-looking cost that it seeks to recover in the prices of interconnection and unbundled network elements.

681. Some parties express concern that the information required to compute prices based on forward-looking costs is inherently so hypothetical as to be of little or no practical value.[1686] Based on the record before us, we disagree. A number of states, which ultimately will have to review forward-looking cost studies in carrying out their duties under section 252, either have already implemented forward-looking, incremental costing methodologies to set prices for interconnection and unbundled network elements or support the use of such an approach.[1687] While these states have applied somewhat different definitions of, and approaches to setting prices developed on, an incremental cost methodology, the record demonstrates that such approaches are practical and implementable.

682. We conclude that, under a TELRIC methodology, incumbent LECs' prices for interconnection and unbundled network elements shall recover the forward-looking costs directly attributable to the specified element, as well as a reasonable allocation of forward-looking common costs. Per-unit costs shall be derived from total costs using reasonably accurate "fill factors" (estimates of the proportion of a facility that will be "filled" with network usage); that is, the per-unit costs associated with a particular element must be derived by dividing the total cost associated with the element by a reasonable projection of the actual total usage of the element. Directly attributable forward-looking costs include the incremental costs of facilities and operations that are dedicated to the element. Such costs typically include the investment costs and expenses related to primary plant used to provide that element. Directly attributable forward-looking costs also include the incremental costs of

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[1685] *See* Regulatory Flexibility Act, 5 U.S.C. §§ 601 *et seq.*

[1686] *See, e.g.*, GVNW comments at 35; NYNEX comments at 54; USTA comments at 47-50.

[1687] *See, e.g.*, Louisiana Commission comments at 4; Texas Commission comments at 22; Washington Commission comments at 25; California Commission comments at 28-29; Colorado Commission comments at 35; Maryland Commission comments at 7-8; Oklahoma Commission comments at Attachment A (Oklahoma Corporation Commission Telephone Rules, OAC 165:55) pp. 10-11. The Wyoming and Florida commissions have indicated their support for such an approach. *See* Wyoming Commission comments at 27 (supporting uniform use of TSLRIC costing methods so long as details left to states); *see also* Florida Commission comments at 26 (TSLRIC may be appropriate to set cost standard for a price floor).

shared facilities and operations. Those costs shall be attributed to specific elements to the greatest extent possible.[1688] For example, the costs of conduits shared by both transport and local loops, and the costs of central office facilities shared by both local switching and tandem switching, shall be attributed to specific elements in reasonable proportions. More broadly, certain shared costs that have conventionally been treated as common costs (or overheads) shall be attributed directly to the individual elements to the greatest extent possible. The forward-looking costs directly attributable to local loops, for example, shall include not only the cost of the installed copper wire and telephone poles but also the cost of payroll and other back office operations relating to the line technicians, in addition to other attributable costs.

683. Forward-looking cost methodologies, like TELRIC, are intended to consider the costs that a carrier would incur in the future. Thus, a question arises whether costs should be computed based on the least-cost, most efficient network configuration and technology currently available, or whether forward-looking cost should be computed based on incumbent LECs' existing network infrastructures, taking into account changes in depreciation and inflation. The record indicates three general approaches to this issue. Under the first approach, the forward-looking economic cost for interconnection and unbundled elements would be based on the most efficient network architecture, sizing, technology, and operating decisions that are operationally feasible and currently available to the industry. Prices based on the least-cost, most efficient network design and technology replicate conditions in a highly competitive marketplace by not basing prices on existing network design and investments unless they represent the least-cost systems available for purchase. This approach, however, may discourage facilities-based competition by new entrants because new entrants can use the incumbent LEC's existing network based on the cost of a hypothetical least-cost, most efficient network.

684. Under the second approach, the cost of interconnection and unbundled network elements would be based on existing network design and technology that are currently in operation.[1689] Because this approach is not based on a hypothetical network in the short run, incumbent LECs could recover costs based on their existing operations, and prices for interconnection and unbundled elements that reflect inefficient or obsolete network design and technology. This is essentially an embedded cost methodology.

685. Under the third approach, prices for interconnection and access to unbundled elements would be developed from a forward-looking economic cost methodology based on the most efficient technology deployed in the incumbent LEC's current wire center locations.

[1688] *Compare Telephone Company-Cable Television Cross-Ownership Rules*, CC Docket No. 87-266, Memorandum Opinion and Order on Reconsideration and Third Further Notice of Proposed Rulemaking, 10 FCC Rcd 244, 345-46 (1994).

[1689] *See, e.g.*, BellSouth reply at 37; Roseville Tel. reply at 8; USTA reply at 18-19.

This approach mitigates incumbent LECs' concerns that a forward-looking pricing methodology ignores existing network design, while basing prices on efficient, new technology that is compatible with the existing infrastructure. This benchmark of forward-looking cost and existing network design most closely represents the incremental costs that incumbents actually expect to incur in making network elements available to new entrants. Moreover, this approach encourages facilities-based competition to the extent that new entrants, by designing more efficient network configurations, are able to provide the service at a lower cost than the incumbent LEC. We, therefore, conclude that the forward-looking pricing methodology for interconnection and unbundled network elements should be based on costs that assume that wire centers will be placed at the incumbent LEC's current wire center locations, but that the reconstructed local network will employ the most efficient technology for reasonably foreseeable capacity requirements.

686. We agree with USTA, Bell Atlantic, and BellSouth that, as a theoretical matter, the combination of significant sunk investment, declining technology costs, and competitive entry may increase the depreciation costs and cost of capital of incumbent LECs. We do not agree, however, that TSLRIC does not or cannot account for risks that an incumbent LEC incurs because it has sunk investments in facilities. On the contrary, properly designed depreciation schedules should account for expected declines in the value of capital goods. Both AT&T and MCI appear to agree with this proposition.[1690] For example, AT&T states, "[i]n order to estimate TSLRIC, one must perform a discounted cash flow analysis of the future costs associated with the decision to invest . . . . One-time costs associated with the acquisition of capital goods are amortized over the economic life of the assets using the user cost of capital . . . , which requires accounting for both expected capital good price changes and economic depreciation."[1691] Moreover, we are confident that parties to an arbitration with TELRIC studies can propose specific depreciation rate adjustments that reflect expected asset values over time.

687. As noted, we also agree that, as a matter of theory, an increase in risk due to entry into the market for local exchange service can increase a LEC's cost of capital. We believe that this increased risk can be partially mitigated, however, by offering term discounts, since long-term contracts can minimize the risk of stranded investment. In addition, growth in overall market demand can increase the potential of the incumbent LEC to use some of its

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[1690] *See* Letter from Leonard S. Sawicki, Director, FCC Affairs, MCI Telecommunications Corp. to William F. Caton, Acting Secretary, FCC, July 24, 1996 at Attachment (Depreciation and Capital Recovery Issues: A Response to Professor Hausman), pp.1-3; *see also* Letter from Richard N. Clarke, AT&T, to William F. Caton, Acting Secretary, FCC, July 19, 1996 at Attachment (Capital Recovery Issues in TSLRIC Pricing: Response to Professor Jerry A. Hausman).

[1691] Letter from Richard N. Clarke, AT&T, to William F. Caton, Acting Secretary, FCC, July 19, 1996 at Attachment (Capital Recovery Issues in TSLRIC Pricing: Response to Professor Jerry A. Hausman), p.8.

displaced facilities for other purposes. Overall, we think that these factors can and should be captured in any LRIC model and therefore we do not agree that this requires a departure from the general principle of forward-looking cost-based pricing for network elements.

688. We are not persuaded by USTA's argument that forward looking methodologies fail to adjust the cost of capital to reflect the risks associated with irreversible investments and that they are "biased downward by a factor of three." First, USTA's argument unrealistically assumes that competitive entry would be instantaneous. The more reasonable assumption of entry occurring over time will reduce the costs associated with sunk investment. Second, we find it unlikely that investment in communications equipment is entirely irreversible or that such equipment would become valueless once facilities-based competition begins. In a growing market, there most likely would be demand for at least some embedded telecommunications equipment, which would therefore retain its value. Third, contractual arrangements between the new entrant and the incumbent that specifically address USTA's concerns and protect incumbent's investments during transition can be established.

689. Finally we are not persuaded that the use by firms of hurdle rates that exceed the market cost of capital is convincing evidence that sunk investments significantly increase a firm's cost of capital. An alternative explanation for this phenomenon is that the process that firms use to choose among investment projects results in overestimates of their returns. Firms therefore use hurdle rates in excess of the market cost of capital to account for these overestimates.[1692]

690. *Summary of TELRIC Methodology.* The following summarizes our conclusions regarding setting prices of interconnection and access to unbundled network elements based on the TELRIC methodology for such elements. The increment that forms the basis for a TELRIC study shall be the entire quantity of the network element provided. As we have previously stated, all costs associated with the providing the element shall be included in the incremental cost. Only forward-looking, incremental costs shall be included in a TELRIC study. Costs must be based on the incumbent LEC's existing wire center locations and most efficient technology available.

691. Any function necessary to produce a network element must have an associated cost. The study must explain with specificity why and how specific functions are necessary to provide network elements and how the associated costs were developed. Only those costs that are incurred in the provision of the network elements in the long run shall be directly

[1692] *See* Richard Thaler, *The Winner's Curse*, 2 J. Econ. Perspectives 201 (1988); Keith Brown, *Note on the Apparent Bias of Net Revenue Estimates for Capital Investment Projects*, 29 J. Fin. 1215-16 (1974); Daniel Kahneman and Daniel Lovallo, *Timid Choices, Bold Forecasts*, 39 Management Science 17, 28 (1993). In addition, we note that Hausman's arguments that TSLRIC method underestimate the true cost of an element apply only to the capital expense associated with an element and not to the operating expense.

attributable to those elements. Costs must be attributed on a cost-causative basis. Costs are causally-related to the network element being provided if the costs are incurred as a direct result of providing the network elements, or can be avoided, in the long run, when the company ceases to provide them. Thus, for example, the forward-looking costs of capital (debt and equity) needed to support investments required to produce a given element shall be included in the forward-looking direct cost of that element. Directly attributable costs shall include costs such as certain administrative expenses, which have traditionally been viewed as common costs, if these costs vary with the provision of network elements. Retailing costs, such as marketing or consumer billing costs associated with retail services, are not attributable to the production of network elements that are offered to interconnecting carriers and must not be included in the forward-looking direct cost of an element.

692. In a TELRIC methodology, the "long run" used shall be a period long enough that all costs are treated as variable and avoidable.[1693] This "long run" approach ensures that rates recover not only the operating costs that vary in the short run, but also fixed investment costs that, while not variable in the short term, are necessary inputs directly attributable to providing the element.

693. States may review a TELRIC economic cost study in the context of a particular arbitration proceeding, or they may conduct such studies in a rulemaking and apply the results in various arbitrations involving incumbent LECs. In the latter case, states must replace any interim rates[1694] set in arbitration proceedings with the permanent rate resulting from the separate rulemaking. This permanent rate will take effect at or about the time of the conclusion of the separate rulemaking and will apply from that time forward.

694. *Forward-Looking Common Costs.* Certain common costs are incurred in the provision of network elements. As discussed above, some of these costs are common to only a subset of the elements or services provided by incumbent LECs. Such costs shall be allocated to that subset, and should then be allocated among the individual elements or services in that subset, to the greatest possible extent. For example, shared maintenance facilities and vehicles should be allocated only to the elements that benefit from those facilities and vehicles. Common costs also include costs incurred by the firm's operations as a whole, that are common to all services and elements (*e.g.*, salaries of executives involved in overseeing all activities of the business), although for the purpose of pricing interconnection and access to unbundled elements, which are intermediate products offered to competing carriers, the relevant common costs do not include billing, marketing, and other costs

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[1693] *See* 1 Alfred E. Kahn *The Economics of Regulation: Principles and Institutions* 70-71 (1988).

[1694] *See infra*, Section VII.C., discussing default proxy price ceilings and ranges.

attributable to the provision of retail service.[1695] Given these common costs, setting the price of each discrete network element based solely on the forward-looking incremental costs directly attributable to the production of individual elements will not recover the total forward-looking costs of operating the wholesale network.[1696] Because forward-looking common costs are consistent with our forward-looking, economic cost paradigm, a reasonable measure of such costs shall be included in the prices for interconnection and access to network elements.

695. The incumbent LECs generally argue that common costs are quite significant,[1697] while several other parties maintain that these amounts are minimal.[1698] Because the unbundled network elements correspond, to a great extent, to discrete network facilities, and have different operating characteristics, we expect that common costs should be smaller than the common costs associated with the long-run incremental cost of a service. We expect that many facility costs that may be common with respect to the individual services provided by the facilities can be directly attributed to the facilities when offered as unbundled network elements. Moreover, defining the network elements at a relatively high level of aggregation, as we have done,[1699] should also reduce the magnitude of the common costs. A properly conducted TELRIC methodology will attribute costs to specific elements to the greatest possible extent, which will reduce the common costs. Nevertheless, there will remain some common costs that must be allocated among network elements and interconnection services. For example, at the sub-element level of study (*e.g.*, identifying the respective costs of 2-wire loops, 4-wire loops, ISDN loops, and so on), common costs may be a significant proportion of all the costs that must be recovered from sub-elements. Given the likely asymmetry of information regarding network costs, we conclude that, in the arbitration process, incumbent LECs shall have the burden to prove the specific nature and magnitude of these forward-looking common costs.

696. We conclude that forward-looking common costs shall be allocated among elements and services in a reasonable manner, consistent with the pro-competitive goals of the

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[1695] *See infra*, Section VIII.B., describing "avoided costs" in the resale context.

[1696] *See, e.g.*, AT&T comments at 61-66; Teleport comments at 47-48.

[1697] *See, e.g.*, PacTel reply at 27-28; *see also* Cincinnati Bell reply at 10; USTA comments at Attachment 1 (Affidavit of Jerry A. Hausman), p.4 n.1.

[1698] *See, e.g.*, Competition Policy Institute comments at 19; MCI comments at 66; Texas Public Utility Counsel comments at 24.

[1699] *See supra*, Section V., discussing unbundling requirements.

1996 Act. One reasonable allocation method would be to allocate common costs using a fixed allocator, such as a percentage markup over the directly attributable forward-looking costs. We conclude that a second reasonable allocation method would allocate only a relatively small share of common costs to certain critical network elements, such as the local loop and collocation, that are most difficult for entrants to replicate promptly (*i.e.*, bottleneck facilities). Allocation of common costs on this basis ensures that the prices of network elements that are least likely to be subject to competition are not artificially inflated by a large allocation of common costs. On the other hand, certain other allocation methods would not be reasonable. For example, we conclude that an allocation methodology that relies exclusively on allocating common costs in inverse proportion to the sensitivity of demand for various network elements and services may not be used.[1700] We conclude that such an allocation could unreasonably limit the extent of entry into local exchange markets by allocating more costs to, and thus raising the prices of, the most critical bottleneck inputs, the demand for which tends to be relatively inelastic. Such an allocation of these costs would undermine the pro-competitive objectives of the 1996 Act.

697. We believe that our treatment of forward-looking common costs will minimize regulatory burdens and economic impact for all parties involved in arbitration of agreements for interconnection and access to unbundled elements, and will advance the 1996 Act's pro-competitive objectives for local exchange and exchange access markets.[1701] In our decisionmaking, we have considered the economic impact of our rules in this section on small incumbent LECs. For example, although opposed to the use of a forward-looking, economic cost methodology, small incumbent LECs favor the recovery of joint and common costs in the event the Commission adopts forward-looking cost methodology. We are adopting such an approach. Moreover, the cost-based pricing methodology that we are adopting is designed to permit incumbent LECs to recover their economic costs of providing interconnection and unbundled elements, which may minimize the economic impact of our decisions on incumbent LECs, including small incumbent LECs. We also note that certain small incumbent LECs are not subject to our rules under section 251(f)(1) of the 1996 Act, unless otherwise determined by a state commission, and certain other small incumbent LECs may seek relief from their state commissions from our rules under section 251(f)(2) of the 1996 Act.[1702]

[1700] *See* Frank P. Ramsey, *A Contribution to the Theory of Taxation*, 37 Econ. J. 47 (1927); *see generally* Kenneth E. Train, *Optimal Regulation: The Economic Theory of Natural Monopoly* 115-40 (1992) (discussing efficiency properties of Ramsey prices); Bridger M. Mitchell & Ingo Vogelsang, *Telecommunications Pricing: Theory and Practice* 43-61 (1991). The sensitivity of demand is measured by the elasticity of demand, which is defined as the percentage change in the quantity of a service demanded for a one per cent change in price.

[1701] *See* Regulatory Flexibility Act, 5 U.S.C. §§ 601 *et seq.*

[1702] 47 U.S.C. § 251(f).

698. We further conclude that, for the aggregate of all unbundled network elements, incumbent LECs must be given a reasonable opportunity to recover their forward-looking common costs attributable to operating the wholesale network. In no instance should prices exceed the stand-alone cost for a specific element, and in most cases they should be below stand-alone costs. Stand-alone costs are defined as the forward-looking cost that an efficient entrant would incur in providing a given element or any combination of elements. No price higher than stand-alone cost could be sustained in a market from which entry barriers were completely absent. Where there are few common costs, there is likely to be only a minimal difference between the forward-looking costs that are directly attributable to the particular element, which excludes these costs, and stand-alone cost, which includes all of them. Network elements should not, however, be priced at levels that would enable the incumbent LEC to recover the same common costs multiple times from different elements. Any multiple recovery would be unreasonable and thus in violation of the statutory standard. Further, we note that the sum of the direct costs and the forward-looking common costs of all elements will likely differ from the incumbent LEC's historical, fully distributed costs.

699. *Reasonable Return on Investment and "Profit."* Section 252(d)(1) states that rates for interconnection and access to unbundled elements "may include a reasonable profit."[1703] We find that the TELRIC pricing methodology we are adopting provides for such a reasonable profit and thus no additional profit is justified under the statutory language. We note there are two types of profit. First, in plain English, profit is defined as "the excess of returns over expenditure in a transaction or a series of transactions."[1704] This is also known as a "normal" profit, which is the total revenue required to cover all of the costs of a firm, including its opportunity costs.[1705] Second, there is "economic" profit, which is any return in excess of normal profit.[1706] Thus, for example, if the normal return in an industry is 10 percent and a firm earns a return of 14 percent, the economic profit for that firm is 4 percent. Economic is also referred to as "supranormal" profit. We conclude that the definition of "normal" profit is embodied in "reasonable profit" under Section 252(d)(1).

700. The concept of normal profit is embodied in forward-looking costs because the forward-looking cost of capital, *i.e.*, the cost of obtaining debt and equity financing, is one of the forward-looking costs of providing the network elements. This forward-looking cost of capital is equal to a normal profit. We conclude that allowing greater than normal profits

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[1703] 47 U.S.C. § 252(d)(1).

[1704] *Webster's New Collegiate Dictionary* 931 (10th ed. 1994).

[1705] *See* David W. Pearce, *The MIT Dictionary of Modern Economics* (1994) at 310.

[1706] *Id.* at 415.

would not be "reasonable" under sections 251(c) and 252(d)(1).[1707] Thus, contrary to the arguments put forth by several incumbent LECs, we find that adding an additional measure of profit to the risk-adjusted cost of capital[1708] in setting the prices for interconnection and access to unbundled elements would violate the requirements of sections 251(c) and 252(d)(1) of the 1996 Act.

701. Possible accounting losses from the sale of interconnection and unbundled network elements using a reasonable forward-looking cost-based methodology do not necessarily indicate that incumbent LECs are being denied a "reasonable profit" under the statute. The use of a forward-looking, economic, cost-based pricing methodology, including a reasonable allocation of legitimate joint and common costs, will permit incumbent LECs the opportunity to earn a reasonable return on their investment in network elements. Finally, contrary to PacTel's argument, and as discussed below in detail, we conclude that our forward-looking cost-based pricing methodology is consistent with the Fifth Amendment and is not confiscatory.

[1707] We note that our interpretation is consistent with existing Supreme Court precedent concerning what constitutes a reasonable rate of return for a regulated public utility. For example, in *Bluefield Water Works*, the Court stated:

> A public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties; but it has no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures.

Bluefield Water Works & Improvement Co. v. Public Service Comm'n of West Virginia, 262 U.S. 679, 692-93 (1923). Similarly, in *FPC v. Hope Natural Gas*, the Court stated:

> . . . it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business. These include service on the debt and dividends on the stock . . . By that standard the return to the equity owner should be commensurate with risks on investments in other enterprises having corresponding risks. That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital.

Federal Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591, 603 (1994) (*Hope Natural Gas*). *Cf.*, Charles F. Phillips, Jr., *The Economics of Regulation* 260 (Rev. ed. 1965) (". . . a regulated company must be afforded the opportunity not only of assuring its financial integrity so that it can maintain its credit standing and attract additional capital as needed, but also for earnings comparable to those of other companies having corresponding risks.").

[1708] *See supra*, this Section, for a discussion of risk-adjusted cost of capital.

702. Based on the current record, we conclude that the currently authorized rate of return at the federal or state level is a reasonable starting point for TELRIC calculations, and incumbent LECs bear the burden of demonstrating with specificity that the business risks that they face in providing unbundled network elements and interconnection services would justify a different risk-adjusted cost of capital or depreciation rate. These elements generally are bottleneck, monopoly services that do not now face significant competition. We recognize that incumbent LECs are likely to face increased risks given the overall increases in competition in this industry, which generally might warrant an increased cost of capital, but note that, earlier this year, we instituted a preliminary inquiry as to whether the currently authorized federal 11.25 percent rate of return is too high given the current marketplace cost of equity and debt.[1709] On the basis of the current record, we decline to engage in a time-consuming examination to determine a new rate of return, which may well require a detailed proceeding. States may adjust the cost of capital if a party demonstrates to a state commission that either a higher or lower level of cost of capital is warranted, without that commission conducting a "rate-of-return or other rate based proceeding."[1710] We note that the risk-adjusted cost of capital need not be uniform for all elements. We intend to re-examine the issue of the appropriate risk-adjusted cost of capital on an ongoing basis, particularly in light of the state commissions' experiences in addressing this issue in specific situations.

703. We disagree with the conclusion that, when there are mostly sunk costs, forward-looking economic costs should not be the basis for pricing interconnection elements. The TELRIC of an element has three components, the operating expenses, the depreciation cost,[1711] and the appropriate risk-adjusted cost of capital. We conclude that an appropriate calculation of TELRIC will include a depreciation rate that reflects the true changes in economic value of an asset and a cost of capital that appropriately reflects the risks incurred by an investor. Thus, even in the presence of sunk costs, TELRIC-based prices are an appropriate pricing methodology.

[1709] *See Common Carrier Bureau Sets Pleading Schedule in Preliminary Rate of Return Inquiry*, Public Notice, 11 FCC Rcd 3651 (Com. Car. Bur. 1996).

[1710] 47 U.S.C. § 252(d)(1)(A)(i).

[1711] Depreciation is the method of recognizing as an expense the cost of a capital investment. Properly calculated economic depreciation is a periodic reduction in the book value of an asset that makes the book value equal to its economic or market value.

(b) Cost Measures Not Included in Forward-Looking Cost Methodology

704. *Embedded Costs.* We read section 252(d)(1)(A)(i) to prohibit states from conducting traditional rate-of-return or other rate-based proceedings to determine rates for interconnection and access to unbundled network elements. We find that the parenthetical, "(determined without reference to a rate-of-return or other rate-based proceeding),"[1712] does not further define the type of costs that may be considered, but rather specifies a type of proceeding that may not be employed to determine the cost of interconnection and unbundled network elements. The legislative history demonstrates that Congress was eager to set in motion expeditiously the development of local competition and intended to avoid imposing the costs and administrative burdens associated with a traditional rate case. Prior to the joint conference, the Senate version of the 1996 Act contained the parenthetical language.[1713] In addition, the Senate version of the 1996 Act eliminated rate-of-return regulation,[1714] as did the House version.[1715] Conferees removed the provisions eliminating rate-of-return regulation, but retained the parenthetical.

705. Section 252(d)(1)(A)(i) does not specify whether historical or embedded costs should be considered or whether only forward-looking costs should be considered in setting arbitrated rates. We are not persuaded by incumbent LEC arguments that prices for interconnection and unbundled network elements must or should include any difference between the embedded costs they have incurred to provide those elements and their current economic costs. Neither a methodology that establishes the prices for interconnection and access to network elements directly on the costs reflected in the regulated books of account, nor a price based on forward looking costs plus an additional amount reflecting embedded costs, would be consistent with the approach we are adopting. The substantial weight of economic commentary in the record suggests that an "embedded cost"-based pricing methodology would be pro-competitor -- in this

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[1712] 47 U.S.C. § 252(d)(1)(A)(i).

[1713] S. 652, 104th Cong., 1st Sess. § 251(d)(6)(A) (1995) ("the charge (A) shall be (i) based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the unbundled element . . . .").

[1714] *Id.* at § 301(a)(3) ("Rate of Return Regulation Eliminated -- (A) In instituting the price flexibility required under paragraph (1) the Commission and the States shall establish alternative forms of regulation for Tier 1 telecommunications carriers that do not include regulation of the rate of return earned by such carrier . . . .").

[1715] H.R. 1555, 104th Cong., 1st Sess. § 248(b) (1995) ("Abolition of Rate-of-Return Regulation -- Notwithstanding any other provision of law, to the extent that a carrier has complied with sections 242 and 244 of this part, the Commission, with respect to rates for interstate or foreign communications, and State commissions, with respect to rates for intrastate communications, shall not require rate-of-return regulation.").

case the incumbent LEC -- rather than pro-competition.[1716] We therefore decline to adopt embedded costs as the appropriate basis of setting prices for interconnection and access to unbundled elements. Rather, we reiterate that the prices for the interconnection and network elements critical to the development of a competitive local exchange should be based on the pro-competition, forward-looking, economic costs of those elements, which may be higher or lower than historical embedded costs. Such pricing policies will best ensure the efficient investment decisions and competitive entry contemplated by the 1996 Act, which should minimize the regulatory burdens and economic impact of our decisions on small entities.[1717]

706. Incumbent LECs contend generally that, in order to ensure they will recover their total investment costs and earn a profit, they must recover embedded costs. These costs, they argue, were incurred under federal and regulatory oversight and therefore should be recoverable.[1718] We are not convinced by the incumbent LECs' principal arguments for recognizing embedded cost in setting section 251 pricing rules. Even if the incumbent LECs' contention is correct, increasing the rates for interconnection and unbundled elements offered to competitors would interfere with the development of efficient competition, and is not the proper remedy for any past under-depreciation. Moreover, contrary to assertions by some incumbent LECs, regulation does not and should not guarantee full recovery of their embedded costs. Such a guarantee would exceed the assurances that we or the states have provided in the past.[1719] We have considered the economic impact of precluding recovery of small incumbent LECs' embedded costs.[1720] We do not believe that basing the prices of interconnection and unbundled elements on an incumbent LEC's embedded costs would advance the pro-competitive goals of the statute. We also note that certain small incumbent LECs are not subject to our rules under section 251(f)(1) of the 1996 Act, unless otherwise determined by a state commission, and certain other small incumbent LECs may seek relief from their state commissions from our rules under

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[1716] *See, e.g.*, Ad Hoc Telecommunications Users' Committee reply at Appendix A (Interconnection Pricing Standards for Monopoly Rate Elements in a Potentially Competitive Local Telecommunications Market), p.4; ALTS comments at Attachment B (Competitive Pricing of Interconnection, Unbundled Elements, and Collocation), pp.28-29; AT&T reply at Appendix B (Reply Affidavit of William J. Baumol, Janusz A. Ordover, and Robert D. Willig), pp.3-5; Competition Policy Institute comments at 18-19; DJ comments at 30-31.

[1717] *See* Regulatory Flexibility Act, 5 U.S.C. §§ 601 *et seq.*

[1718] *See, e.g.*, Ameritech reply at 31; BellSouth comments at 57; Lincoln Tel. comments at 16-17.

[1719] *See In the Matter of the Applications of Pacific Bell*, Order and Authorization, 10 FCC Rcd 12448, 12502-12503 (1995).

[1720] *See* Regulatory Flexibility Act, 5 U.S.C. §§ 601 *et seq.*

section 251(f)(2) of the 1996 Act.[1721]

707. We acknowledge that some incumbent LECs may have incurred certain embedded costs reasonably before the passage of the 1996 Act, based on different regulatory regimes. Some incumbent LECs may assert that they have made certain historical investments required by regulators that they have been denied a reasonable opportunity to recover in the past and that the incumbent LECs may no longer have a reasonable opportunity to recover in the new environment of the 1996 Act. The record before us, however, does not support the conclusion that significant residual embedded costs will necessarily result from the availability of network elements at economic costs. To the extent that any such residual consists of costs of meeting universal service obligations, the recovery of such costs can and should be considered in our ongoing universal service proceeding.[1722] To the extent a significant residual exists within the interstate jurisdiction that does not fall within the ambit of section 254, we intend that to address that issue in our upcoming proceeding on access reform.

708. *Opportunity Cost -- Efficient Component Pricing Rule.* A number of incumbent LECs advocate using the "efficient component pricing rule" (ECPR) to set the prices that incumbent LECs charge new entrants for inputs required to produce the same retail services the incumbent produces. Under the ECPR, the price of an input should be equal to the incremental cost of the input plus the opportunity cost that the incumbent carrier incurs when the new entrant provides the services instead of the incumbent. The opportunity cost, which is computed as revenues less all incremental costs, represents both profit and contribution to common costs of the incumbent, given the existing retail prices of the services being sold.

709. We conclude that ECPR is an improper method for setting prices of interconnection and unbundled network elements because the existing retail prices that would be used to compute incremental opportunity costs under ECPR are not cost-based. Moreover, the ECPR does not provide any mechanism for moving prices towards competitive levels; it simply takes prices as given. The record indicates that both incumbents and new entrants agree that retail prices are not based on costs. Incumbents generally argue that local residential retail prices are below costs while new entrants contend that they exceed competitive levels.[1723] In either case, application of ECPR would result in input prices that would be either higher or lower than those which would be generated in a competitive market and would not lead to efficient retail pricing.

710. In markets where retail prices exceed competitive levels, entry would take place if

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[1721] 47 U.S.C. § 251(f).

[1722] *See Universal Service* NPRM at para. 32.

[1723] *See, e.g.*, Ameritech comments at 62.

network element prices were set at efficient competitive levels. The ECPR, however, will serve to discourage competition in these very markets because it relies on the prevailing retail price in setting the price which new entrants pay the incumbent for inputs. While ECPR establishes conditions for efficient entry given existing retail prices, as its advocates contend, the ECPR provides no mechanism that will force retail prices to their competitive levels. We do not believe that Congress envisioned a pricing methodology for interconnection and network elelments that would insulate incumbent LECs' retail prices from competition. Instead, Congress specifically determined that input prices should be based on costs because this would foster competition in the retail market. Therefore, we reject the use of ECPR for establishing prices for interconnection and unbundled elements.

711. As discussed above, the record in this docket shows that end user prices are not cost-based. In *Open Video Systems*, in contrast, we did not find that there would be a problem with the determination of end user prices.[1724] We concluded that "[u]se of [an ECPR] approach is appropriate in circumstances where the pricing is applicable [sic] to a new market entrant (the open video system operator) that will face competition from an existing incumbent provider (the incumbent cable operator), as opposed to circumstances where the pricing is used to establish a rate for an essential input service that is charged to a competing new entrant by an incumbent provider."[1725] In addition, in *Open Video Systems*, we concluded that the ECPR is appropriate because it encourages entry for open video system operators and also enhances the availability of carriage for unaffiliated programmers.[1726] The ECPR generally protects the provider's profits and provides opportunities for third parties to use the provider's inputs. The ECPR does not provide a mechanism to drive retail prices to competitive levels, however. In *Open Video Systems*, we wanted to encourage entry by open video system providers and to encourage them to have incentives to open their systems to unaffiliated programmers. Here, our goal is to ensure that competition between providers, including third party providers using interconnection and unbundled elements, will drive prices toward competitive levels and thus use of the ECPR is inappropriate.

712. *Universal Service Subsidies.* We conclude that funding for any universal service mechanisms adopted in the universal service proceeding may not be included in the rates for interconnection, network elements, and access to network elements that are arbitrated by the states under sections 251 and 252. Sections 254(d) and 254(e) of the 1996 Act mandate that universal service support be recovered in an equitable and nondiscriminatory manner from all providers of

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[1724] *Implementation of Section 302 of the Telecommunications Act of 1996 -- Open Video Systems*, CS Docket No. 96-46, Second Report and Order, FCC 96-249 (rel. June 3, 1996) (*Open Video Systems*).

[1725] *Id.* at 127.

[1726] *Id.*

telecommunications services.[1727] We conclude that permitting states to include such costs in rates arbitrated under sections 251 and 252 would violate that requirement by requiring carriers to pay specified portions of such costs solely because they are purchasing services and elements under section 251. Section 252(d)(1) requires that rates for interconnection, network elements, and access to network elements reflect the costs of providing those network elements, not the costs of supporting universal service.

713. Section 254(f) provides that a state may adopt equitable, nondiscriminatory, specific, and predictable mechanisms to advance universal service within that state.[1728] If a state collects universal service funding in rates for elements and services pursuant to sections 251 and 252, it will be imposing non-cost based charges in those rates. Including non-cost based charges in the rates for interconnection and unbundled elements is inconsistent with our rules implementing sections 251 and 252 which require that these rates be cost-based. It is also inconsistent with the requirement of section 254(f) that telecommunications carriers contribute to state universal service on a nondiscriminatory basis, because telecommunications carriers requesting interconnection or access to unbundled network elements will be required to make contributions to universal service support through such surcharges.[1729] States may not, therefore, include universal service support funding in the rates for elements and services pursuant to sections 251 and 252, nor may they implement mechanisms that have the same effect. For example, states may not fund universal service support by imposing higher rates for interconnection, unbundled elements, or transport and termination on carriers that offer service to different types of customers or different geographic areas. To the extent that New York's "pay or play" system funds universal service in this manner, it violates sections 251, 252, and 254 of the 1996 Act. Nothing in the 1996 Act or in this Order, however, precludes a state from adopting a universal service funding mechanism, whether interim or otherwise, if such funds are collected in accordance with section 254(f) on an "equitable and nondiscriminatory basis" through "specific, predictable, and sufficient mechanisms that do not rely on or burden Federal universal service support mechanisms."[1730]

714. Our decision here does not exempt carriers purchasing elements or services under section 251 from contributing to (or possibly receiving) universal service support. Rather, the recovery of universal service support costs from telecommunications carriers, including carriers requesting unbundled network elements, will be governed by section 254 of the 1996 Act.

[1727] Joint Explanatory Statement at 131 ("In keeping with the conferees' intent that universal service support should be clearly identified, [section 254(e)] states that such support should be made explicit . . .").

[1728] 47 U.S.C. § 254(f).

[1729] *See infra*, Section VII.D.3., discussing discrimination.

[1730] 47 U.S.C. § 254(f).

Federal universal service support mechanisms will be determined by our decisions reached in CC Docket 96-45, based on the recommendations of the Federal/State Universal Service Joint Board, and states may adopt additional universal service support mechanisms consistent with section 254(f).

715. We are mindful that the requirements of the 1996 Act may be disruptive to existing state universal service support mechanisms during the period commencing with this order and continuing until we complete our universal service proceeding to implement section 254. As discussed in the subsection immediately below, we permit incumbent LECs to continue to recover certain non-cost-based interstate access charge revenues for a limited period of time, largely because of concerns about possible deleterious impacts on universal service. We also authorize incumbent LECs, for a similar limited period of time, to continue to recover explicit intrastate universal service subsidy revenues based on intrastate access charges. This mechanism minimizes any possibility that implementation of sections 251 and 252 will unduly harm universal service during the interim period prior to completion of our universal service and access reform proceedings. Because we conclude this action should adequately provide for the continuation of a portion of existing subsidy flows during a transition period until completion of our proceeding implementing section 254, we decline to permit any additional funding of universal service support through rates for interconnection, unbundled elements, and transport and termination during the interim period.

716. *Interim Application of Access Charges to Purchasers of Unbundled Local Switching Element.* In the introduction of this Order, we emphasize that implementation of section 251 of the 1996 Act is integrally related to both universal service reform as required under section 254, and to reform of the interstate access charge system.[1731] In order to achieve pro-competitive, deregulatory markets for all telecommunications services, we must create a new system of funding universal service that is specific, explicit, predictable, sufficient, and competitively neutral. We also must move access charges to more cost-based and economically efficient levels. We intend to fulfill both of these goals in the coming months, by completing our pending universal service proceeding to implement section 254 by our statutory deadline of May 1997, and by addressing access charge issues in an upcoming access reform proceeding. The 1996 Act, however, requires us to adopt rules implementing section 251 by August 1996. We are concerned that implementation of the requirements of section 251 now, without taking into account the effects of the new rules on our existing access charge and universal service regimes, may have significant, immediate, adverse effects that were neither intended nor foreseen by Congress.

717. Specifically, as we conclude above, the 1996 Act permits telecommunications carriers that purchase access to unbundled network elements from incumbent LECs to use those elements to provide telecommunications services, including the origination and termination of interstate calls. Without further action on our part, section 251 would allow entrants to use those

[1731] *See supra*, Section I.B.

unbundled network facilities to provide access services to customers they win from incumbent LECs, without having to pay access charges to the incumbent LECs. This result would be consistent with the long term outcome in a competitive market. In the short term, however, while other aspects of our regulatory regime are in the process of being reformed, such a change may have detrimental consequences.

718. The access charge system includes non-cost-based components and elements that at least in part may represent subsidies, such as the carrier common line charge (CCLC) and the transport interconnection charge (TIC). The CCLC recovers part of the allocated interstate costs for incumbent LECs to provide local loops to end users. In the universal service NPRM, we observed that the CCLC may result in higher-volume toll users paying rates that exceed cost, and some customers paying rates that are below cost. We sought comment on whether that subsidy should be continued, and on whether and how it should be restructured.[1732] The nature of most of the revenues recovered through the TIC is unclear and subject to dispute, although a portion of the TIC is associated with certain costs related to particular transport facilities. Although the TIC was not created to subsidize local rates, some parties have argued in the *Transport* proceeding and elsewhere that some portion of the revenues now recovered through the TIC may be misallocated local loop or intrastate costs that operate to support universal service.[1733] In the forthcoming access reform proceeding, we intend to consider the appropriate disposition of the TIC, including the development of cost-based transport rates as directed by the United States Court of Appeals for the District of Columbia Circuit in *Competitive Telecommunications Association v. FCC (CompTel v. FCC)*.[1734]

719. Without a temporary mechanism such as the one we adopt below, the implementation of section 251 would permit competitive local service providers that also provide interstate long-distance service to avoid totally the CCLC and the TIC, which in part represent contributions toward universal service, by serving their local customers solely through the use of unbundled network elements rather than through resale. We believe that allowing such a result before we have reformed our universal service and access charge regimes would be undesirable as a matter of both economics and policy, because carrier decisions about how to interconnect with incumbent LECs would be driven by regulatory distortions in our access charge rules and our universal service scheme, rather than the unfettered operation of a competitive market. Because

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[1732] *Universal Service* NPRM at paras. 113-14.

[1733] *Transport Rate Structure and Pricing*, CC Docket No. 91-213, Report and Order and Further Notice of Proposed Rulemaking, 7 FCC Rcd 7006, 7065-7066 (1992) (*First Transport Order*). *Cf.* Letter from Bruce K. Cox, Government Affairs Director, AT&T, to William F. Caton, Acting Secretary, FCC, September 7, 1995 (filed in CC Docket No. 91-213) (suggesting that TIC revenues not allocable to specific transport facilities may represent misallocated common line costs).

[1734] *Competitive Telecommunications Association v. FCC*, No. 96-1168 (D.C. Cir. July 5, 1996).

of our desire to err on the side of caution where universal service may be implicated, we conclude that some action is needed during the interim period before we complete our access reform and universal service proceedings.

720. We conclude that we should establish a temporary transitional mechanism to help complete all of the steps toward the pro-competitive goal of the 1996 Act, including the implementation of a new, competitively-neutral system to fund universal service and a comprehensive review of our system of interstate access charges. Therefore, for a limited period of time, incumbent LECs may recover from interconnecting carriers the CCLC and a charge equal to 75 percent of the TIC for all interstate minutes traversing the incumbent LECs' local switches for which the interconnecting carriers pay unbundled local switching element charges. Incumbent LECs may recover these charges only until the earliest of: (1) June 30, 1997; (2) the effective date of final decisions by the Commission in both the universal service and access reform proceedings; or (3) if the incumbent LEC is a BOC, the date on which that BOC is authorized under section 271 of the 1996 Act to offer in-region interLATA service. The end date for BOCs that are authorized to offer interLATA service shall apply only to the recovery of access charges in those states in which the BOC is authorized to offer such service.

721. We tentatively concluded in the NPRM that purchasers of unbundled network elements should not be required to pay access charges. We reaffirm our conclusion above in our discussion of unbundled network elements that nothing on the face of sections 251(c)(3) and 252(d)(1) compels telecommunications carriers that use unbundled elements to pay these charges, nor limits these carriers' ability to use unbundled elements to originate or terminate interstate calls, and that payment of rates based on TELRIC plus a reasonable allocation of common costs, pursuant to section 251(d)(1), represents full compensation to the incumbent LEC for use of the network elements that telecommunications carriers purchase. Because of the unique situation described in the preceding paragraphs, however, we conclude, contrary to our proposal in the NPRM, that during a time-limited period, interconnecting carriers should not be able to use unbundled elements to avoid access charges in all cases. As detailed below, this temporary mechanism will apply only to carriers that purchase the local switch as an unbundled network element, and use that element to originate or terminate interstate traffic.[1735] We are applying these transitional charges to the unbundled local switching element, rather than to any other network elements, because such an approach is most closely analogous to the manner in which the CCLC and TIC are recovered in the interstate access regime. Currently, the CCLC and TIC apply to interstate switched access minutes that traverse incumbent LECs' local switches. Applying the CCLC and 75 percent of the TIC to the unbundled local switching element is consistent with our goal of minimizing disruptions while we reform our universal service system and consider changes to our access charge mechanisms. Moreover, the CCLC and the TIC are

[1735] As discussed *infra*, carriers that choose to enter a local market through resale of an incumbent LEC's intrastate local exchange service will pay interstate and intrastate access charges to originate and terminate toll traffic for end user customers that purchase that resold local exchange service.

recovered on a per-minute basis, and the local switch is the primary point at which incumbent LECs are capable of recording interstate minutes for traffic associated with end user customers of requesting carriers.

722. We have crafted this short-term continuation of certain access charge revenue flows to minimize the possibility that incumbent LECs will be able to "double recover" through access charges the facility costs that new entrants have already paid to purchase unbundled elements. For that reason, we do not permit incumbent LECs to assess on purchasers of the unbundled local switching element any interstate access charges other than the CCLC and 75 percent of the TIC. The other access charges are all designed to recover the cost of particular facilities involved in the provision of interstate access services, such as local switching, dedicated interoffice transport circuits, and tandem switching. Imposition of these facility-based access charges in addition to the cost-based charges for comparable network elements established under Section 252 could result in double recovery. The mechanism we establish will ensure that incentives created by non-cost-based elements of access charges do not result in harmful consequences prior to completion of access reform and our universal service proceeding. Imposition of additional access charges is therefore not necessary. We note that this mechanism serves to minimize the potentially disruptive effects of our decisions on incumbent LECs, including small incumbent LECs.[1736]

723. For the same reason, we permit incumbent LECs to recover only 75 percent of the TIC. Some portion of the TIC recovers revenues associated with specific transport facilities. To the extent that these costs can be identified clearly, they should not be imposed on new entrants through the TIC. Incumbent LECs will be fully compensated for any transport facilities that new entrants purchase from them through the unbundled element rates states establish under 252(d)(1), which, as we have stated, must be based on economic cost rather than access charges. In our interim transport rate restructuring, we explicitly set the initial tandem switching rate at 20 percent of the interstate revenue requirement, with the remainder included in the TIC.[1737] In addition, certain costs of upgrading incumbent LEC networks to support SS7 signaling were allocated to transport through then-existing separations procedures. In our interim transport rate restructuring, we did not create any facility-based charges to recover these costs,[1738] so the associated revenues presumably were incorporated into the TIC. There may also be other revenues associated with transport facilities that are recovered today through the TIC. While we are uncertain of the precise magnitude of these revenues, in our best judgment, based on the record in the *Transport* proceeding and other information before us, we find that it is likely that

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[1736] *See* Regulatory Flexibility Act, 5 U.S.C. §§ 601 *et seq.*

[1737] *First Transport Order*, 7 FCC Rcd at 7019.

[1738] *First Transport Order*, 7 FCC Rcd at 7019.

these revenues approach, but probably do not exceed 25 percent of the TIC for most incumbent LECs. Thus, we believe that 25 percent is a conservative amount to exclude from the TIC to ensure that incumbent LECs do not double recover revenues associated with transport facilities from new entrants. Moreover, the Court in *CompTel v. FCC* remanded our *Transport* decision, in part, because of the inclusion of tandem switching revenues in the TIC rather than in the rate element for tandem switching. We find that excluding 25 percent of the TIC represents a reasonable exercise of our discretion to prevent revenues associated with the tandem switching revenue requirement from being recovered from purchasers or unbundled local switching.

724. We strongly emphasize that these charges will apply to purchasers of the unbundled switching element only for a very limited period, to avoid the possible harms that might arise if we were to ignore the effects on access charges and universal service of implementation of section 251. BOCs shall not be permitted to recover these revenues once they are authorized to offer in-region interLATA service, because at that time the potential loss of access charge revenues faced by a BOC most likely will be able to be offset by new revenues from interLATA services. Moreover, although we do not prejudge the conditions necessary to grant BOC petitions under section 271 to offer in-region interLATA service, we do decide that BOCs should not be able to charge the CCLC and the TIC, which are not based on forward-looking economic costs, to competitors that use unbundled elements under section 251 once they are authorized to provide in-region interLATA service. Only BOCs are subject to special restrictions in the 1996 Act to ensure that their entry into the in-region interLATA market does not have an adverse impact on competition. We conclude that this additional trigger date after which BOCs may not continue to receive access charges from purchasers of unbundled local switching is consistent with this Congressional design.

725. We have selected June 30, 1997 as an ultimate end date for this transitional mechanism to coincide with the effective date for LEC annual access tariffs, and because we believe it is imperative that this transitional requirement be limited in duration. We can conceive of no circumstances under which the requirement that certain entrants pay the CCLC or a portion of the TIC on calls carried over unbundled network elements would be extended further. The fact that access or universal service reform have not been completed by that date would not be a sufficient justification, nor would any actual or asserted harm to the financial status of the incumbent LECs. By June 30, 1997, the industry will have had sufficient time to plan for and adjust to potential revenue shifts that may result from competitive entry. Thus, the economic impact of our decision on competitive local service providers, including those that are small entities, should be minimized.[1739]

726. We believe that we have ample legal authority to implement this temporary transitional measure, and we find that this approach is consistent with the letter and spirit of the 1996 Act. We recognize that the CCLC and TIC have not been developed in accordance with the

[1739] *See* Regulatory Flexibility Act, 5 U.S.C. §§ 601 *et seq.*

pricing standards of section 252(d)(1), and that to comply with the 1996 Act, the rates that states establish for interconnection and unbundled network elements may not include non-cost-based amounts or subsidies. The 1934 and 1996 Acts do, however, give us legal authority to determine, for policy reasons, that users of LEC facilities should pay certain access charges for a period of time.[1740] Section 4(i) of the 1934 Act authorizes the Commission to "perform any and all acts . . . not inconsistent with this Act, as may be necessary in the execution of its functions."[1741] Given the extraordinary upheaval in the industry's structure set in motion by the 1996 Act, and the specific concerns described above, we believe that a temporary mechanism is necessary in order to ensure that the policy goals underlying the access charge system and the Communications Act itself are not undermined. Further, we believe section 251(g) of the 1996 Act lends support to our decision. As discussed above, section 251(g) does not require that incumbent LECs continue to receive access charge revenues when telecommunications carriers use unbundled incumbent LEC network elements to originate and terminate interstate traffic. That section does, however, provide evidence of Congressional recognition of the potential tension between existing interconnection obligations, such as access charges, and the new methods of interconnection mandated by section 251, and therefore supports our decision to create a limited-duration mechanism to address this tension.

727. The decision of the court in *CompTel v. FCC* to remand our decision to adopt the TIC is not inconsistent with this approach. The Court's concern stemmed, in part, from the inclusion of a portion of the interstate tandem switching revenue requirement in the TIC. We have excluded from the charges that purchasers of unbundled local switching must pay a percentage of the TIC that, at a minimum, includes these allocated tandem switching revenues from the transitional charges that incumbent LECs may assess on IXCs.[1742] Furthermore, the Court directed the Commission to develop a cost-based transport rate structure, or to explain why it chose not to do so.[1743] We intend to fulfill this obligation in the forthcoming access reform proceeding. The charge equal to 75 percent of the TIC will be applied only as an interim measure for a brief, clearly-identified period, until that restructuring of access charges is completed. The court expressly acknowledged that the 1996 Act would have implications for the

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[1740] *See, e.g., New England Tel. and Tel. Co. v. FCC*, 826 F.2d 1101 (D.C. Cir 1987); *North American Telecommunications Association v. FCC*, 772 F.2d (7th Cir. 1085); *Lincoln Tel. and Tel. Co. v. FCC*, 659 F.2d (D.C. Cir. 1989).

[1741] 47 U.S.C. § 4(i).

[1742] As discussed above, we estimate that the tandem switching, SS7, and other costs associated with transport facilities now recovered through the TIC likely do not exceed 25% of the TIC for most incumbent LECs.

[1743] *Competitive Telecommunications Association v. FCC*, No. 96-1168 at 26-27.

access charge system.[1744] For the reasons described above, we conclude that these effects necessitate temporary application of a portion of the TIC to entrants that win end user customers from LECs, and that purchase the local switch as an unbundled element to originate and terminate interstate and intrastate toll traffic for such end users. In the access reform proceeding, we intend to determine the appropriate disposition for these revenues. Until we have had the opportunity to do so, however, we permit incumbent LECs to recover a transitional charge equal to 75 percent of the TIC under the limited circumstances described herein.

728. The interim mechanism we establish here differs from the waiver relief we have previously granted to NYNEX and Ameritech to permit them to recover certain interstate access charge revenues through "bulk billing" of revenues to all interstate switched access customers.[1745] Those orders responded to waiver requests filed prior to the passage of the 1996 Act. Our responsibility in those proceedings was to determine whether special circumstances existed, and whether the specific relief requested better served the public interest than continued application of our general rules. By constrast, the action we take today addresses industry-wide issues that arise from the new regime put into place by section 251 of the 1996 Act, which allows states to establish unbundled network element rates that recover the full unseparated cost of elements. Our response to the Ameritech and NYNEX waiver petitions does not, simply because those petitions also concerned access charge recovery, constrain our decision in this proceeding.

729. It would be unreasonable to provide such a transitional mechanism on the federal level, but to deny similar authority to the states. Therefore, states may continue existing explicit universal service support mechanisms based on intrastate access charges for an interim period of a similar brief, clearly-defined length. During that period, unless decided otherwise by the state, incumbent LECs may continue to recover such revenues from purchasers of unbundled local switching elements that use those elements to originate or terminate intrastate toll calls for end user customers they win from incumbent LECs. States may terminate these mechanisms at any time. We define mechanisms based on intrastate access charges as those mechanisms that require purchasers of intrastate access services from incumbent LECs to pay non-cost-based charges for those access services on the basis of their intrastate access minutes of use.

730. We do not intend, however, that such a transitional mechanism eviscerate the requirements of sections 252 and 254, which, as we have stated, prohibit funding of universal service subsidies through rates for interconnection and unbundled network elements. Mechanisms

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[1744] *Id.* at 12-13.

[1745] *See The NYNEX Tel. Cos. Petition for Waiver, Transition Plan to Preserve Universal Service in a Competitive Environment*, Memorandum Opinion and Order, 10 FCC Rcd 7445 (1995), *reconsideration pending* (*NYNEX USPP Order*); *Ameritech Operating Companies Petition for a Declaratory Ruling and Related Waivers to Establish a New Regulatory Model for the Ameritech Region*, Order, FCC 96-58 (released Feb. 15, 1996) (*Ameritech Customers First Order*).

such as New York's "pay or play" system, which would impose intrastate access charges on non-access services rather than allowing incumbent LECs to recover non-cost-based revenues from purchasers of access services, may not be included in this interim system. Such a result is justified because state "pay or play" mechanisms do not at present constitute a significant revenue stream to incumbent LECs, and therefore elimination of this mechanism is unlikely, in the short term, to have significant detrimental effects on universal service support.

731. These state mechanisms must end on the earlier of: (1) June 30, 1997; or (2) if the incumbent LEC that receives the transitional access charge revenues is a BOC, the date on which that BOC is authorized under section 271 of the 1996 Act to offer in-region interLATA service. With one exception, the analysis provided above as to the rationale for the end dates for the transitional interstate access charge mechanism applies here as well. Because our access reform proceeding focuses on federal charges, and because the full extent of the section 254 universal service mechanism remains to be determined in that proceeding, intrastate access charge-based universal service support mechanisms should not now be required to terminate upon the completion of those proceedings.

732. As with our decision to permit incumbent LECs to continue to receive certain interstate access charge revenues from some purchasers of unbundled local switching for a limited period of time, we believe our decision to allow states to preserve certain intrastate universal service support mechanisms based on access charges is within our authority under section 251(d)(1) of the 1996 Act, and section 4(i) of the 1934 Act. Moreover, although section 251(g) does not directly refer to intrastate access charge mechanisms, it would be incongruous to conclude that Congress was concerned about the effects of potential disruption to the interstate access charge system, but had no such concerns about the effects on analogous intrastate mechanisms.

(c) Fifth Amendment Issues

733. We conclude that our decision that prices for incumbent LECs' unbundled elements and interconnection offerings be based on forward-looking economic cost does not violate the incumbent LECs' rights under the Fifth Amendment of the Constitution. The Supreme Court has recognized that public utilities owned and operated by private investors, even though their assets are employed in the public interest to provide consumers with service, may assert their rights under the Takings Clause of the Fifth Amendment.[1746] In applying the Takings Clause to rate setting for public utilities, the Court has stated that "[t]he guiding principle has been that the Constitution protects utilities from being limited to a charge for their property serving the public

[1746] The Fifth Amendment provides that, "private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V. *See Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307 (1989) (*Duquesne*).

which is so 'unjust' as to be confiscatory."[1747]

734. The Supreme Court has held that the determination of whether a rate is confiscatory depends on whether that rate is just and reasonable, and not on what methodology is used.[1748] In *Federal Power Comm'n v. Hope Natural Gas Co.*, the Court upheld the Federal Power Commission's order that required the company to make a large reduction in wholesale gas rates. The commission based its determination of a reasonable rate of return on a plant valuation determined by using a historical cost methodology that was only half as large as the company's own valuation based on forward-looking reproduction costs. In its decision, the Court set forth the governing legal standard for determining whether a rate is constitutional:

> Under the statutory standard of "just and reasonable" it is the result reached not the method employed that is controlling. It is not the theory but the impact of the rate order which counts. If the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry under the Act is at an end. The fact that the method employed to reach that result may contain infirmities is not then important.[1749]

735. The Court went on to explain that, in determining whether a rate is reasonable, the regulatory body must balance the interests of both the investor and consumer.[1750] "From the investor or company point of view, it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business . . . . [T]he return on the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks."[1751]

736. Under sections 251(c)(2) and (3) of the 1996 Act, incumbent LECs must establish

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[1747] *Duquesne*, 488 U.S. at 307 (*citing Covington & Lexington Turnpike Road Co. v. Sandford*, 164 U.S. 578, 597 (1896)).

[1748] *Hope Natural Gas*, 320 U.S. at 602-603; *see also Duquesne; In re Permian Basin Area Rate Cases*, 390 U.S. 747 (1968); *Federal Power Commission v. Memphis Light, Gas & Water Division*, 411 U.S. 458 (1973); *Jersey Central Power & Light v. FERC*, 810 F.2d 1168 (D.C. Cir. 1987).

[1749] *Hope Natural Gas*, 320 U.S. at 602.

[1750] *Id.*

[1751] *Id.* at 603.

rates for interconnection and unbundled elements that are just and reasonable.[1752] In adopting the rules that govern those rates, under *Hope Natural Gas* we must consider whether the end result of incumbent LEC rates is just and reasonable. Incumbent LECs argue that establishing a rate structure that does not permit recovery of historical or embedded costs is confiscatory. We disagree. As stated above, the Court has consistently held since *Hope Natural Gas* that it is the end result, not the method used to achieve that result, that is the issue to be addressed.[1753] Indeed, the Court has found that the "fixing of prices, like other applications of the police power, may reduce the value of the property which is being regulated. But the fact that the value is reduced does not mean that the regulation is invalid."[1754] Moreover, the Court has upheld as reasonable changes in ratemaking methodology when the change resulted in the exclusion of historical costs prudently incurred.[1755] Thus, the mere fact that an incumbent LEC may not be able to set rates that will allow it to recover a particular cost incurred in establishing its regulated network does not, in and of itself, result in confiscation.

737. Moreover, *Hope Natural Gas* requires only that the end result of our overall regulatory framework provides LECs a reasonable opportunity to recover a return on their investment. In other words, incumbent LECs' overall rates must be considered, including the revenues for other services under our jurisdiction.[1756]

738. In this proceeding, we are establishing pricing rules that should produce rates for monopoly elements and services that approximate what the incumbent LECs would be able to charge if there were a competitive market for such offerings. We believe that a forward-looking economic cost methodology enables incumbent LECs to recover a fair return on their investment, *i.e.*, just and reasonable rates. The record does not compel a contrary conclusion. No incumbent LEC has provided persuasive evidence that prices based on a forward-looking economic cost methodology would have a significant impact on its "financial integrity." We further note that at least one federal appellate court has held incremental cost-based pricing

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[1752] 47 U.S.C. § 251(c)(2) and (3).

[1753] *See, e.g.*, *Duquesne*, 488 U.S. at 310; *Hope Natural Gas*, 320 U.S. at 602.

[1754] *Hope Natural Gas*, 320 U.S. at 601.

[1755] *Duquesne*, 488 U.S. at 301-302.

[1756] However, we may not consider incumbent LECs' revenue derived from services not under our jurisdiction. *Smith v. Ill. Bell*, 282 U.S. 133 (1930).

constitutional.[1757]

739. Incumbent LECs may seek relief from the Commission's pricing methodology if they provide specific information to show that the pricing methodology, as applied to them, will result in confiscatory rates. We also do not completely foreclose the possibility that incumbent LECs will be afforded an opportunity to recover, to some extent, their embedded costs through a mechanism separate from rates for interconnection and unbundled network elements. As stated above, we intend to explore this issue in detail in our upcoming access reform proceeding.

740. GTE argues that the proper standard to review our ratemaking methodology is the just compensation standard generally reserved for takings of property. This is in effect a contention that the 1996 Act's physical collocation and unbundled network facility requirements constitute physical occupation of their property that should be deemed a taking and that must be subject to "just compensation." Assuming for the sake of argument that the physical collocation and unbundled facilities requirements do result in a taking, we nevertheless find that the ratemaking methodology we have adopted satisfies the just compensation standard. Just compensation is normally measured by the fair market value of the property subject to the taking.[1758] Just compensation is not, however, intended to permit recovery of monopoly rents.[1759] The just and reasonable rate standard of TELRIC plus a reasonable allocation of the joint and common costs of providing network elements that we are adopting attempts to replicate, with respect to bottleneck monopoly elements, the rates that would be charged in a competitive market,[1760] and, we believe, is entirely consistent with the just compensation standard. Indeed, a similar rate methodology based on incremental costs has been found to satisfy the just compensation requirement.[1761] For these reasons, we conclude that, even if the 1996 Act's physical collocation and unbundled network facility requirements constitute a taking, a forward-looking economic cost methodology satisfies the Constitution's just compensation standard.

[1757] *Metropolitan Transp. Auth. v. Interstate Commerce Commission*, 792 F.2d 287, 297 (2d Cir.), *cert. denied*, 479 U.S. 1017 (1986).

[1758] *See, e.g., United States v. Miller*, 317 U.S. 369, 374 (1943) (holding that just compensation can readily be set by ascertaining the property's fair market value, *i.e.*, "what a willing buyer would pay in cash to a willing seller").

[1759] *See, e.g., Lord Mfg. Co. v. United States*, 84 F.Supp. 748, 755-56 (Ct.Cl. 1949), *citing United States v. Cors*, 337 U.S. 325, 334 (1949).

[1760] *Compare Policy and Rules Concerning Rates for Dominant Carriers*, Further Notice of Proposed Rulemaking, CC Docket No. 87-313, 3 FCC Rcd 3195, 3200-01 (1988).

[1761] *Metropolitan Transp. Auth. v. Interstate Commerce Commission*, 792 F.2d at 297.

3. Rate Structure Rules

a. General Rate Structure Rules

(1) Background

741. In addition to applying our economic pricing methodology to determine the rate level of a specific element or interconnection, the state must also determine the appropriate rate structure. We discuss in this section general principles for analyzing rate structure questions, such as in what circumstances charges should be flat-rated or usage sensitive and in what circumstances they should be recurring or non-recurring. These rate structure rules will apply as well if a state sets rates based on default proxies discussed in Section VII.C.2 below, where we also discuss the appropriate rate structure for specific network elements. Network providers incur costs in providing two broad categories of facilities, dedicated and shared. Dedicated facilities are those that are used by a single party -- either an end user or an interconnecting network. Shared facilities are those used by multiple parties. In the NPRM, we proposed that costs should be recovered in a manner that reflects the way they are incurred.[1762] We also sought comment on whether we should require states to provide for recovery of dedicated facility costs on a flat-rated basis, or at a minimum, require LECs to offer a flat-rate option.[1763]

(2) Comments

742. Parties from all sectors of the telecommunications industry agree that costs should be recovered in a manner that reflects the way they are incurred.[1764] Lincoln states that using an approach that varies with capacity, without taking into account the utilization of shared facilities, would not allow small and mid-sized LECs to recover their total costs, because they lack economies of scale and scope.[1765] No commenters take issue with that principle or the principle that the costs of dedicated facilities should be recovered through flat rates. A wide variety of

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[1762] NPRM at para. 150.

[1763] *Id.* at para. 152.

[1764] *See, e.g.*, AT&T comments at 67; GSA/DoD comments at 10; Kentucky Commission comments at 5; Lincoln Tel. comments at 17; Sprint comments at 62; Texas Public Utility Counsel comments at 36; USTA comments at 57; LDDS comments at 57; NEXTLINK comments at 30 (generally supporting rate structures that reflect off-peak costs); Washington Commission comments at 24.

[1765] Lincoln Tel. comments at 17.

parties proposed that the Commission adopt such a rule.[1766] BellSouth, however, opposes rigid rate structure rules, and contends they could be detrimental if they preclude alternative structures to which parties are willing to agree.[1767]

(3) Discussion

743. We conclude, as a general rule, that incumbent LECs' rates for interconnection and unbundled elements must recover costs in a manner that reflects the way they are incurred. This will conform to the 1996 Act's requirement that rates be cost-based, ensure requesting carriers have the right incentives to construct and use public network facilities efficiently, and prevent incumbent LECs from inefficiently raising costs in order to deter entry. We note that this conclusion should facilitate competition on a reasonable and efficient basis by all firms in the industry by establishing prices for interconnection and unbundled elements based on costs similar to those incurred by the incumbents, which may be expected to reduce the regulatory burdens and economic impact of our decision for many parties, including both small entities seeking to enter the local exchange markets and small incumbent LECs.[1768] We also adopt some more specific rules that follow from this general rule.

744. First, we require that the charges for dedicated facilities be flat-rated, including, but not limited to, charges for unbundled loops, dedicated transport, interconnection, and collocation. These charges should be assessed for fixed periods, such as a month. We are requiring flat-rated charges for dedicated facilities. Usage-based charges for dedicated facilities would give purchasers of access to network elements an uneconomic incentive to reduce their traffic volumes. Moreover, purchasers of access to network elements with low volumes of traffic would pay below-cost prices, and therefore have an incentive to add lines that they would not add if they had to pay the full cost. As stated in the NPRM, a flat-rated charge is most efficient for dedicated facilities, because it ensures that a customer will pay the full cost of the facility, and no more. It ensures that an entrant will, for example, purchase the exclusive right to use additional loops only if the entrant believes that the benefits of the additional loops will exceed its costs. It also ensures that the entrant will not face an additional (and non-cost-based) usage charge.

745. Second, if we apply our general rule that costs should be recovered in a manner that reflects the way they are incurred, then recurring costs must be recovered through recurring charges, rather than through a nonrecurring charge. A recurring cost is one incurred periodically

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[1766] *See, e.g.*, Florida Commission comments at 31; GSA/DoD comments at 10; MFS comments at 61-63; Ohio Consumers' Counsel comments at 30; Telecommunications Resellers Ass'n comments at 42.

[1767] BellSouth comments at 57-58.

[1768] *See* Regulatory Flexibility Act, 5 U.S.C. §§ 601 *et seq.*

over time. A LEC may not recover recurring costs such as income taxes, maintenance expenses, and administrative expenses through a nonrecurring charge because these are costs that are incurred in connection with the asset over time. For example, we determine that maintenance expenses relating to the local loop must be recovered through the recurring loop charge, rather than through a nonrecurring charge imposed upon the entrant.

746. We find that recovering a recurring cost through a nonrecurring charge would be unjust and unreasonable because it is unlikely that incumbent LECs will be able to calculate properly the present value of recurring costs. To calculate properly the present value of recurring costs, an incumbent LEC would have to project accurately the duration, level, and frequency of the recurring costs and estimate properly its overall cost of capital. We find that, in practice, the present value of the recurring costs cannot be calculated with sufficient accuracy to warrant up-front recovery of these costs because incumbent LECs lack sufficient experience with the provision of interconnection and unbundled rate elements. Without sufficient experience, incumbent LECs are unable to project the length of time that an average entrant would interconnect with, or take an unbundled element from, the incumbent LEC, or how expenses associated with interconnection and unbundled rate elements would change over time. In contrast, a recurring charge for a recurring cost would ensure that a customer is only charged for the costs the entrant incurs while that entrant is taking interconnection service or unbundled rate elements from the incumbent LEC. Moreover, when costs associated with the interconnection and particular unbundled rate elements change, the incumbent LEC can make appropriate adjustments to the charges at the time such cost changes occur.

747. Accordingly, we find that imposing nonrecurring charges for recurring costs could pose a barrier to entry because these charges may be excessive, reflecting costs that may (1) not actually occur; (2) be incurred later than predicted; (3) not be incurred for as long as predicted; (4) be incurred at a level that is lower than predicted; (5) be incurred less frequently than predicted; and (6) be discounted to the present using a cost of capital that is too low.

748. Notwithstanding the foregoing, where recurring costs are *de minimis*, we will permit incumbent LECs to recover such costs through nonrecurring charges. We find that recurring costs are *de minimis* where the costs of administering the recurring charge would be excessive in relation to the amount of the recurring costs.

749. Third, states may, but need not, require incumbent LECs in an arbitrated agreement to recover nonrecurring costs, costs that are incurred only once, through recurring charges over a reasonable period of time. The recovery of such nonrecurring costs through recurring charges is a common practice for telecommunications services. Construction of an interconnector's physical collocation cage is an example of a nonrecurring cost. We find that states may, where reasonable, require an incumbent LEC to recover construction costs for an interconnector's physical collocation cage as a recurring charge over a reasonable period of time in lieu of a nonrecurring charge. This arrangement would decrease the size of the entrant's initial capital

outlay, thereby reducing financial barriers to entry. At the same time, any such reasonable arrangement would ensure that incumbent LECs are fully compensated for their nonrecurring costs.

750. We require, however, that state commissions take steps to ensure that incumbent LECs do not recover nonrecurring costs twice and that nonrecurring charges are imposed equitably among entrants. A state commission may, for example, decide to permit incumbent LECs to charge the initial entrants the full amount of costs incurred for shared facilities for physical collocation service, even if future entrants may benefit. A state commission may, however, require subsequent entrants, who take physical collocation service in the same central office and receive benefits as a result of costs for shared facilities, to pay the incumbent LEC for their proportionate share of those costs, less depreciation (if an asset is involved). Under this approach, the state commission could require the incumbent LEC to provide the initial entrants *pro rata* refunds, reflecting the full amount of the charges collected from the subsequent entrants. Alternatively, a state commission may decide to permit incumbent LECs to charge initial entrants a proportionate fraction of the costs incurred, based on a reasonable estimate of the total demand by entrants for the particular interconnection service or unbundled rate elements.

751. In addition, state commissions must ensure that nonrecurring charges imposed by incumbent LECs are equitably allocated among entrants where such charges are imposed on one entrant for the use of an asset and another entrant uses the asset after the first entrant abandons the asset. For example, when an entrant pays a nonrecurring charge for construction of a physical collocation cage and the entrant discontinues occupying the cage before the end of the economic life of the cage, a state commission could require that the initial entrant receive a *pro rata* refund from the incumbent LEC for the undepreciated value of the cage in the event that a subsequent entrant takes physical collocation service and uses the asset. Under this approach, the state commission could require that the subsequent entrant pay the incumbent LEC a nonrecurring charge equal to the remaining unamortized value of the cage and the initial entrant will receive a credit from the incumbent LEC equal to the unamortized value of the cage at the time the subsequent entrant takes service and utilizes the cage.

752. BellSouth's concern that rate structure rules could preclude mutually agreeable alternative structures is misplaced. The rate structure rules we adopt here apply only to rates imposed by the states in arbitration among the parties and to state review of BOC statements of generally available terms. Our rules do not restrict parties from agreeing to alternative rate structures. On the contrary, our intent, following the clear pro-negotiation spirit of the 1996 Act, is for parties to use the backdrop of state arbitrations conducted under our rules, to negotiate more efficient, mutually agreeable arrangements, subject, of course, to the antitrust laws[1769] and to the 1996 Act's requirements that voluntarily negotiated agreements not unreasonably discriminate

[1769] Sherman Antitrust Act, 15 U.S.C. §§ 1 *et seq.*

against third parties.[1770]

b. Additional Rate Structure Rules for Shared Facilities

(1) Background

753. In the NPRM, we stated our belief that the costs of shared facilities should be recovered in a manner that efficiently apportions costs among users that share the facility. The NPRM noted that, for shared facilities, it may be efficient to set prices using any of the following: a usage-sensitive charge; a usage-sensitive charge for peak-time usage and a lower charge for off-peak usage; or a flat charge for the peak capacity that an interconnector wishes to pay for and use as though that portion of the facility were dedicated to the interconnector.[1771]

(2) Comments

754. USTA argues that shared facilities are more reasonably priced on a usage-sensitive basis.[1772] The Florida Commission and Telecommunications Resellers Association both contend that a variety of charges may be appropriate for shared facilities.[1773] Telecommunications Resellers Association further argues that the Commission should "require, where practicable, that LECs offer a flat-rated option with respect to common facilities and bear the burden of justifying instances in which they allege that such an option is not workable."[1774] AT&T makes a similar proposal, arguing that rates should generally be non-usage sensitive except where a usage-based charge is clearly required.[1775] Lincoln Tel. argues that costs of shared facilities should be apportioned among users of the shared facility and that a capacity approach that does not account for utilization of shared facilities would prevent small and mid-sized LECs from recovering their costs as they lack economies of scale.[1776]

[1770] *E.g.*, 47 U.S.C. § 252(e)(2)(A)(i).

[1771] NPRM at para. 151.

[1772] USTA comments at 57; *see also* Lincoln Tel. comments at 17; Sprint comments at 62; NTIA reply at 33-34.

[1773] Florida Commission comments at 31; Telecommunications Resellers Ass'n comments at 42.

[1774] Telecommunications Resellers Ass'n comments at 42.

[1775] AT&T comments at 67.

[1776] *See* Lincoln Tel. comments at 17.

(3) Discussion

755. The costs of shared facilities including, but not limited to, much of local switching, tandem switching, transmission facilities between the end office and the tandem switch, and signaling, should be recovered in a manner that efficiently apportions costs among users. Because the cost of capacity is determined by the volume of traffic that the facilities are able to handle during peak load periods, we believe, as a matter of economic theory, that if usage-sensitive rates are used, then somewhat higher rates should apply to peak period traffic, with lower rates for non-peak usage. The peak load price would be designed to recover at least the cost of the incremental network capacity added to carry peak period traffic. Pricing traffic during peak periods based on the cost of the incremental capacity needed to handle additional traffic would be economically efficient because additional traffic would be placed on the network if and only if the user or interconnecting network is willing to pay the cost of the incremental network capacity required to handle this additional traffic. Such pricing would ensure that a call made during the peak period generates enough revenue to cover the cost of the facilities expansion it requires, and would thus give carriers an incentive to expand and develop the network efficiently. In contrast, off-peak traffic imposes relatively little additional cost because it does not require any incremental capacity to be added to base plant, and consequently, the price for carrying off-peak traffic should be lower.

756. We recognize, however, that there are practical problems associated with a peak-sensitive pricing system. For example, different parts of a given provider's network may experience peak traffic volumes at different times (*e.g.*, business districts may experience their peak period between 10:00 and 11:00 a.m., while suburban areas may have their peak periods between 7:00 and 8:00 p.m.) Moreover, peak periods may change over time. For instance, growth in Internet usage may create new peak periods in the late evening. Further, charging different prices for calls made during different parts of the day may cause some customers to shift their calling to the less expensive time periods, which could shift the peak or create new peaks. Thus, to design an efficient peak-sensitive pricing system requires detailed knowledge of both the structure of costs as well as demand.

757. We conclude that the practical problems associated with peak-sensitive pricing make it inappropriate for us to require states to impose such a rate structure for unbundled local switching or other shared facilities whose costs vary with capacity. Because we believe that such a structure may be the most economically efficient, however, we do not prohibit states from imposing peak-sensitive pricing. We also expect that parties may be able to negotiate agreements with peak/off-peak differences if the benefits of such distinctions are sufficiently high. We conclude that states may use either usage-sensitive rates or flat capacity-based rates for shared facilities, if a state finds that such rates reasonably reflect the costs imposed by the various users. States may consider for guidance rate structures developed in competitive markets for shared facilities. We note that our decisions in this section may benefit small entity entrants in local exchange and exchange access markets by minimizing the extent to which purchasers of

interconnection and unbundled access pay rates that diverge from the costs of those facilities and services.[1777]

c. Geographic/Class-of-Service Averaging

(1) Background

758. In the NPRM, we asked about the appropriate level of aggregation for rates for interconnection and access to unbundled elements. We noted that geographic averaging is simple to administer and prevents unreasonable or unlawful rate differences but, where averaging covers high and low cost areas, it could distort competitors' decisions whether to lease unbundled elements or build their own facilities. We sought comment on the geographic deaveraging of interconnection and unbundled element rates by zone, LATA, or other area.[1778]

759. We also inquired about disaggregation by class of service. We questioned whether business and residential loops, or loops deployed using different technologies should be charged different rates, and how large a differential should be allowed.[1779]

(2) Comments

760. *Geographic Deaveraging.* Commenters generally agreed that rates for interconnection and unbundled elements should be geographically deaveraged where there are significant cost variations.[1780] Many parties assert that there are large geographic variations in the costs of providing these services and elements.[1781] Many commenters argue that rates for interconnection and unbundled elements must be geographically deaveraged in order to meet the

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[1777] *See* Regulatory Flexibility Act, 5 U.S.C. §§ 601 *et seq.*

[1778] NPRM at para. 133.

[1779] *Id.*

[1780] *See, e.g.*, Connecticut Commission comments at 13-14; N. Economides comments at 3; Maine Commission, *et al.* comments at 19. *Cf.* Colorado Commission comments at 41; Ohio Consumers' Counsel comments at 27-28 (deaveraging should be left to states); Pennsylvania Commission comments at 31 (noting industry movement towards deaveraging); Texas Commission at 24 (Commission should defer geographic deaveraging and rate rebalancing to universal service proceeding).

[1781] *See, e.g.*, Cincinnati Bell comments at 27; Lincoln Tel. comments at 14; Maine Commission, *et al.* comments at 27-28; Sprint comments at 50-51.

cost-based requirements of sections 251 and 252.[1782] Teleport maintains, however, that most geographic or class-of-service classifications have arisen from marketing or regulatory considerations and have no basis in cost causation.[1783] The Ad Hoc Telecommunications Users Committee fears the "balkanization of [incumbent] LECs' markets" and would only allow geographic deaveraging where incumbent LECs could demonstrate significant regional variation in their non-common costs.[1784] It claims that excessive pricing flexibility would encourage the recovery of common costs to be shifted from competitive markets to less competitive markets.[1785] Finally, MFS would have us require geographic averaging to deter anticompetitive, strategic pricing by incumbent LECs.[1786]

761. *Extent of Deaveraging.* Cincinnati Bell, Lincoln Tel., and MECA would place no limits on the degree of deaveraging that would be permitted.[1787] MCI and Sprint advocate deaveraging based on the population density in specified geographic areas or zones.[1788] AT&T also advocates zone density deaveraging and would have us require at least six zones.[1789] MFS proposes that prices could be averaged over several possible areas, with state-wide averaging being the maximum geographic area. To address concerns that widespread averaging may force low cost areas to subsidize high cost areas, MFS suggests that exchanges be assigned to a small number of cost bands based on access line density, but that rates be set at the state-wide average cost of the exchanges assigned to each zone.[1790] GST generally favors a level of disaggregation that would mitigate incumbent LEC administrative expenses, but would require loop components

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[1782] AT&T comments at 60.

[1783] Teleport comments at 48.

[1784] Ad Hoc Telecommunications Users Committee comments at 47.

[1785] *Id.*

[1786] MFS comments at 55-56.

[1787] *See, e.g.*, Cincinnati Bell comments at 27; Lincoln Tel. comments at 14; MECA comments at 46.

[1788] MCI comments at 68; Sprint comments at 50; *see also* MFS comments at 55-57.

[1789] AT&T comments at 67.

[1790] MFS comments at 55-56.

such as drops to be deaveraged and priced at LRIC.[1791]

762. *Opposition to National Rule.* Many state commissions seek flexibility to determine the degree of deaveraging and argue that this issue should be left to the states.[1792] Several favor deaveraging wherever the benefits exceed the administrative costs.[1793] The Connecticut Commission has already allowed SNET to create four cost categories based on density.[1794] The Michigan Commission would deaverage rates for interconnection and access to unbundled elements only where competitive entry warrants such flexibility, subject to a TSLRIC floor constraint.[1795] Michigan Commission further states that there may also be non-competitive situations that warrant rate deaveraging, such as when a service has wide cost variances, when averaging may reduce subscription levels, or when deaveraging could provide more accurate market signals due to cost variation.[1796]

763. *Class-of-Service Deaveraging.* In contrast to the general support by parties for geographic deaveraging, only one party supports class-of-service deaveraging.[1797] That party, the Ohio Consumers' Counsel, argues that permitting intercategory restrictions on unbundled elements would be consistent with intercategory restrictions on resale, such as prohibitions against reselling residential services to business customers, which are permitted under the 1996 Act.[1798] Many parties argue that incumbent LECs should not be able to charge different rates for interconnection or unbundled elements based on the class of service being provided with the elements or the class

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[1791] GST comments at 30.

[1792] *See, e.g.*, Colorado Commission comments at 41; Connecticut Commission comments at 13-14; Maine Commission, *et al.* comments at 19-21; Michigan Commission comments at 15; Texas Commission comments at 24; *see also* Ohio Consumers' Counsel comments at 27-28; California Commission reply at 18.

[1793] *See, e.g.*, Connecticut Commission comments at 13-14; Indiana Commission comments at 24; Mass. Commission comments at 11 n.5.

[1794] Connecticut Commission comments at 13-14.

[1795] Michigan Commission comments at 15-16.

[1796] *Id.*

[1797] Ohio Consumers' Counsel comments at 27-28.

[1798] *Id.*

of customer purchasing or using the interconnection or unbundled elements.[1799] According to most commenters, the 1996 Act's requirement that rates for interconnection and unbundled elements be cost-based generally precludes class-of-service rate differences, unless the costs of provision vary significantly across classes.[1800] Sprint adds that there is no cost justification for rates to differ when unbundled elements are used for business customers instead of residential customers. Sprint also argues that requiring different rates for newer, less-expensive elements would give entrants the incentive to avoid serving customers connected to older, more-expensive plant, which would leave incumbent LECs at systematic cost disadvantages.[1801]

(3) Discussion

764. *Geographic Deaveraging.* The 1996 Act mandates that rates for interconnection and unbundled elements be "based on the cost . . . of providing the interconnection of network elements." [1802] We agree with most parties that deaveraged rates more closely reflect the actual costs of providing interconnection and unbundled elements. Thus, we conclude that rates for interconnection and unbundled elements must be geographically deaveraged.

765. The record reflects that at least two states have implemented geographically-deaveraged rate zones.[1803] These rate zone pricing systems have generally included a minimum of three zones. In the *Expanded Interconnection* proceeding, the Commission also permitted LECs to implement a three zone structure.[1804] We conclude that three zones are presumptively sufficient to reflect geographic cost differences in setting rates for interconnection and unbundled elements, and that states may, but need not, use these existing density-related rate zones. Where such

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[1799] *See, e.g.*, Koch comments at 3; GST comments at 30; Mass. Commission comments at 11; MFS comments at 56-57; Sprint comments at 50; Teleport comments at 48.

[1800] *See, e.g.*, Citizens comments at 18; Mass. Commission comments at 11; MFS comments at 56-57.

[1801] Sprint comments at 51.

[1802] 47 U.S.C. § 252(d)(1)(a)(i).

[1803] Connecticut Commission comments at 13; Illinois Commission comments at Attachment C (Illinois Commerce Commission Order), p.54, 60-61.

[1804] *Expanded Interconnection with Local Telephone Company Facilities and Amendment of the Part 69 Allocation of General Support Facility Costs*, CC Docket Nos. 91-141 and 92-222, Report and Order and Notice of Proposed Rulemaking, 7 FCC Rcd 7369, 7454-57 (1992) (*Expanded Interconnection Order*); Second Report and Order and Third Notice of Proposed Rulemaking, 8 FCC Rcd 7374, 7426-29 (1993). LEC central offices in areas with the highest traffic densities were assigned to Zone 1; offices in areas with intermediate degrees of density were assigned to Zone 2; and offices in areas with the lowest density were assigned to Zone 3.

systems are not in existence, states shall create a minimum of three cost-related rate zones to implement deaveraged rates for interconnection and unbundled elements. A state may establish more than three zones where cost differences in geographic regions are such that it finds that additional zones are needed to adequately reflect the costs of interconnection and access to unbundled elements.

766. *Class-of-Service Deaveraging.* The record leads us to the opposite conclusion for class-of-service deaveraging. Under the 1996 Act, wholesale rates for resold services will be based on retail rates less avoided costs. Rates for interconnection and access to unbundled elements, however, are to be based on costs. We conclude that the pricing standard for interconnection and unbundled elements prohibits deaveraging that is not cost based. Interconnection and unbundled elements are intermediate services provided by incumbent LECs to other telecommunications carriers, and there is no evidence that the cost of providing these intermediate services varies with the class of service the telecommunications carrier is providing to its end-user customers. We conclude that states may not impose class-of-service deaveraging on rates for interconnection and unbundled elements. We disagree with the Ohio Consumers' Counsel's position that the 1996 Act's explicit permission of class-of-service deaveraging of resold services implies that class-of-service deaveraging should be permitted for interconnection and unbundled elements. Finally, we note that these decisions concerning averaging may be expected to lead to increased competition and a more efficient allocation of resources, which should benefit the entire industry, including small entities and small incumbent LECs.[1805]

C. Default Proxy Ceilings and Ranges

767. As previously discussed, we strongly encourage state commissions, as a general rule, to set arbitrated rates for interconnection and access to unbundled network elements pursuant to the forward-looking, economic cost pricing methodology we adopt in this Order. Such rates would approximate levels charged in a competitive market, would be economically efficient, and would be based on the forward-looking, economic cost of providing interconnection and unbundled elements. We recognize, however, that, in some cases, it may not be possible for carriers to prepare, or the state commission to review, economic cost studies within the statutory time frame for arbitration and thus here first address situations in which a state has not approved a cost study. States that do not complete their review of a forward-looking economic cost study within the statutory time periods but must render pricing decisions, will be able to establish interim arbitrated rates based on the proxies we provide in this Order. A proxy approach might provide a faster, administratively simpler, and less costly approach to establishing prices on an interim basis than a detailed forward-looking cost study.

768. The default proxies we establish will, in most cases, serve as presumptive ceilings. States may set prices below those ceilings if the record before them supports a lower price,

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[1805] *See* Regulatory Flexibility Act, 5 U.S.C. §§ 601 *et seq.*

States should provide a reasoned basis for selecting a particular default price. In one case, for local switching, the default proxy is a range within which a state may set prices.

769. States that set prices based upon the default proxies must also require the parties to update the prices in the interconnection agreement on a going-forward basis, either after the state conducts or approves an economic study according to the cost-based pricing methodology or pursuant to any revision of the default proxy. We believe generic economic cost models,[1806] in principle, best comport with the preferred economic cost approach described previously, and we intend to examine further such models by the first quarter of 1997 to determine whether any of those models, with any appropriate modifications, could serve as better default proxies. Any updated price would take effect beginning at the time of the completed and approved study or the application of the revised default proxy.

770. Second, if a state has approved or conducted an economic cost study, prior to this Order, that complies with the methodology we adopt in this Order, the state may continue to apply the resulting rate even when not consistent with our default proxies. There must, however, be a factual record, including the cost study, sufficient for purposes of review after notice and opportunity for the affected parties to participate.

771. Finally, while we provide for the use by states of default proxies, we recognize that certain states that are unable to utilize an economic cost study may wish to obtain the benefits of setting rates pursuant to such a study for its residents. The Commission will therefore entertain requests by states to review an economic cost study, to assist the state in conducting or reviewing such a study, or to conduct such a study.

1. Use of Proxies Generally

a. Background

772. In the NPRM, we discussed the possibility of setting certain outside limits for interconnection and unbundled element rates, in particular, by the use of proxies. We invited parties to comment on whether the use of certain proxies to set outer boundaries on the prices for interconnection and unbundled elements would be consistent with the pricing principles of the 1996 Act. Specifically, in the NPRM, we asked parties to comment on the benefits of various types of proxies: (1) generic cost studies, such as the Benchmark Cost Model and the Hatfield models;[1807] (2) some measure of nationally-averaged cost data;[1808] (3) rates in existing

[1806] *See* Section VII.C.3. *infra.*

[1807] NPRM at para. 137; *see infra*, Section VII.C.3, discussing generic cost models.

interconnection and unbundling arrangements between incumbent LECs and other providers of local service, such as neighboring incumbent LECs, CMRS providers, or other entrants in the same service area;[1809] (4) a subset of the incumbent LECs' existing interstate access rates, charged for interconnection with IXCs and other access customers, or an intrastate equivalent;[1810] (5) use of the interstate prices established in the *ONA* proceeding for unbundled features and functions of the local switch as ceilings for the same unbundled elements under section 251;[1811] and (6) any other administratively simple methods for establishing a ceiling for interconnection and unbundled network element rates.[1812] As a counterpart to ceilings, we also sought comment on whether it would be necessary or appropriate for us to establish floors for interconnection and unbundled element prices.[1813]

b. Comments

773. *Proxies Generally.* A number of parties offer general support for the use of cost proxies to establish upper limits on the rates that incumbent LECs may charge for interconnection and unbundled elements.[1814] Ad Hoc Telecommunications Users Committee cautions, however, that using a proxy approach does not eliminate the need for detailed analysis of the cost methodologies and cost inputs upon which the proxy is based.[1815] In addition, USTA contends that the Commission should establish a presumptive framework using targets based on pricing proxies, from which the states would be permitted to depart based on individual circumstances.[1816]

[1808] NPRM at para. 137.

[1809] *Id.* at para. 138.

[1810] *Id.* at paras. 139-140.

[1811] *Id.* at para. 140.

[1812] *Id.* at para. 141.

[1813] *Id.* at para. 143.

[1814] *See, e.g.*, GSA/DoD comments at 8; Cox comments at 31, reply at 30; WinStar comments at 31; NEXTLINK comments at 27-28; Texas Public Utility Counsel Comments at 28-33; NCTA comments at Attachment A (Declaration of Bruce M. Owen), pp.5-6, reply at 18-19; *see also* USTA comments at 50 ("may be a feasible way to establish presumptively valid rates for some unbundled elements").

[1815] Ad Hoc Telecommunications Users Committee comments at 48-49.

[1816] USTA reply at 19, 28; *see also* Washington Commission comments at 27.

774. Incumbent LECs and AT&T generally oppose the use of proxies.[1817] They argue that a national proxy methodology for all network elements is inappropriate because it would not reflect cost-based rates,[1818] may restrict competitive entry,[1819] does not allow for variations among the states,[1820] and is inconsistent with the 1996 Act's mandate of economic costing.[1821] Several commenters contend that the use of proxies could harm small and mid-sized incumbent LECs if such proxies are developed from larger geographic and demographic scales.[1822] In addition, Ameritech opposes the use of proxies for those states that have already adopted cost methodologies and urges the Commission to limit application of such proxies to states that have not yet adopted appropriate cost and pricing methodologies.[1823]

775. *Floors and Ceilings.* Several commenters oppose adoption of a federal floor and ceiling for the rates of interconnection and access to unbundled elements.[1824] They argue generally that such an approach is inferior to a prescription of a specific methodology because it results in rates that are not cost-based and therefore inconsistent with the statute, provides an incentive to incumbent LECs to price inefficiently at the maximum, and removes incentives for

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[1817] *See, e.g.*, AT&T comments at 52-53; Bell Atlantic comments at 39; Cincinnati Bell comments at 27; Frontier comments at 22-23; LDDS comments at 65 n.66; Lincoln Tel. comments at 15-16.

[1818] *See, e.g.*, ALTS comments at 37; AT&T comments at 53; NYNEX comments at 53; Lincoln Tel. comments at 15-16; Texas Statewide Telephone Cooperative comments at 14; Rural Tel. Coalition comments at 22; Washington Independent Tel. Ass'n comments at 6.

[1819] *E.g.*, Cincinnati Bell comments at 28; AT&T comments at 53.

[1820] *See, e.g.*, Bell Atlantic comments at 39; Rural Tel. Coalition comments at 22; Wyoming Commission comments at 31; Alaska Commission comments at 2-3.

[1821] *See, e.g.*, ALTS comments at 35; Time Warner comments at 54-55; Washington Independent Tel. Ass'n comments at 6-7; Ohio Commission comments at 50.

[1822] *See, e.g.*, Cincinnati Bell comments at 28; Colorado Independent Tel. Ass'n comments at 4; Illinois Ind. Ass'n comments at 5; Lincoln Tel. comments at 17; Matanuska Tel. comments at 4; Rural Tel. Coalition comments at 22, 28-29; SBA comments at 16; TDS comments at 22.

[1823] Ameritech comments at 61.

[1824] *See, e.g.*, Frontier comments at 22; Lincoln Tel. comments at 14-15; MECA comments at 47; Pennsylvania Commission comments at 31; Telecommunications Resellers Ass'n comments at 41.

upgrading network technology.[1825] Moreover, any such price ceiling would have to be set as high as the reasonable price for the highest cost company or be challenged as confiscatory when higher cost LECs are unable to recover their costs.[1826] In addition, the Texas Public Utility Counsel notes that floors impair the ability of competition to reveal how low costs really are.[1827]

776. Many parties agree, however, that if the Commission establishes pricing guidelines it should use an "outer bounds" pricing approach or require pricing within a zone of reasonableness.[1828] Others support an "outer bounds" if the Commission ensures that states will have sufficient leeway to accommodate state-specific situations,[1829] and the range of reasonableness is not so circumscribed as to reduce the range to the equivalent of a price point.[1830] They argue that establishing separate floors and ceilings enables the Commission to set absolute boundaries that frame the debate with the incumbent LEC concerning relevant costs and prices during negotiations and ultimately arbitration, while giving states flexibility to address state-specific costing issues.[1831] Parties assert that calculation of a perfectly correct, single price is impossible and that cost boundaries allow states to choose an acceptable pricing result with a range of reasonable rates.[1832] Several parties agree that the Commission should establish a presumptive rate ceiling, and that rates exceeding the ceiling should be presumed unlawful.[1833] USTA contends that, if the Commission adopts rate ceilings, such ceilings should indicate levels

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[1825] *See, e.g.*, NYNEX comments at 57; Frontier comments at 22-23; Lincoln Tel. comments at 14-15; AT&T comments at 52-53; TDS comments at 22.

[1826] Oregon Commission comments at 29-30; *see also* GVNW comments at 38-39.

[1827] Texas Public Utility Counsel comments at 33.

[1828] *See, e.g.*, Ad Hoc Telecommunications Users Committee comments at 48; BellSouth comments at 55; Cox comments at 24; GSA/DoD comments at 8; NEXTLINK comments at 27-28; SBC comments at 93; USTA comments at 38; WinStar comments at 31; NCTA reply at 18.

[1829] *See, e.g.*, Kentucky Commission comments at 5; Ohio Consumers' Counsel comments at 29; Puerto Rico Tel. comments at 10-11; Washington Commission comments at 26.

[1830] *See, e.g.*, BellSouth comments at 55.

[1831] *See, e.g.*, GSA/DoD comments at 8; Cox comments at 24, reply at 30-31; NEXTLINK comments at 27-28.

[1832] *See, e.g.*, Rural Tel. Coalition comments at 30.

[1833] *See, e.g.*, ACSI comments at 56; Bell Atlantic comments at 39-40; Cincinnati Bell comments at 27, 30; MCI comments at 60; PacTel comments at 73-74; Texas Public Utility Counsel comments at 28-29.

above which rates must be further justified.[1834] Ameritech maintains that floors should be used only as a benchmark below which rates may not be set in order to guard against cross-subsidization and predatory pricing.[1835]

777. *Generic Cost Models.* Several generic forward-looking cost models were introduced into the record. These are discussed in Section VII.C.3. below.

778. *Nationally-Averaged Costs.* Although a few commenters support the use of nationally-averaged costs as a proxy to establish the rates for interconnection and unbundled network elements,[1836] many more parties oppose the use of such nationally-averaged cost data.[1837] These parties argue that nationally-averaged data ignore geographically divergent factors and the interests of small or rural LECs, do not account for variance of cost between incumbent LECs, and do not reflect the true cost of the service.[1838] No nationally-averaged cost studies were introduced into the record.

779. *Existing Interconnection Agreements.* Generally, commenters oppose the use of rates in existing interconnection agreements as a proxy-based ceiling for interconnection and unbundled element rates.[1839] These parties argue that, because the agreements are the subject of the negotiation between two carriers with their own particular characteristics and needs, such agreements are likely to be inconsistent and not cost-based, may not be based on the pricing standards codified at 252(d), and the services covered by these agreements may not be those that

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[1834] USTA comments at 50.

[1835] Ameritech comments at 73; *see also* GSA/DoD comments at 8; Ohio Consumers' Counsel comments at 28; TDS comments at 20.

[1836] *See, e.g.*, MECA comments at 47; PacTel comments at 74; Sprint comments at 55; *see also* ACSI comments at 56.

[1837] *See, e.g.*, Ad Hoc Telecommunications Users Committee comments at 49-50; Bay Springs, *et al.* comments at 17; Cincinnati Bell comments at 28; Colorado Independent. Tel. Ass'n comments at 4; Florida Commission comments at 29; Illinois Independent Tel. Ass'n comments at 5-6; Lincoln Tel. comments at 15-16; Telecommunications Resellers Ass'n comments at 41.

[1838] *See, e.g.*, Ad Hoc Telecommunications Users Committee comments at 49; Bay Springs, *et al.* comments at 17; Cincinnati Bell comments at 28; GVNW comments at 31-38.

[1839] *See, e.g.*, ACSI comments at 58; Ad Hoc Telecommunications Users comments at 52; Cincinnati Bell comments at 28-29; Colorado Commission comments at 43; Florida Commission comments at 30; MCI comments at 70; Telecommunications Resellers Ass'n comments at 41.

entrants need to purchase.[1840] A few parties express qualified support for a proxy based on the rates in existing interconnection agreements between incumbent LECs, arguing that such rates have already been scrutinized and determined to be just and reasonable.[1841] WinStar cautions that the Commission should not use the rates contained in the existing interconnection agreements between incumbent LECs and CMRS providers or other new entrants as a proxy ceiling because they were negotiated by parties with unequal bargaining power.[1842]

780. *Interstate Access.* A number of parties support the use of a proxy based on existing interstate access charges, claiming that it is easy to apply, based on cost, and would be self-correcting as the access reform and universal service proceedings remove subsidies from access rates.[1843] ALLTEL further maintains that if access charges are used, there should be no requirement for small and mid-sized LECs to produce cost studies that could hamper their interconnection negotiations.[1844] USTA further argues that such proxies are important to all LECs, but are especially important for rural, small, and mid-sized LECs subject to the two percent waiver process, who should not be subjected to the burden of producing expensive and time-consuming cost studies.[1845] Several parties note that some access charges may need to be adjusted or converted to reflect the characteristics of particular unbundled service offerings.[1846] Others oppose the development of a proxy-based ceiling derived from existing interstate access rates, because access charges are based on historical, rather than economic, costs, and contain

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[1840] *See, e.g.*, Ad Hoc Telecommunications Users Committee comments at 52; Florida Commission comments at 30; Telecommunications Resellers Ass'n comments at 41; Time Warner comments at 55.

[1841] *See, e.g.*, Bell Atlantic comments at 39-40; Ohio Consumers' Counsel comments at 28-29; PacTel reply at 34-35; Pennsylvania Commission comments at 31; Texas Commission comments at 24-25; WinStar comments at 32.

[1842] WinStar comments at 34; *see also* Telecommunications Resellers Ass'n comments at 41; ACSI comments at 58.

[1843] *See, e.g.*, ALLTEL comments at 10-11; Bell Atlantic comments at 39-40, 56; BellSouth comments at 56; Cincinnati Bell comments at 29; SBC comments at 94; USTA comments at 54, reply at 28.

[1844] ALLTEL comments at 11.

[1845] USTA reply at 27-28.

[1846] *See, e.g.*, Cincinnati Bell at 30; SBC comments at 95; USTA comments at 54.

inordinate amounts of contribution.[1847] These commenters note that setting rates for other elements that could not be derived from access rates would involve application of different proxies,[1848] and the intrastate and interstate rates associated with common lines are applied in different ways to different categories and classes of customers.[1849] NYNEX argues access charges were designed for a different purpose than interconnection and unbundled elements and therefore would be inappropriate proxies.[1850]

781. In addition, several parties assert that a proxy based on access charges should include all or part of the CCLC or TIC, because otherwise it would be impossible to determine whether an appropriate amount of joint and common costs would be recovered, and IXCs would be able to reconstruct access through unbundled elements priced less than access.[1851] GVNW argues that the TIC is particularly important for small LECs that are not allowed to charge a rate that more accurately reflects their tandem switched transport costs.[1852] On the other hand, several commenters argue that the CCLC and TIC should be excluded,[1853] and WinStar further maintains that, even without those elements, access charge rates would still be too high to serve as a proxy ceiling.[1854]

[1847] *See, e.g.*, ACSI comments at 58; Ad Hoc Telecommunications Users Committee comments at 52-53; Colorado Commission comments at 43; Frontier comments at 23; Lincoln Tel. comments at 15-16; MCI comments at 70; MFS comments at 57 n.66.

[1848] *See, e.g.*, Ad Hoc Telecommunications Users Committee comments at 52-53.

[1849] *See, e.g.*, NYNEX comments at 59-60.

[1850] NYNEX comments at 58-59.

[1851] *See, e.g.*, Cincinnati Bell comments at 29; NYNEX comments at 59; Texas Commission comments at 25; USTA comments at 51-53.

[1852] GVNW comments at 39.

[1853] *See, e.g.*, Sprint comments at 58; Texas Public Utility Counsel comments at 30-32; WinStar comments at 36-37.

[1854] WinStar comments at 36-37.

c. Discussion

782. We adopt, in the section below, default proxies for particular network elements. We believe that these default proxies generally will result in reasonable price ceilings or price ranges and, for administrative and practical reasons, will be beneficial to the states in conducting initial rate arbitrations, especially in the time period prior to completion of a cost study. The proxies we adopt are designed to approximate prices that will enable competitors to enter the local exchange market swiftly and efficiently and will constrain the incumbent LECs' ability to preclude efficient entry by manipulating the allocation of common costs among services and elements. States that utilize the default proxies we establish to set prices in an arbitration should revise those prices on a going-forward basis when they are able to utilize the preferred economic costing methodology we describe in Section VII.B.2.a. above, or if we subsequently adopt new proxies.[1855]

783. We have considered the economic impact of the adoption of default proxy ceilings and ranges on small entities, including new entrants and small incumbent LECs.[1856] The adoption of proxies for interim arbitrated rates should minimize regulatory burdens on the parties to arbitration, including small entities seeking to enter the local exchange markets and small incumbent LECs, by permitting states to implement the 1996 Act more quickly and facilitating competition on a reasonable and efficient basis by all firms in the industry. We therefore believe that the adoption of default proxy ranges and ceilings advances the pro-competitive goals of the 1996 Act. We also note that certain small incumbent LECs are not subject to our rules under section 251(f)(1) of the 1996 Act, unless otherwise determined by a state commission, and certain other small incumbent LECs may seek relief from their state commissions from our rules under section 251(f)(2) of the 1996 Act.[1857]

784. The proxies that we establish represent the price ceiling or price ranges for the particular element on an averaged basis. In Section VII.B.3.c. above, we required that rates be set on a geographically-deaveraged basis. Consequently, states utilizing the proxies shall set rates such that the average rate for the particular element in a study area does not exceed the applicable proxy ceiling or lie outside the proxy range.

785. We reject the use of rates in interconnection agreements that predate the 1996 Act as

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[1855] *See infra*, Section VII.C.3., discussing generic cost models.

[1856] *See* Regulatory Flexibility Act, 5 U.S.C. §§ 601 *et seq*.

[1857] 47 U.S.C. § 251(f).

a proxy-based ceiling for interconnection and unbundled element rates.[1858] These existing interconnection agreements were not reached in a competitive market environment. Further, such agreements may reflect the divergent bargaining power of the parties to the agreement, various public policy initiatives to advance rural telephone service, or non-monetary *quid pro quos* often found in voluntarily negotiated business arrangements that may be difficult to quantify. There is little basis for us to conclude that rates in these interconnection agreements reflect the forward-looking, incremental cost of interconnection and unbundled network elements. Prices in agreements reached since the 1996 Act are more likely than prior agreements to provide useful information about forward-looking costs, which together with other information may be useful in establishing proxies.

786. In the NPRM, we also raised the issue of using some measure of nationally-averaged cost data as a proxy.[1859] No such study has been submitted into the record in this proceeding.

2. Proxies for Specific Elements

a. Overview

787. Although we encourage states to use an economic cost methodology to set rates for interconnection, unbundled network elements, and collocation, we will permit states unable to analyze an economic costing study within the statutory time constraints to use default proxies in setting and reviewing rates. We set forth below the default proxies for specific network elements. These proxies are interim only. They will apply only until a state sets rates in arbitrations on the basis of an economic cost study, or until we promulgate new proxies based on economic cost models.[1860] We also set forth below the rate structure rules that apply to each of network elements. These rate structure requirements are applicable regardless of whether a state uses an economic cost study or the proxy approach to set rate levels.

[1858] *See* discussion *supra*, Section III.C., concerning the applicability of section 252 to preexisting agreements.

[1859] NPRM at para. 137.

[1860] *See infra*, Section VII.C.3., discussing generic cost models.

b. Discussion

(1) Loops

(a) Comments

788. A number of commenters assert that unbundled loops, in particular, are dedicated facilities, and therefore should be priced on a flat-rated basis.[1861] Sprint suggests that prices for unbundled loops not depend on minutes of use, but rather distance.[1862] MFS urges the Commission to preempt a Texas statute that, it contends, requires incumbent LECs to price unbundled loops on a usage-sensitive basis.[1863]

(b) Discussion

789. Most loop costs are associated with a single customer.[1864] Outside plant between a customer's premises and ports on incumbent LEC switches is typically either physically separate for each individual customer, or has costs that can easily be apportioned among users. We therefore conclude that costs associated with unbundled loops should be recovered on a flat-rated basis. Usage-based rates for an unbundled loop would most likely translate into usage-based rates for new entrants' retail local customers. A retail usage-based rate would distort incentives for efficient use. Customers that had to pay a usage charge would have an incentive not to use the network in situations where the benefit of using the network exceeds the true cost of using the network. Usage-based loop prices would put an entrant at an artificial cost disadvantage when competing for high-volume customers.[1865]

790. In general, we believe that states should use a TELRIC methodology to establish

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[1861] *See, e.g.*, CompTel comments at 36; Florida Commission comments at 31; MFS comments at 62; *see also* AT&T comments at 67; GSA/DoD comments at 10.

[1862] Sprint comments at 62.

[1863] MFS comments at 62.

[1864] *See MTS and WATS Market Structure*, CC Docket No. 78-72, Phase I, Third Report and Order, 93 FCC 2d 241, 291-297 (1983).

[1865] We note that MFS has filed a separate petition asking the Commission to preempt certain provisions of the Texas statute, which it contends requires incumbent LECs to sell unbundled local loops on a usage-sensitive basis. *See* Public Notice, *Petition for Preemption of Local Entry Barriers Pursuant to Section 253*, 11 FCC Rcd 6578 (Com. Car. Bur. 1996) (*MFS Texas Petition*). We will rule specifically on the Texas statute when we consider the *MFS Texas Petition*.

geographically deaveraged, flat-rate charges for access to unbundled loops. As discussed above, however, we recognize that, in some cases, it may not be possible for carriers to prepare, or for state commissions to review, economic cost studies within the statutory time frame for arbitration proceedings. Because reviewing and approving such cost studies takes time and because many states have not yet begun, or have only recently begun, to develop and examine such studies, it is critical for the near-term development of local competition to have proxies that provide an approximation of forward-looking economic costs and can be used by states almost immediately. These proxies would be used by a state commission until it is able either to complete a cost study or to evaluate and adopt the results of a study or studies submitted in the record. In an NPRM to be issued shortly, we will investigate more fully various long-run incremental cost models in the record with an eye to developing a model that can be used to generate proxies for the forward looking economic costs of network elements. Until such time as we can develop such a model, we have developed the following default proxy ceilings that state commissions that have not completed forward looking economic cost studies may use in the interim as an approximation to the forward looking cost of the local loop.

791. State commissions may use this proxy to derive a maximum (or ceiling) loop rate for each incumbent LEC operating within their state, and may establish actual unbundled loop rates at any level less than or equal to this maximum rate in specific arbitrations or other proceedings. Of course, we are encouraging states to have economic studies completed wherever feasible. Moreover, states will have to replace this proxy ceiling with the results of their own forward looking economic cost study or the results produced by a generic economic cost model that the Commission has approved.[1866]

792. We are adopting a proxy ceiling based on two cost models and rates for unbundled loops allowed by six states that had available to them the results of forward-looking economic cost studies at the time they considered either interim or permanent rates for the unbundled loop element. These states are Colorado, Connecticut, Florida, Illinois, Michigan, and Oregon. Each of these states has used a standard that appears to be reasonably close to the forward-looking economic cost methodology that we require to be used, although possibly not consistent in every detail with our TELRIC methodology.[1867] Generally, these states appear to have included an

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[1866] *See infra*, Section VII.C.3., discussing generic cost models.

[1867] *See In re: US West Communications, Inc. Filing of Advice Letter No. 2610 In Compliance with Commission Decision No. C96-521 Adopting Emergency Rules (Tariff)*, Docket No. 96S-233T, Decision No. C96-655 (Colorado Commission, June 21, 1996)["*Colorado Decision*"] at 58-64 (interim unbundled loop prices set after review of TSLRIC cost studies); *Re Southern New England Telephone Company*, Order No. 95-06-17, 1995 WL 803837 (Conn. D.P.U.C., December 20, 1995)["*Connecticut Decision*"] at 9-10, 72 (same); *In re: application of City Signal, Inc., for an order establishing and approving interconnection arrangements with Ameritech Michigan*, Case No. U-10647 (Michigan Commission, February 23, 1995) ["*Michigan Decision*"] at 32, 56-57 (setting interim unbundled loop rates based on estimated TSLRIC costs); *In Re: Resolution of petition(s) to*

allocation of forward-looking common costs in their unbundled loop prices. The individual state studies resulted in the following average rates for unbundled local loops: Colorado, $18; Connecticut, $12.95; Florida, $17.28; Illinois, $10.93; Michigan, $10.03; and Oregon, $12.45, computed as set forth below.

793. The Colorado Commission set an interim rate of $18 per month for unbundled loops terminated at the main distribution frame of the LEC switch.[1868] The Connecticut Commission ruled that SNET must provide the following interim unbundled loop prices varying by four zones: metro $10.18; urban $11.33; suburban $15.33; and rural $14.97.[1869] In the absence of further information about customer density or average loop length by zone, we used a simple average equal to $12.95. The Florida Commission set an interim rate for 2-wire loops at $17.00 per month for BellSouth, $15.00 for United/Centel, and $20.00 for GTE.[1870] Using weights equal to the number of loops served by each company in 1994 as reported in the Monitoring Report,[1871] we computed a weighted average price equal to $17.28. Pursuant to its *Customers First* Order, the Illinois Commerce Commission approved tariffs establishing business rates equal to $7.08,

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establish nondiscriminatory rates, terms and conditions for resale involving local exchange companies and alternative local exchange companies and alternative local exchanges companies pursuant to Section 364.161, Florida Statutes, Docket No. 950984-TP, Order No. PSC-96-0444-FOF-TP, (Florida Commission, March 29, 1996)["*Florida Decision I*"] at 16 (interim unbundled loop prices set with reference to BellSouth cost studies); *In Re: Resolution of petition(s) to establish nondiscriminatory rates, terms and conditions for resale involving local exchange companies and alternative local exchange companies and alternative local exchanges companies pursuant to Section 364.161, Florida Statutes*, Docket No. 950981-TP, Order No. PSC-96-0811-FOF-TP (Florida Commission, June 24, 1996)["*Florida Decision II*"] at 25-26 (setting rates after review of GTE and United/Centel cost studies); *In re: Investigation into the Cost of Providing Telecommunications Services*, Order No. 96-188, (Oregon Commission, July 19, 1996)["*Oregon Decision*"] at 78 n.61 (interim unbundled loop prices generally based on LRIC estimates plus applicable group related costs, and an additional contribution for recovery of joint and common costs); *Illinois Bell Telephone Company Proposed introduction of a trial of Ameritech's Customers First Plan in Illinois*, Docket Nos. 94-0096/94-0117/94-0146/94-0301 (Illinois Commission, April 7, 1995)["*Customers First* Order"] at 54, 61 (rates set with reference to Ameritech's LRSIC studies).

[1868] *Colorado Decision* at 66.

[1869] *Connecticut Decision* at 74.

[1870] *Florida Decision I* at 19; *Florida Decision II* at 25-26.

[1871] Monitoring Report, CC Docket No. 87-339, May 1996 (listing the following number of loops by company: GTE, 1,909,172; United/Centel, 1,627,314; BellSouth, 5,328,280).

$10.92, and $14.45, and residential rates equal to $4.59, $8.67, and $12.14 in three density zones.[1872] Based on data from Table 2.5, page 20 of the Common Carrier Statistics, 1995 Preliminary, we found a 36 percent - 64 percent business residential split. Using Illinois Commission data for number of households in each density zone (996,750 in zone A; 2,788,759 in zone B; 4,594,567 in zone C), we computed an average loop cost of $10.93. The Michigan Commission approved transitional rates of $8.00 per loop for business and $11 per loop for residence.[1873] Based on Common Carrier Statistics, 1995 Preliminary data, we computed a 32 percent - 68 percent business-residential split in Michigan, which leads to an average rate of $10.03. The Oregon Commission set the rate for a "basic 2-wire loop set" at $11.95 plus $0.50 for a network access channel connection, for a total price of $12.45.[1874]

794. In order to set a proxy ceiling for unbundled loop elements we make use of the two cost models for which nationwide data are available and upon which parties have had the opportunity to comment in this proceeding. These models are the Benchmark Cost Model (*BCM*)[1875] and the *Hatfield 2.2*.[1876] Based on our current information, we believe that both these models are based on detailed engineering and demographic assumptions that vary among states, and that the outputs of these models represent sufficiently reasonable predictions of relative cost differences among states to be used as set forth below to set a proxy ceiling on unbundled loop prices for each state. We do not believe, however, that these model outputs by themselves necessarily represent accurate estimates of the absolute magnitude of loop costs. As we discuss below, further analysis is necessary in order to evaluate fully the procedures and input assumptions that the models use in order to derive cost estimates. Furthermore, in the case of *BCM*, model outputs include costs in addition to the cost of the local loop. In order to correct for these considerations, we have developed a hybrid cost proxy in the following manner. First, we have applied a scaling factor to the cost estimates of each model. This scaling is based on the actual rates computed for unbundled loop elements in the six states referred to above. Specifically we have multiplied the cost estimate produced by each model in each state by a

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[1872] *See* Ameritech Tariff, Ill. C.C. No. 20, Part 19, Section 1, issued October 23, 1995.

[1873] *Michigan Decision* at 94.

[1874] *Oregon Decision* at Appendix C, p.1.

[1875] *Benchmark Cost Model: A Joint Submission by MCI Communications, Inc., NYNEX Corporation, Sprint Corporation, U S West, Inc.* (December 1995), submitted by MCI Communications, Inc., NYNEX Corp., Sprint/United Management Corp., U S West, Inc. on July 24, 1996 (*BCM*). For a more detailed discussion of the *BCM*, *see infra*, Section VII.C.3.

[1876] *Hatfield Model, Version 2.2, Release 1*, (Hatfield Associates, Inc., March 1996), submitted by AT&T and MCI on May 16, 1996 (*Hatfield 2.2*); *see also* AT&T reply at Appendix D (Update of the Hatfield Model Version 2.2, Release 1). *See infra*, Section VII.C.3., for a more detailed discussion of the various versions of the *Hatfield* model.

factor equal to the unweighted average of rates adopted by state commissions in the six states, divided by the unweighted average of the model cost estimates for the same six states. Our hybrid cost proxy is computed as the simple average of the scaled cost estimates for the two models in each of the 48 contiguous states and the District of Columbia. Neither *BCM* nor *Hatfield 2.2* provide cost estimates for Alaska and only the *BCM* provides an estimate for Hawaii. Our default loop cost proxies for Hawaii and Puerto Rico are based on the default loop cost proxies of the states that most closely approximate them in population density per square mile.[1877] We are not setting default loop cost proxies in this Order for Alaska or for any of the remaining non-contiguous areas subject to the 1996 Act requirement that incumbent LECs offer unbundled loop elements. We are not establishing default loop cost proxies for these areas because we are unsure that comparisons of the population densities of the continental states and of Alaska and other non-contiguous areas subject to the 1996 Act fully capture differences in loop costs. Regulatory authorities in those areas may seek assistance from this Commission should default loop cost proxies be needed before they have completed their investigations of the forward-looking costs of providing unbundled loop elements. Since our intention is to establish a ceiling for unbundled loop rates, we believe that it is necessary to take account of the variation in the data that we have used for scaling. While the six states that we considered appear to have based their rates on forward-looking economic cost pricing principles, the actual rates that they approved appear to reflect other factors as well. Furthermore, because only a small number of states have conducted such studies, some upward adjustment is warranted as a safety margin to ensure that the ceiling captures the variation in forward-looking economic costing prices on a state-by-state basis. We have therefore chosen to adjust the hybrid cost estimates upward by five percent for each state. A table listing the proxy ceilings on a statewide average basis is contained in Appendix D.

795. A number of parties have opposed the use of either the *Hatfield* model or *BCM*.[1878] Some critics, for example, have argued that the models may lead to inaccurate cost estimates since these estimates assume that a network is built "from scratch."[1879] Others have criticized specific procedures that have been used in the models to estimate both operating expenses and capital costs. As discussed below in Section VII.C.3., we believe that these criticisms may have merit. In a future rulemaking proceeding, we intend to examine in greater detail various forward looking economic cost models. For the purposes of setting an interim proxy, however, we note

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[1877] There is a strong (negative) correlation between population density and the loop costs reported by all the cost models. The correlation is significant at the 5% level. Population densities are from The Statistical Abstract of the United States 1995, Table Number 23. For Puerto Rico, land area is from Table 361 and population is from Table 1345.

[1878] For a more detailed discussion of these generic cost models, *see infra*, Section VII.C.3.

[1879] *See, e.g.*, Florida Commission comments at 28-29; USTA comments at 54 n.45; Rural Tel. Coalition reply at 35.

that the criticisms have been directed largely toward the absolute level of cost estimates produced by the models, rather than the relative cost estimates across states. Since our hybrid proxy ceiling explicitly scales the model cost estimates based on existing state decisions and uses the model results simply to compute relative prices, we believe that these criticisms do not apply in the present context.

796. We also note that a third model, the *BCM 2*,[1880] could have been used in the construction of our interim cost proxy by simply taking the scaled cost estimates from three cost models instead of two. We have chosen not to follow this approach since parties have not had an opportunity to comment on the possible deficiencies of the *BCM 2*. For comparison purposes, however, we have computed the corresponding ceiling cost estimates, and have found that the scaled costs using the three model proxy are very similar to the estimated costs that were derived using the two models.[1881]

797. As discussed above, we believe that cost-based rates should be implemented on a geographically deaveraged basis. We allow states to determine the number of density zones within the state, provided that they designate at least three zones, but require that in all cases the weighted average of unbundled loop prices, with weights equal to the number of loops in each zone, should be less than the proxy ceiling set for the statewide average loop cost set forth in Appendix D.

798. As noted above, we have not yet had sufficient time to evaluate fully any of the cost models that have been submitted in the record, and our hybrid proxy is therefore intended to be used only on an interim basis. We believe that the methodology is consistent with forward-looking cost studies, but we also recognize that there may be situations in which forward looking loop costs will differ from computed costs, and accordingly, we have increased the state average loop costs by five percent and established the proxy as a ceiling. We emphasize that use of the hybrid proxy model can be superseded at any time by a full forward looking economic cost study that follows the guidelines set forth in this order. In addition, we are currently in the process of evaluating the more detailed cost models that have been submitted in the record,[1882] and will issue a further notice on the use of these models in the near future.

[1880] *Benchmark Cost Model 2* (July 1996), submitted by Sprint Corp. and U S West, Inc., on July 24, 1996 (*BCM 2*). For a more detailed discussion of this generic cost model, *see infra*, Section VII.C.3.

[1881] The coefficient of correlation is 0.991. Since the models are deterministic, this correlation does not reflect any relevant statistical properties of the models.

[1882] For a more detailed discussion of the cost models submitted in this docket, *see infra*, Section VII.C.3.

(2) Local Switching

(a) Comments

799. Several IXCs propose that local switching rates be part flat-rated and part usage-sensitive. LDDS argues that the price of the unbundled switching element should reflect as closely as possible the manner in which switching costs are incurred. It believes that line-related costs should be recovered through a flat per-line capacity charge, based on a contracted-for number of lines, with an additional usage-based trunking port charge and a combination of per-line and usage-based charges to recover busy hour related costs.[1883] AT&T similarly argues that switching rates should be based on a capacity charge for line-specific costs plus a usage sensitive charge based on calling volume.[1884] MCI states that switching costs are a function of line connections, trunk connections, and busy hour demand on the switch matrix and processor. Hence, the rate for the switching element should have a sub-element price relating to each sub-element, set to recover the associated TSLRIC.[1885] Sprint, on the other hand, contends that the charge for the local switching element should consist of two flat-rated charges, one based on the number of interconnector lines receiving dedicated access to the first point of concentration in the switch, and the second on the number of links between the termination equipment and the switch that an interconnector has ordered to provide it with switching capacity at its desired grade of service.[1886] CompTel argues that trunk port charges should be usage sensitive because trunk ports are used by multiple parties and that the network element for end-office serving wire center (provided by tandem switching) should be priced on a per minute basis.[1887]

800. Time Warner argues that pricing switched-based network elements on a flat-rated basis could give non-facilities-based competitors artificially created cost advantages over those who choose to invest in the development of competing networks.[1888] It also argues that nothing in the 1996 Act suggests that switches should not be priced based on a per-use basis rather than a

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[1883] LDDS comments at 57.

[1884] AT&T comments at 68.

[1885] MCI comments at 30.

[1886] Sprint comments at 35, 62.

[1887] CompTel comments at 36, 45.

[1888] Time Warner comments at 59.

per-line or per-partitioned portion of the switch basis.[1889] NEXTLINK supports the use of rate structures that reflect peak and off-peak costs, but notes that the advantage of such structures must be balanced against the disadvantages of complexity and possible disputes that could arise with regard to more complex billing systems.[1890] The Washington Commission notes that the switched access price structure for interexchange access is usage sensitive, but it states that usage-sensitive pricing structures for switched access are inappropriate for local interconnection services in Washington because state law prohibits mandatory measured local service. To the extent that network element costs are driven by peak demand, the Washington Commission states that rates should reflect that tendency. It would prefer to see rate structures that more accurately reflect peak, rather than average demand and has expressed a strong interest in flat-rated port charges. The Washington Commission states that a flat rate based upon cost of providing capacity at peak load is possibly the most economically correct pricing mechanism; off-peak usage then is at virtually zero cost.[1891]

801. LDDS and AT&T argue that there should be no additional charges for vertical features provided by the switch, as the cost of providing those features should already be reflected in the charge for unbundled local switching.[1892] MCI has a similar view, arguing that, because incumbent LECs do not incur the cost of vertical features on a usage basis, custom calling features should be included in the price for unbundled local switching.[1893]

802. Incumbent LECs and Sprint, however, argue that vertical features are retail services offered to end users today, and must be purchased by the competitor under the wholesale rate provision of the 1996 Act.[1894] In making that argument, however, Sprint notes that although it is not technically feasible to unbundle vertical services the costs of such services can be identified and should be excluded from the price of the local switching element.[1895] Bell Atlantic notes that services currently sold at a loss are subsidized by vertical service offerings. It asserts that, if these offerings were treated as unbundled elements that must be provided at cost instead of

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[1889] Time Warner comments at 59.

[1890] NEXTLINK comments at 30.

[1891] Washington Commission comments at 29-30.

[1892] AT&T comments at 21 n.22; LDDS comments at 56-57.

[1893] MCI comments at 31.

[1894] *See, e.g.*, SBC comments at 38; Sprint comments at 36-37.

[1895] Sprint comments at 37 n.15.

wholesale retail services, then a serious takings issue would arise.[1896] ALLTEL contends that the Commission should not permit the 1996 Act's resale price standards to be undercut by carriers attempting to mimic LEC networks by assembling unbundled elements obtained at below cost prices.[1897] USTA contends that section 251(c) does not allow carriers to assemble unbundled network elements to reconstruct and provide retail services offered by the incumbent LECs.[1898] The Competition Policy Institute argues in response, that the existence of unbundled network elements should not be presumed to be a substitute for a resold service.[1899] NYNEX argues that a competitor should not be allowed to obtain resold local exchange service and ask for vertical features at cost-based rates. It argues that the two competitive vehicles were intended to meet different strategic needs; they were not intended to provide opportunities for arbitrage.[1900]

803. Several commenters included estimates of the cost for end-office switching. MCI provides an estimate of the cost of end-office switching as calculated by the *Hatfield 2* model.[1901] Using the least cost, most efficient technology available in the market at the time, MCI estimates that the TSLRIC of end-office switching is equal to 0.18 cents ($0.0018) per minute of use.[1902] AT&T provides an updated version of the *Hatfield 2* model, the *Hatfield 2.2*, which treats the incumbent LECs' current wire center locations as "fixed" nodes in a reconstructed network.[1903] Cox reports that the *Hatfield 2.2* model estimates that average TSLRIC of end office switching

[1896] Bell Atlantic reply at Exhibit 2 (Declaration of Richard A. Epstein), p.7.

[1897] ALLTEL reply at 7.

[1898] USTA reply at 8.

[1899] Competition Policy Institute comments at 26.

[1900] NYNEX comments at 30, 36, 39.

[1901] MCI comments at Attachment 1, "The Cost of Basic Network Elements, Theory, Modeling, and Policy Implications," prepared for MCI by Hatfield Assoc., Inc.

[1902] *Id.* at 34; *see also* NCTA comments at Attachment 1 (Declaration of Bruce M. Owen), p. 34-35 (converting the *Hatfield 2* estimate for end-office switching and switch port costs into a per minute rate of 0.26 cents).

[1903] *Hatfield Model, Version 2.2, Release 1*, (Hatfield Associates, Inc., March 1996), submitted by AT&T and MCI on May 16, 1996 (*Hatfield 2.2*); *see also* AT&T reply at Appendix D (Update of the Hatfield Model Version 2.2, Release 1), p.1-3.

for most states clusters around 0.2 cents ($0.002) per minute of use.[1904]

804. GTE criticizes the *Hatfield 2.2* model and its assumptions, arguing that the Hatfield model suffers from serious inaccuracies and produces results that are inconsistent with what can actually be observed.[1905] GTE reports that the Cost Proxy Model, which was submitted by Pacific Telesis,[1906] estimates the average cost of routing traffic through end-office switches is equal to 0.35 cents ($0.0035) per minute of use.[1907]

805. In pleadings filed in the *LEC-CMRS Interconnection* proceeding,[1908] Cox asserts that the average incremental cost of inter-office transport and termination of traffic is 0.2 cents ($0.002) per minute of use.[1909] In the same proceeding, U S West argues that Cox's estimate of 0.2 cents per minute of use ignores the large differential between the costs of terminating calls during peak and off-peak hours.[1910] USTA claims that the average incremental cost of call

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[1904] Letter from J.G. Harrington, Dow, Lohnes & Albertson, on behalf of Cox Communications, to William F. Caton, Acting Secretary, FCC, June 20, 1996, in CC Docket No. 95-185, at Tab 2 (Review of Record on LEC Local transport and Termination Costs Finding from LEC Cost Studies), p.3 (*Cox June 20, 1996 Ex Parte*).

[1905] Letter from Whitney Hatch, Assistant Vice President Regulatory Affairs, GTE, to William F. Caton, Acting Secretary, FCC, July 11, 1996 at Attachment 2 (Economic Evaluation of Version 2.2 of the Hatfield Model).

[1906] *The Cost Proxy Model* (INDETEC International, 1996), submitted by Pacific Telesis Group on June 7, 1996 (*CPM*).

[1907] Letter from Whitney Hatch, Assistant Vice President Regulatory Affairs, GTE, to William F. Caton, Acting Secretary, FCC, July 11, 1996 at Attachment 2 (Economic Evaluation of Version 2.2 of the Hatfield Model), pp.16-17.

[1908] *Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket No. 95-185, Notice of Proposed Rulemaking, 11 FCC Rcd 5020, 5038 (1996) (*LEC -CMRS Interconnection NPRM*);

[1909] Letter from J.G. Harrington, Dow, Lohnes & Albertson, on behalf of Cox Communications, to William F. Caton, Acting Secretary, FCC, June 20, 1996, in CC Docket No. 95-185 at Tab 2 (Review of Record on LEC Local Transport and Termination Costs Finding from LEC Cost Studies), pp.1-2; *see also* Letter from Robert F. Roche, CTIA, to William F. Caton, Acting Secretary, FCC, December 8, 1995, in CC Docket No. 94-54, (Incremental Cost of Local Usage, Brock Paper No. 3), p.1.

[1910] U S West comments in CC Docket No. 95-185 at Attachment A (A Response to Dr. Gerald Brock), p.13.

termination is 1.3 cents ($0.013) per minute of use.[1911]

806. In response to the *LEC-CMRS Interconnection NPRM*, many commenters assert that the majority of CMRS providers interconnect with incumbent LEC networks at incumbent LECs' tandem offices.[1912] U S West asserts that Cox's estimate of 0.2 cents ($0.002) per minute of use underestimates the actual cost of transporting and terminating traffic, and claims that, using the same data and methodology as Cox, the incremental cost of transporting and terminating traffic through the tandem is approximately three times higher than Cox's estimate.[1913] In the same proceeding, AirTouch, relying on 1994 testimony before the Georgia Commission, asserts that the LRIC of transporting and terminating a call through the tandem equals approximately 0.49 cents ($0.0049) for the first minute of a call and 0.12 cents ($0.0012) for each additional minute of use.[1914] This estimate is based on the presumption that it should cost roughly half as much to complete a call interchanged at a tandem switch as it does to both originate and terminate a call entirely on one network.[1915] Pacific Bell, asserts that the average LRIC for termination of calls under "Feature Group B," which appears to include terminations at tandems switches in addition to end-office terminations, equals 0.62 ($0.0062) cents per minute of use.[1916]

807. State commissions, that have set rates for the transport and termination of traffic, generally set rates for terminations where parties interconnect at either the end office or the tandem office.[1917] The Maryland Commission has set reciprocal and symmetrical rates for the transport and termination of traffic based, among other things, on a rate proposal calculated by a

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[1911] USTA comments in CC Docket No. 95-185 at Attachment (Bill and Keep: A Bad Solution to a Non-Problem), pp.9-10.

[1912] *See, e.g.*, U S West comments in CC Docket No. 95-185 at Attachment A (A Response to Dr. Gerald Brock), p.13.

[1913] *Id.*

[1914] AirTouch comments in CC Docket No. 95-185 at 32-33.

[1915] *Id.*

[1916] Pacific Bell comments in CC Docket No. 95-185 at Exhibit B (Statement of Professor Jerry A. Hausman) at p.14.

[1917] *See, e.g.*, Maryland Commission comments at Appendix B (Maryland Commission Order No. 72348, Case No. 8584 Phase II), p.28-32.

staff witness.[1918] In the Maryland proceeding, the actual cost of tandem and end-office switch terminations are considered proprietary and were, therefore, not directly reported, but the staff witness testified that the calculation of direct, shared, and common costs is less than one-half his proposed rate of 0.6 cents ($0.006) per minute of use for terminations routed through the tandem-office switch.[1919] The Maryland Commission ultimately adopted rates of 0.3 cents ($0.003) per minute of use end-office-switch terminations and 0.5 cents ($0.005) per minute of use for terminations at the tandem switch.[1920]

808. The Illinois Commission has adopted a rate equal to 0.5 cents ($0.005) per minute of use for terminations routed directly through end-office switches and 0.75 cents ($0.0075) per minute of use for calls routed through tandem switches.[1921] Illinois's rate includes an element for recovering a "contribution" over and above the long-run service incremental cost of termination.[1922] Illinois arrived at its final rates by identifying the proposed rates that would pass imputation tests.[1923] In Massachusetts, NYNEX testified that the average marginal cost of end-office switching equals 0.129 ($0.00129) cents per minute of use.[1924] Cox reports that the Florida staff, after reviewing local service cost support data filed by GTE and Centel/United, concluded that the sum of the estimated TSLRIC for end-office switching and the LRIC for tandem-office switching and transport equals 0.25 cents ($0.0025) per minute of use.[1925]

809. The peak-period interconnection rates in New York between NYNEX and other facilities-based, full service local exchange providers are set at 0.74 cents ($0.0074) per minute of

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[1918] *Id.*

[1919] *Id.* at 29.

[1920] *Id.* at 32.

[1921] Illinois Commission comments at Attachment C (Illinois Commerce Commission Docket No. 94.0096), pp.83-86, 98.

[1922] *Id.*

[1923] *Id.* at 85.

[1924] *See* Mass. Commission comments at Attachment 3 (Testimony of Paula L. Brown, Managing Director, NYNEX Corporation, in Massachusetts Dept. of Pub. Util. Docket No. 93-125, Workpaper 2), June 14, 1993, p.6.

[1925] *Cox June 20, 1996 Ex Parte* at 4 (*citing* Florida Docket No. 950985-TP).

use (end office) and 0.98 cents ($0.0098) per minute of use (tandem).[1926] Off-peak rates are 0.27 cents ($0.0027) (end office) and 0.29 cents ($0.0029) (tandem).[1927] The Michigan Commission has established mutual compensation rates of 1.5 cents ($0.015) per minute of use for calls passing directly through an end-office switch or through tandem office switches.[1928]

(b) Discussion

810. We conclude that a combination of a flat-rated charge for line ports, which are dedicated to a single new entrant, and either a flat-rate or per-minute usage charge for the switching matrix and for trunk ports, which constitute shared facilities, best reflects the way costs for unbundled local switching are incurred and is therefore reasonable. We find that there is an insufficient basis in the record to conclude that we should require two flat rates for unbundled local switching charges as proposed by Sprint.

811. Based on the record in this proceeding and in the *LEC-CMRS Interconnection* proceeding, we conclude that a range between 0.2 cents ($0.002) per minute of use and 0.4 cents ($0.004) per minute of use for unbundled local switching is a reasonable default proxy. In setting this default price range, we consider the range of evidence in the record, and believe that the most credible studies fall at the lower end of this range.[1929] However, so as to minimize disruption for any state that has set a rate only marginally outside this range, we will grandfather any state that has set a rate at 0.5 cents ($0.005) per minute of use or less pending completion of an economic study pursuant to the methodology set forth in this Order.

812. The forward-looking cost studies contained in the record estimate that the average cost of end-office switching ranges from 0.18 cents ($0.0018) per minute of use[1930] to 0.35 cents

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[1926] *Competition, The State Experience* at 81 (compilation of written responses by state commission staffs to questions by FCC staff, compiled by NARUC) (March 8, 1996).

[1927] *Id.*

[1928] Michigan Commission comments at Attachment 1 (State of Michigan, Case No. U-10647, Opinion and Order, February 23, 1995), p.28.

[1929] *See, e.g.*, Maryland Commission comments at Appendix B (Maryland Commission Order No. 72348, Case No. 8548 Phase II), p.28-32; Letter from Robert F. Roche, CTIA, to William F. Caton, Acting Secretary, FCC, December 8, 1995, in CC Docket No. 94-54 (Incremental Cost of Local Usage, Brock Paper No. 3), p.1; *Hatfield Model, Version 2.2, Release 1*, (Hatfield Associates, Inc. March 1996), submitted by AT&T and MCI on May 16, 1996; AT&T reply at Appendix D (Update of the Hatfield Model, Version 2.2, Release 1).

[1930] *See* MCI comments at Attachment 1, "The Cost of Basic Network Elements, Theory, Modeling, and Policy Implications," prepared for MCI by Hatfield Assoc., Inc. p.34.

($0.0035) per minute of use.[1931] Maryland and Florida have adopted rates based on forward-looking economic cost studies that fall within the default price range we are adopting.[1932] NYNEX's estimate of 0.129 cents ($0.00129) per minute of use, in the Massachusetts proceeding, is estimate an estimate of the marginal cost of end-office switching.[1933] As discussed above, we generally expect studies estimating marginal costs to generate estimates that are less than estimates derived from TELRIC-based studies. We, therefore, conclude that 0.2 cents ($0.002) per minute of use is a reasonable lower end of the price range for end-office switching.

813. USTA's estimate of 1.3 cents ($0.013) appears to be an outlier that is significantly higher than the other estimates.[1934] We find that USTA's estimate does not represent an appropriate cost model for termination of traffic. USTA's estimate is based on the high end of a set of econometric estimates of LEC-reported cost data rather than an independent cost estimate, and USTA gives no explanation of why we should regard this as the best estimate. In addition, USTA's figure is derived, at least in part, from studies that attempt to measure the incremental cost of end-to-end use of the network for local calls, not the cost of local switching. Pacific Bell's study of the average LRIC of a call terminating under "Feature Group B"[1935] apparently includes terminations at tandem switches in addition to end-office terminations.

814. Michigan and Illinois have adopted rates for transport and termination of traffic that are higher than the default price range we adopt for end-office switching.[1936] Michigan, which established mutual compensation rates of 1.5 cents ($0.015) per minute of use, did not review a

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[1931] Letter from Whitney Hatch, Assistant Vice President Regulatory Affairs, GTE, to William F. Caton, Acting Secretary, FCC, July 11, 1996 at Attachment 2 (Economic Evaluation of Version 2.2 of the Hatfield Model), pp.16-17.

[1932] *See* Maryland Commission comments at Appendix B (Maryland Commission Order No. 72348, Case No. 8584 Phase II), pp.28-32; *Cox June 20, 1996 Ex Parte* at 4.

[1933] *See* Mass. Commission comments at Attachment 3 (Testimony of Paula L. Brown, Managing Director, NYNEX Corporation, in Massachusetts Dept. of Pub. Util. Docket No. 93-125, Workpaper 2), p.6.

[1934] USTA comments in CC Docket No. 95-185 at Attachment (Bill and Keep: A Bad Solution to a Non-Problem), pp.9-10.

[1935] Pacific Bell comments in CC Docket No. 95-185 at Exhibit B (Submission of Jerry A. Hausman), para. 32.

[1936] Michigan Commission comments at Attachment 1 (State of Michigan, Case No. U-10647, Opinion and Order, February 23, 1995), p.28; Illinois Commission comments at Attachment C (Illinois Commerce Commission Docket No. 94.0096), pp.83-86, 98.

forward-looking cost study.[1937] Illinois's 0.5 cents ($0.005) per minute rate for termination through the end office is just outside the range we are establishing. First, as previously stated, we are grandfathering rates of 0.5 cents ($0.005) per minute or lower. Further, we do not believe Illinois's rate overrides the weight of evidence in the record, which supports the range we are establishing.

815. States that do not calculate the rate for the unbundled local switching element pursuant to a forward-looking economic cost study may, in the interim, set the rate so that the sum of the flat-rated charge for line ports and the product of the projected minutes of use per port and the usage-sensitive charges for switching and trunk ports, all divided by the projected minutes of use, does not exceed 0.4 cents ($0.004) per minute of use and is not lower than 0.2 cents ($0.002) per minute of use. A state may impose a rate for unbundled local switching that is outside this range if it finds that a forward-looking economic cost study shows a higher or lower rate is justified. States that use our proxy and impose flat-rated charges for unbundled local switching should set rates so that the price falls within the range of 0.2 cents ($0.002) per minute of use and 0.4 cents ($0.004) per minute of use if converted through use of a geographically disaggregated average usage factor. A default price range of 0.2 cents ($0.002) per minute of use and 0.4 cents ($0.004) per minute of use should allow carriers the opportunity to recover fully their additional cost of terminating a call including, according to Maryland's study, a reasonable allocation of common costs. We observe that the most credible studies in the record before us fall at the lower end of this range and we encourage states to consider such evidence in their analysis.

816. With respect to the argument that vertical features should be priced pursuant to the resale price standards, we concluded earlier that vertical features are part of the unbundled local switching element, because they are provided through the operation of hardware and software comprising the "facility" that is the switch.[1938] Accordingly, the pricing standard in 252(d)(1) applies to vertical features as part of the functionality of the switch. As previously discussed, allowing new entrants to purchase switching and vertical features as part of the local switching network element is an integral part of a separate option Congress has provided for new entrants to compete against incumbent LECs.[1939]

[1937] Michigan Commission comments at Attachment 1 (State of Michigan, Case No. U-10647, Opinion and Order, February 23, 1995), p.28.

[1938] *See supra*, Section V.J., discussing unbundled local switching.

[1939] "[I]t is unlikely that competitors will have a fully redundant network in place when they initially offer local service, because the investment necessary is so significant. Some facilities and capabilities . . . will likely need to be obtained from the incumbent [LEC] as network elements pursuant to new section 251." Joint Explanatory Statement at 148.

817. The 1996 Act establishes different pricing standards for these two options available to new entrants -- resale of services pursuant to section 251(c)(4) and unbundled elements pursuant to section 251(c)(3). Where the new entrant purchases vertical features as part of its purchase of an unbundled local switching element, the price of that element, including associated vertical features, should be determined according to section 252(d)(1). The availability of vertical services as part of a wholesale service offering is distinct from their availability as part of the local switching network element. In these circumstances, allowing the new entrant to combine unbundled elements with wholesale services is an option that is not necessary to permit the new entrant to enter the local market.

818. As to Bell Atlantic's takings argument, we concluded above that the pricing of unbundled elements according to the just and reasonable standard in section 251(c)(2) and (c)(3), and applied in section 252(d)(1), is not an unconstitutional taking.[1940] That analysis, which looks at the overall rates established by our regulations, applies with equal force to the pricing of unbundled local switching, inclusive of associated vertical features. A forward-looking economic cost methodology enables incumbent LECs to recover a fair return on their investments and Bell Atlantic has provided no specific evidence to the contrary. We conclude that our pricing methodology for unbundled local switching, inclusive of associated vertical features, provides just compensation to incumbent LECs.

(3) Other Elements

(a) Comments

819. AT&T argues that charges for common transport should be usage sensitive, and that signaling links, signal transfer point, and service control point should be priced using a combination of flat-rated capacity charges and usage-sensitive charges.[1941] The Ohio Consumers' Counsel agrees with AT&T about the principles of rate structure, but argues that the specific prescriptions for rate structure proposed by AT&T are unnecessary if the principles are adopted.[1942] Sprint asserts that common transport rates should be per-minute charges that vary with distance.[1943] MCI argues that trunk connection costs should be recovered through a minute-

[1940] *See supra*, Section VII.B.2.a.(3)(c).

[1941] AT&T comments at 68.

[1942] Ohio Consumers' Counsel reply at 16.

[1943] Sprint comments at 63.

of-use charge.[1944] AT&T argues that dedicated transport rates should be non-usage sensitive.[1945]

(b) Discussion

820. The primary categories of network elements identified in this Order, other than loops and switching, are transport, signaling, and collocation. Our rule that dedicated facilities shall be priced on a flat-rated basis[1946] applies to dedicated transmission links because these facilities are dedicated to the use of a specific customer.

821. For dedicated transmission links, states must use existing rates for interstate dedicated switched transport as a default proxy ceiling. We believe these rates are currently at or close to economic cost levels. Such rates were set based on interstate special access rates, which we found based on the record in the *Transport* proceeding were relatively close to costs.[1947] These interstate access rates originally were based on incumbent LEC accounting costs, rather than a forward-looking economic cost model. Since 1991, however, incumbent LEC interstate access rates have been subject to price cap regulation, and have therefore been disengaged from embedded costs.[1948]

822. Typically, transmission facilities between tandem switches and end offices are shared facilities. Pursuant to our rate structure guidelines, states may establish usage-sensitive or flat-rate charges to recover those costs. For shared transmission facilities between tandem switches and end offices, states may use as a default proxy ceiling the rate derived from the incumbent LEC's interstate direct trunked transport rates in the same manner that we derive presumptive price caps for tandem switched transport under our interstate price cap rules, using the same

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[1944] MCI comments at 30.

[1945] AT&T comments at 67.

[1946] *See supra*, Section VII.B.3.

[1947] *First Transport Order*, 7 FCC Rcd at 7028 (1992); *Transport Rate Structure and Pricing*, CC Docket No. 91-213, Third Memorandum Opinion and Order on Reconsideration and Supplemental Notice of Proposed Rulemaking, 10 FCC Rcd 3030, 3038-39 (1994).

[1948] Interstate access rates for dedicated transport vary by region, type of circuit, mileage, and other factors. For example, BellSouth's entrance facility charge, for transport from an IXC's point of presence to a BellSouth serving wire center, is $134 monthly per DS1 circuit ($5.58 per derived voice grade circuit) and $2,100 monthly per DS3 circuit ($3.13 per derived voice grade circuit). Dedicated transport for 10 miles of interoffice transmission between a serving wire center and an end office is $325 monthly per DS1 circuit ($13.54 per derived voice grade circuit) and $2,950 monthly per DS3 circuit ($4.39 per derived voice grade circuit). Installation, multiplexing, and other transport-related charges may also apply.

weighting and loading factors.[1949] We conclude above that interstate direct-trunked transport rates provide a reasonable default proxy ceiling for unbundled dedicated transport rates. When we restructured the incumbent LECs' interstate transport rates to be more closely aligned with cost, we derived presumptive tandem-switched transmission rate levels from direct-trunked transport rates.[1950] This proxy ceiling for shared transmission facilities between tandem switches and end offices, therefore, should be similarly derived.

823. The United States Court of Appeals for the District of Columbia Circuit recently remanded our interim transport rules.[1951] The court concluded that the Commission had not provided sufficient justification for its method of establishing the rate level of the interstate switched access rate element for tandem switching.[1952] We do not believe, however, that the *CompTel v. FCC* decision is inconsistent with the rules we establish here because the decision did not address or criticize the Commission's determination of the rates for dedicated transport or tandem-switched transport links. Because our proxies do not involve the interstate access rate for tandem switching, they are not inconsistent with the court's analysis.

824. Tandem switching also employs shared facilities. States may, therefore, establish usage-sensitive charges to recover tandem-switching costs. For those states that cannot complete a forward-looking economic cost study within the arbitration period or cannot devote the necessary resources to such a review, we establish a default rate ceiling of 0.15 cents ($0.0015) per minute of use. The additional cost of termination at a tandem in comparison to termination at an end office consists of the cost of tandem switching and the cost of tandem-switched transport transmission. Illinois and Maryland have adopted rates for the transport and termination of traffic from the tandem switch that are, respectively, 0.25 cents ($0.0025) per minute of use and 0.2

[1949] Specifically, when the transport rate restructure was implemented, the initial levels of tandem-switched transmission rates were presumed reasonable if they were based on a weighted per-minute equivalent of direct-trunked transport DS1 and DS3 rates that reflects the relative number of DS1 and DS3 circuits used in the tandem to end office links, calculated using a loading factor of 9000 minutes per month per voice-grade circuit. 47 C.F.R. § 69.111.

[1950] *First Transport Order*, 7 FCC Rcd at 7018-19. Interstate access rates for tandem-switched transport vary by region and mileage. The average charge by RBOCs in Density Zone 1 for transport termination and one mile of switched common transport facility between a tandem switching office and end office equals 0.033 cents ($0.000331) per minute. For a five-mile facility, the average charge is 0.048 cents ($0.000479) per minute; for a ten-mile facility, 0.066 cents ($0.000664) per minute.

[1951] *Competitive Telecommunications Ass'n v. FCC*, No. 95-1168 (D.C. Cir. April 28, 1996).

[1952] The court accepted both AT&T's claim that the Commission had not justified the allocation of 80 percent of the tandem revenue requirement to the TIC and only 20 percent to the tandem element, and CompTel's argument that the Commission had not justified its allocation of overheads to the tandem element.

cents ($0.002) per minute of use, higher than rates for termination at end office switches.[1953] In both instances, our default rate ceiling for tandem switching constitutes at least 60 percent of the implicit tandem switching and transport to the end office switch. We, therefore, find the default rate ceiling we adopt for tandem switching to be consistent with both Illinois's and Maryland's adopted rates for transport and switching of traffic from the tandem office. States that use our proxy and impose flat-rated charges for tandem switching should set rates so that the price does not exceed 0.15 cents ($0.0015) per minute of use if converted through use of a geographically disaggregated usage factor.

825. Rates for signaling and database services should be usage-sensitive, based either on the number of queries or the number of messages, with the exception of the dedicated circuits known as signaling links, which should be charged on a flat-rated basis. Usage charges of this type appear to reflect most accurately the underlying costs of these services.[1954] Interstate access rates for most of these elements have been justified using the price caps new services test, which roughly approximates the results of a forward-looking economic cost study.[1955] In addition, the costs of these services were forward-looking, in that the services were completely new and hence, by definition, used the best-available technology. Thus, we establish as a default proxy ceiling for these elements corresponding interstate access charges for these elements.[1956] For elements that have not been subject to the new services test, states may establish proxy ceilings by identifying the direct costs of providing the element and adding a reasonable allocation of joint and common costs. Because we expect that the joint and common costs associated with the forward-looking cost of network elements are substantially less than those associated with

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[1953] Illinois Commission comments at Attachment C (Illinois Commerce Commission Docket No. 94.0096); pp.83-86, 98; Maryland Commission comments at Appendix B (Maryland Commission Order No. 72348, Case No. 8548 Phase II), pp.28-32.

[1954] *Ameritech Operating Companies Petition for Waiver of Part 69 of the Commission's Rules to Establish Unbundled Rate Elements for SS7 Signalling*, DA 96-446, Order, at para. 31 (Com. Car. Bur., rel. Mar. 27, 1996).

[1955] *Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge supplements for Open Network Architecture*, CC Docket Nos. 89-79 and 87-313, Report and Order, Order on Reconsideration, and Supplemental Notice of Proposed Rulemaking, 6 FCC Rcd 4524, 4531 (1991); *modified on recon.*, 7 FCC Rcd 5235 (1992); *Open Network Architecture Tariffs of Bell Operating Companies*, CC Docket No. 92-91, Order, 9 FCC Rcd 440, 454-456 (1993).

[1956] Interstate database services consist of Line Information Database (LIDB) and 800 Database. Deployment of SS7 (out-of-band signaling) has enabled LECs to offer these services. The average charge for RBOCs for LIDB in Density Zone 1 equals 3.34 cents ($0.034) per database query.

traditional service-based costs,[1957] allowing a reasonable allocation is sufficient to protect against possible anticompetitive pricing. Absent any proxy, this approach will provide the most reasonable approximation of forward-looking economic cost.

826. We have established rate structure rules for collocation elements in connection with our *Expanded Interconnection* proceeding.[1958] Many collocation elements established under section 251(c)(6) are likely to represent the same facilities, and should have the same cost characteristics, as existing interstate expanded interconnection services, and therefore we require states to use the same rate structure rules for those collocation elements that we established in the *Expanded Interconnection* proceeding. As a proxy ceiling, states may use the rates the LEC has in effect in its federal expanded interconnection tariff for the equivalent services. Expanded interconnection services are subject to the new services test, which, as discussed above, uses a forward-looking methodology. Although LECs have filed expanded interconnection tariffs, we have not yet completed our investigation into those tariffs. Any price for unbundled collocation elements set based on LEC expanded interconnection tariffs would therefore be subject to any modification of those tariffs that results from our pending investigation, and any state-imposed prices based on those tariffs will need to be adjusted accordingly.

827. We find it unnecessary to specify rate structures for other unbundled elements. The states shall make those determinations by applying our general rate structure principles described above. In the absence of an acceptable forward-looking cost study, states may establish default proxy ceilings for other unbundled elements by identifying the direct costs of providing the element and adding a reasonable allocation of joint and common costs.

[1957] *See supra*, Section VII.B.2.a.

[1958] *Expanded Interconnection with Local Telephone Company Facilities*, CC Docket No. 91-141, 9 FCC Rcd 5154, 5186 (1994).

3. Forward-Looking Cost Model Proxies

a. Background and Comments

828. In the NPRM, we sought comment on the use of certain generic cost studies. Commenters discussed several such models. These models include: 1) the *Hatfield 2*;[1959] 2) the *Hatfield 2.2*;[1960] 3) the *BCM*;[1961] 4) the *BCM 2*;[1962] and 5) the *CPM*.[1963]

829. *Generic Cost Models*. Several generic forward-looking costing models were introduced into the record. Several commenters, supporting the use of generic cost models to establish the rates that incumbent LECs may charge for interconnection and unbundled elements, claim that such an approach would result in ceilings that are efficient, objective, and based on non-proprietary inputs.[1964] On the other hand, certain commenters argue that generic cost models should not be used as proxies because they fail to reflect the possible differences in costs among states, and among carriers, due to technical, demographic, and geographic factors.[1965] In addition, many parties also discussed the use of proxies as direct substitutes for the prices of interconnection and unbundled network element rates.[1966]

[1959] *The Cost of Basic Network Elements: Theory, Modeling, and Policy Implications* (Hatfield Associates, Inc., March 1996), submitted by MCI on March 29, 1996 (*Hatfield 2*).

[1960] *Hatfield Model, Version 2.2, Release 1*, (Hatfield Associates, Inc., March 1996), submitted by AT&T and MCI on May 16, 1996 (*Hatfield 2.2*); *see also* AT&T reply at Appendix D (Update of the Hatfield Model Version 2.2, Release 1).

[1961] *Benchmark Cost Model: A Joint Submission by MCI Communications, Inc., NYNEX Corporation, Sprint Corporation, U S West, Inc.* (December 1995), submitted by MCI Communications, Inc., NYNEX Corp., Sprint/United Management Corp., U S West, Inc. on July 24, 1996 (*BCM*).

[1962] *Benchmark Cost Model 2* (July 1996), submitted by Sprint Corp. and U S West, Inc., on July 24, 1996 (*BCM 2*).

[1963] *The Cost Proxy Model* (INDETEC International, 1996), submitted by Pacific Telesis Group on June 7, 1996 (*CPM*).

[1964] *See, e.g.*, Ad Hoc Telecommunications Users Committee comments at 50; PacTel comments at 76; Ohio Consumers' Counsel comments at 28-29.

[1965] *See, e.g.*, Bay Springs, *et al.* comments at 16-17; Cincinnati Bell comments at 28; Florida Commission comments at 30; Telecommunications Resellers Ass'n comments at 41; California Commission reply at 19.

[1966] *See, e.g.*, AT&T comments at 53.

830. *The Hatfield Models.*[1967] Parties also commented on the particular generic cost models placed on the record in this proceeding, and several support the use of a version of the *Hatfield* model.[1968] These parties argue that the *Hatfield* model represents the only comprehensive nationwide analysis of virtually all network elements on a highly disaggregated basis and is the ideal standard for the Commission to adopt because it will provide immediate certainty on pricing.[1969] Other commenters oppose the application of a version of the *Hatfield* model,[1970] asserting that it may not accurately reflect an incumbent LEC's decisionmaking process for determining the economic and technical feasibility of interconnection because it assumes building "from scratch," an assumption potentially leading to inaccuracy.[1971] Critics of the various *Hatfield* models also argue that they results in below-cost rates for services,[1972] do not capture embedded costs,[1973] and employ a nationwide industry average for costs when costs should be based on the particular carrier's costs.[1974]

831. GTE argues that the *Hatfield 2.2* model's assumptions and analytic practices result in an understatement of cost per loop of about $8.00.[1975] GTE criticizes the assumption that all traffic carried by LECs will be served by a brand new entrant that instantly materializes. GTE indicates that such an assumption would not produce results that are representative of incumbent

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[1967] We note that many parties did not address their comments to a particular version of the *Hatfield* model. In such cases, we will refer generally to the *Hatfield* model.

[1968] *See, e.g.*, ACSI comments at 56; AT&T comments at 53 (commenting on *Hatfield 2.2*); MCI comments at 68-69 (commenting on *Hatfield 2*); NEXTLINK comments at 27-28; Washington Commission comments at 27.

[1969] *See, e.g.*, MCI comments at 69 (commenting on *Hatfield 2*).

[1970] *See, e.g.*, PacTel comments at 74-76, reply at 30 (commenting on *Hatfield 2.2*); Ohio Consumers' Counsel comments at 29 n.10; USTA comments at 54 n.45; Sprint reply at 31-32; Rural Tel. Coalition reply at 35.

[1971] *See, e.g.*, Florida Commission comments at 28-29; Lincoln Tel. reply at 6; Rural Tel. Coalition reply at 35; USTA comments at 47-48, 54 n.45.

[1972] *See, e.g.*, Lincoln Tel. reply at 6; U S West comments 20-22.

[1973] *See, e.g.*, USTA comments at 54 n.45; Rural Tel. Coalition reply at 35; PacTel reply at 30 (commenting on *Hatfield 2.2*).

[1974] *See, e.g.*, GVNW reply at 12-13; Lincoln Tel. reply at 6; Sprint reply at 28-32.

[1975] Letter from Whitney Hatch, Assistant Vice President Regulatory Affairs, GTE, to William F. Caton, Acting Secretary, FCC, July 11, 1996 at Attachment 2 (Economic Evaluation of Version 2.2 of the Hatfield Model).

LEC costs when providing services and unbundled elements. GTE argues that the *Hatfield 2.2* model's use of multiplicative factors to calculate installation costs produces inaccuracies, to the extent that the basis of these factors depart from historical relationships. In addition, GTE asserts that the equipment prices used in the *Hatfield 2.2* model are consistently lower than prices paid by LECs. Moreover, GTE asserts that the capital cost and depreciation rates of the *Hatfield 2.2* model do not reflect costs of capital and depreciation rates that will prevail under competitive conditions.[1976] Finally, it asserts that the *Hatfield 2.2* model uses unrealistically high fill factors (the percentage of capacity used), which results in an understatement of investment and, hence, annualized cost.[1977]

832. *The Benchmark Cost Models.*[1978] Although some parties support the use of the *BCM* to set rates for interconnection and unbundled elements,[1979] many other parties oppose its use for this purpose.[1980] Several commenters argue that, because the *BCM* was designed to identify only high cost areas, its assumptions are flawed and will fail to reflect small and rural LECs' network characteristics.[1981] NYNEX argues that the *BCM* is based on a limited set of assumptions about the costs that affect loops.[1982] Commenters further contend that the *BCM* is not technology neutral,[1983] is not designed to estimate the costs of serving business customers,[1984] assumes one

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[1976] *Id.* at 13-16.

[1977] *Id.* at 9-12.

[1978] We note that many parties did not address their comments to a particular version of the *BCM*. In such cases, we will refer generally to the *BCM*.

[1979] *See, e.g.*, ACSI comments at 56; Sprint comments at 54 n.30; Texas Public Utility Counsel comments at 29.

[1980] *See, e.g.*, Florida Commission comments at 29-30; GVNW comments at 38-39; NYNEX comments at 57; Ohio Consumers' Counsel comments at 29, n.10; PacTel comments at 74-76; SBC comments at 92-93; TDS comments at 22; Rural Tel Coalition comment at 22, reply at 34-35.

[1981] *See, e.g.*, Rural Tel. Coalition comments at 22; TDS comments at 22; *see also* Time Warner comments at 54-55; USTA comments at 54 n.45.

[1982] NYNEX comments at 57; *see also* SBC comments at 92-93.

[1983] *See, e.g.*, WinStar comments at 34; Texas Statewide Tel. Cooperative, Inc. comments at 14.

[1984] *See, e.g.*, NYNEX comments at 57.

type of central office switch,[1985] and uses ARMIS cost loading factors that assume that costs are spread over the existing, larger investment base.[1986]

833. *Cost Proxy Model (CPM).* Pacific Telesis maintains that its *CPM* is a superior alternative to the *Hatfield* models and *BCM* models because it is more flexible, can be based on non-proprietary information, can be independently audited, can estimate the cost of providing local telephone service for one-fourth (1/4) mile grids or large geographic areas, and reflects the actual locale of subscribers within a census block.[1987]

b. Discussion

834. We believe that the generic forward-looking costing models, in principle, appear best to comport with the preferred economic cost approach discussed previously. Several such models were placed in the record, including *Hatfield 2*, *Hatfield 2.2*, *BCM*, *BCM 2*, and the *CPM*. The *BCM* is designed to produce "benchmark" costs for the provision of basic telephone service within specific geographic regions defined by the Bureau of the Census as Census Block Groups. The *Hatfield 2* model combines output from the *BCM* with independently-developed investment data to produce annual cost estimates for eleven basic network functions. The *CPM* is similar in structure to the *BCM* and *Hatfield 2* models, although it uses different algorithms.

835. These models appear to offer a method of estimating the cost of network elements on a forward-looking basis that is practical to implement and that allows state commissions the ability to examine the assumptions and parameters that go into the cost estimates. Although these models were submitted too late in this proceeding for the Commission and parties to evaluate them fully, our initial examination leads us to believe that the remaining practical and empirical issues can be resolved in the near future. In light of the advantages of such a generic approach, we will further examine these generic economic cost models by the first quarter of 1997 to determine whether we should use one of them to replace the default proxies we adopt in this proceeding. In that event, states would have the option of setting rates in arbitrations on the basis of an economic cost study or by using a generic forward-looking cost model approved at that time.[1988]

[1985] *Id.*

[1986] *Id.*

[1987] PacTel comments at 76.

[1988] We note that we address certain criticisms of the models in the context of their use in the development of the proxy for the unbundled local loop, *supra*, Section VII.C.2.b.(1)(b).

836. Finally, we note that Commission staff developed a model of the telecommunications industry that they designed to simulate industry demand and supply characteristics.[1989] In order to encourage an open-ended discussion of the utility of the staff model, the Common Carrier Bureau sought comment on a working draft of the model that was released. Almost all parties commenting on the staff model urged the Commission not to rely upon the staff model as record evidence in this proceeding.[1990] We are not relying on the staff model to develop the requirements imposed by this Order.

D. Other Issues

1. Future Adjustments to Interconnection and Unbundled Element Rate Levels

a. Background and Comments

837. In the NPRM, we sought comment on whether some cost index or price cap system would be appropriate to ensure that rates reflect expected changes in costs over time.[1991] Only two parties commented on this issue, and neither supported establishment of a price cap system or other index system to adjust rates over time. MCI claims that it is not necessary to recompute TSLRIC costs each year. It argues that large productivity factors are not needed as they are in price cap system, because initial access rates were based on embedded costs, which greatly exceed economic costs. MCI proposes that the Commission should use initial rates as ceilings for a three to five year period. It contends that, if competition develops satisfactorily, there may not be a need to revisit the costing process. On the other hand, MCI suggests that if it appears that LECs retain substantial market power, a performance review could become necessary.[1992] Ad Hoc Telecommunications Users Committee notes that the success of any price cap plan would depend on the accuracy of the productivity offset. It states that an inappropriately low productivity offset could result in excessive charges.[1993]

[1989] *See* Public Notice, *Supplemental Comment Period Designated for Local Competition Proceeding*, CC Docket 96-98, DA 96-1007 (rel. June 20, 1996). The comment period was extended subsequently to July 8, 1996. *See* Public Notice, *Supplemental Comment Period Extended for Local Competition Proceeding*, CC Docket 96-98, DA 96-1030 (rel. June 25, 1996). The Commission did not authorize reply comments.

[1990] *See, e.g.*, Ameritech July 8 comments at 14; NCTA July 8 comments at 2; PacTel July 8 comments at 21; *see also* New York Commission July 8 comments at 1-2 (Commission should institute "collaborative process" whereby federal, state, and industry participants can review model and develop alternatives).

[1991] NPRM at para. 133.

[1992] MCI comments at 68.

[1993] Ad Hoc Telecommunications Users Committee comments at 31.

b. Discussion

838. As noted earlier, we will continue to review our pricing methodology, and will make revisions as appropriate. Accordingly, there is no present need to establish a Commission price cap or cost index system to adjust interconnection and unbundled element rate levels.

2. Imputation

a. Background

839. We sought comment in the NPRM on whether we should require an "imputation rule" in establishing rates for unbundled network elements.[1994] An imputation rule would require that the sum of prices charged for a basket of unbundled network elements not exceed the retail price for a service offered using the same basket of elements. We further solicited comment on any other rules that could be adopted regarding pricing of unbundled network elements that would help to promote the pro-competitive goals of the 1996 Act.

b. Comments

840. Commenters favoring an imputation rule, including some IXCs and other potential entrants, and one state utility counsel, argue that imputation is necessary to prevent potential anticompetitive practices highlighted in the NPRM, such as price squeezes and predatory pricing by incumbent LECs.[1995] Several commenters also endorsed imputation as a method of testing whether rates are reasonable.[1996] Sprint argues that, unless the Commission imposes an imputation rule, incumbent LECs will have little incentive to pursue rate rebalancing activities vigorously before state commissions.[1997] Teleport urges the Commission not to assume that new entrants possess sufficient financial resources to survive a price squeeze and suggests that, if a carrier fails an imputation test, the Commission should find that the market is not sufficiently competitive to

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[1994] NPRM at para. 184.

[1995] *See e.g.*, ACSI comments at 56-57; ACTA comments at 26; Frontier comments at 29-30; NEXTLINK comments at 33; Telecommunications Resellers Ass'n comments at 26; Teleport comments at 60-63; Texas Public Utility Counsel comments at 47-48. MCI comments at Attachment 1 (The Cost of Basic Network Elements: Theory, Modeling and Policy Implications), pp.6-7 (arguing that imputation is necessary, but not sufficient, to prevent price squeezes).

[1996] *See, e.g.*, Intermedia Comments at 14; Sprint Comments at 72-74.

[1997] Sprint reply at 44.

allow incumbent BOC entry into the in-region long distance market.[1998]

841. Among new entrants, Time Warner believes an imputation rule is unnecessary because unbundled element rates will not exceed retail rates in most cases.[1999] It asserts that the Commission should not adopt an imputation rule during the transition period prior to the enactment of universal service reform, and that it is unlikely that competing providers will ignore competitive forces and uniformly retain non-competitive margins in order to support residential rates below TSLRIC.[2000]

842. Several commenters express the view that imputation issues should be left for decision by the states.[2001] A number of state utility commissions that employ an imputation rule in their states endorse imputation as a way to prevent price squeezes, but either take no position on, or oppose, Commission adoption of imputation as a national standard.[2002] The Michigan Commission Staff believes that states should have flexibility to address imputation issues on their own, a process that has already begun in Michigan.[2003] The Washington Commission states that, although it has employed imputation as a method of ensuring that customers of monopoly services do not subsidize other more competitive services, the "threat" posed by below-cost rates generally has been overstated.[2004]

843. The National Association of State Utility Consumer Advocates and the Competition Policy Institute argue that the Commission lacks power to act in this area because of the intrastate/interstate jurisdictional divide established by section 152(b) of the Communications Act

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[1998] Teleport comments at 60-63.

[1999] Time Warner comments at 83.

[2000] *Id.* at 84-85

[2001] *See, e.g.*, Alabama Commission comments at 28; Florida Commission comments at 38 (no need for federal imputation rule if each state may implement unbundled element pricing rules that cover costs); Wyoming Commission comments at 36.

[2002] *See, e.g.*, Colorado Commission comments at 56-57 (opposing a national imputation rule); Washington Commission comments at 35 (questioning the need for preemption order that would require that local service rates exceed costs); Illinois Commission comments at 56-58 (urging the Commission not to prohibit states from adopting imputation rules, but taking no position on the need for a national imputation rule pending further study by the federal-state joint board).

[2003] Michigan Commission Staff comments at 16-17.

[2004] Washington Commission comments at 36.

of 1934.[2005]

844. Responding to the concern, expressed in the NPRM, about requiring imputation for below-cost services, the Texas Commission observes that Texas law will permit waiver of its imputation rule in certain cases.[2006] Frontier states that in the case of subsidized services a limited offset could be applied to reflect the subsidy, but only in the uncommon case in which the incumbent LEC can affirmatively prove that the affected class of service is priced below its forward-looking incremental cost.[2007]

845. Joint Consumer Advocates and the Ohio Commission suggest that adoption of an imputation rule is unnecessary because both the incumbent LEC and the new entrant will face the same burdens in providing below cost service, and each may recover their costs through other revenue sources, such as federal and state universal service funds.[2008] Joint Consumer Advocates and Ohio Consumers' Counsel take issue with the assumption that local service is subsidized, and argue imputation is unnecessary because retail rates are not significantly below cost.[2009] They assert that since other services, such as toll, also use the local loop, it is improper to load all of the costs of the local loop onto local service.[2010]

846. Several commenters voice concerns that an imputation rule would be difficult to implement in rural areas.[2011] The Minnesota Independent Coalition states that imputation could lead to increases in local rates for rural service, in contravention of the 1996 Act's universal service requirements of preserving rates in rural areas that are reasonably comparable to rates charged for similar services in urban areas, and the universal service policy requirements of

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[2005] Competition Policy Institute comments at 13; Natl. Ass'n of State Util. Consumer Advocates comments at 5-8; Joint Consumer Advocates reply at 14.

[2006] Texas Commission comments at 29-30, Attachment II (Public Util. Regulatory Act of 1995, Tex. Rev. Civ. Stat. Ann., Art. 1446(c)) (Texas law requires the Texas Commission to adopt imputation rules by December 1, 1996).

[2007] Frontier comments at 29-30.

[2008] Joint Consumer Advocates reply at 15-16; Ohio Commission comments at 67.

[2009] Joint Consumer Advocates reply at 14-16; Ohio Consumers' Counsel comments at 38-40.

[2010] *Id.*

[2011] *See, e.g.*, TCA Comments at 8.

254(b).[2012]

847. Incumbent LECs also oppose imputation, claiming that it would create opportunities for arbitrage,[2013] fail to reflect the costs of unbundling incumbent LEC networks,[2014] put pressure on states to raise retail rates,[2015] create a de facto ceiling preventing incumbent LECs from recovering their costs,[2016] and constitute an unconstitutional taking of incumbent LEC revenues.[2017] NYNEX and BellSouth also assert that restrictions on cost recovery are inconsistent with the 1996 Act's requirement that unbundled element rates be based on costs.[2018] According to USTA and Ameritech, an imputation rule may cause incumbent LECs to subsidize new entrants, and lead to inefficient entry.[2019] BellSouth argues that intrastate retail prices are based on factors other than cost, such as the policies of the state commission that approved the charges, and that an imputation rule would interfere with the states' exclusive ratemaking authority over intrastate rates and charges. According to BellSouth, Congress did not establish any requirement or expectation that these pricing standards would yield charges that would bear any particular relationship to one another, and BellSouth asserts there is no reason to expect the sum of unbundled element prices to add up to the retail rate any more than one would expect that the individual parts of an automobile could be obtained for less than the price of an already-assembled car. [2020]

[2012] Minn. Ind. Coalition comments at 31, 33; *see also* Western Alliance comments at 3-4 (Commission should not adopt an imputation rule until other, explicit mechanisms are in place to ensure the statutory goal of reasonable parity of urban and rural rates).

[2013] *E.g.*, USTA comments at 75.

[2014] *See, e.g.*, Ameritech comments at 83-84 (rejecting a "sum-of-the-parts" test for unbundled element pricing, and arguing that an imputation rule must make allowance for costs of unbundling the network); GTE comments at 64-65.

[2015] *E.g.*, USTA comments at 77.

[2016] *E.g.*, NYNEX comments at 60 (asserting that such a price ceiling conflicts with the 1996 Act).

[2017] *See, e.g.*, NYNEX comments at 60-61; USTA comments at 77, reply at 31.

[2018] BellSouth reply at 42; NYNEX comments at 61.

[2019] Ameritech comments at 84; USTA comments at 77.

[2020] BellSouth comments at 68; *see also* US Network Services comments at 5-6.

c. Discussion

848. Although we recognize, as several commenters observe, that an imputation rule could help detect and prevent price squeezes, we decline to impose an imputation requirement. Adoption of an imputation rule could force states to engage in a major rate rebalancing effort at this time, because it would impose substantial additional burdens on states at a time when they will need to devote significant resources to implementing the 1996 Act.

849. In addition to our practical concerns regarding implementation of an imputation rule, we find that an imputation rule may not be necessary to achieve the pro-competitive goals of the 1996 Act. As some commenters, including several state commissions, suggest, competing providers may be able to provide basic service, at less than the cost of facilities and associated management, just as incumbent LECs do currently, by selling customers higher profit vertical or intrastate toll services, or through receipt of access revenues and subsidies. Further, the Ohio Consumers' Counsel suggest that below-cost rates may not be sufficiently prevalent to justify a national imputation rule.[2021] The Joint Consumer Advocates and the Ohio Consumers' Counsel question whether local service is, in fact, underpriced.[2022]

850. We give special weight to the comments of several state commissions that currently employ imputation rules.[2023] These state commissions endorse imputation as a tool to prevent price squeezes, but urge us only to provide states with the flexibility to adopt imputation rules. We agree with those state commission commenters that argue that nothing in the 1996 Act prohibits individual states from adopting imputation rules. While an imputation rule may be pro-competitive, we will leave the implementation of such rules to individual states for the time being.

[2021] Ohio Consumers' Counsel comments at 39.

[2022] Joint Consumer Advocates reply at 16; Ohio Consumers' Counsel comments at 39.

[2023] *See, e.g.*, Colorado Commission comments at 56-57; Illinois Commission comments at 57-58; Michigan Commission Staff comments at 16-17; Washington Commission comments at 35.

3. Discrimination

a. Background

851. In the NPRM, we noted the different usages of the term "discrimination" in the 1996 Act and the 1934 Act.[2024] Sections 251 and 252 require that interconnection and unbundled element rates be "nondiscriminatory."[2025] Similarly, section 251(c)(4) requires that, in making resale available, carriers not impose "discriminatory conditions or limitations on resale."[2026] Finally, section 252(e) provides that states may reject a negotiated agreement or a portion of the agreement if it "discriminates" against a carrier not a party to the agreement and section 252(i) requires incumbent LECs to "make available any interconnection, service, or network element provided under an agreement . . . to which it is a party to any requesting telecommunications carrier upon the same terms and conditions."[2027] In contrast, section 202(a) of the 1934 Act provides that "(i)t shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges . . . for . . . like communication service."[2028]

852. We sought comment on "the meaning of the term 'nondiscriminatory' in the 1996 Act compared with the phrase 'unreasonable discrimination' in the 1934 Act." We asked specifically whether Congress intended to prohibit all price discrimination, including measures such as density zone pricing or volume and term discounts, by choosing the word "nondiscriminatory." We further asked whether sections 251 and 252 could be interpreted to prohibit only unjust or unreasonable discrimination. Finally, we sought comment on whether the 1996 Act prohibited carriers from charging different rates to parties that are not similarly situated.[2029]

[2024] NPRM at para. 155.

[2025] 47 U.S.C. §§ 251(c)(2), (3), (6), and 252(d)(1).

[2026] 47 U.S.C. § 251(c)(4)(B). *See infra*, Section VIII.C..

[2027] 47 U.S.C. §§ 252(e), (i).

[2028] 47 U.S.C. § 202(a).

[2029] NPRM at para. 156.

b. Comments

853. Many state regulatory commissions, several incumbent LECs, and USTA maintain that the term "nondiscriminatory" used in the 1996 Act is synonymous with the prohibition of "unjust and unreasonable discrimination" used in the 1934 Act.[2030] Generally, these parties agree that pricing variations are only discriminatory when the affected parties are similarly situated. They argue that a blanket prohibition on all price differences, even when justified by costs, would be anti-competitive and would appear to defeat the process of negotiation. The Ohio Commission argues that smaller companies, not similarly situated to the larger telephone companies already in operation, need different treatment in order to compete.[2031] Finally, they contend that Congress did not intend to prohibit reasonably supported plans, such as volume and term discounts. The Pennsylvania Commission argues that, if Congress had intended to prohibit cost-based price differences, it would have included interconnection and unbundled elements in the prohibition against geographic price differences for toll rates, which is contained in Section 254(g).[2032] Pacific Telesis argues that different prices are permissible under the "nondiscriminatory" standard wherever incremental costs decline as output increases.[2033]

854. Other commenters, including MCI and MFS, assert that the term "nondiscriminatory" in the 1996 Act must be interpreted to have a more stringent meaning than the phrase "unjust and unreasonable discrimination" used in the 1934 Act.[2034] Several parties suggest that since the conferees considered and rejected a version of section 251 that applied an "unreasonably discriminatory" standard to the actions of incumbent LECs, the change in wording was purposeful.[2035] Generally, these parties argue that although the "nondiscriminatory" standard

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[2030] *See, e.g.*, Alabama Commission comments at 23; BellSouth comments at 58; California Commission comments at 31-33; Colorado Commission comments at 48; District of Columbia Commission comments at 25; Illinois Commission comments at 47; Indiana Commission comments at 25; MECA comments at 55-56; Ohio Commission comments at 51; PacTel comments at 76-77; USTA comments at 57-58.

[2031] Ohio Commission comments at 53.

[2032] Pennsylvania Commission comments at 32.

[2033] PacTel comments at 77; *but see* AT&T reply at 35.

[2034] *See, e.g.*, MCI comments at 71; MFS comments at 63; ALTS reply at 40.

[2035] NCTA comments at 31 n.114 (*citing* S. 652, 104th Cong. 1st Sess. § 101 (deleting Section 251(c)(2)(C)) (Draft, Nov. 27, 1995)); *see also* MFS comments at 63.

is more stringent, cost-based price differences are nonetheless permissible under the 1996 Act.[2036] The Independent Cable & Telecommunications Association contends that the only way to prevent incumbent LECs from discriminating against smaller companies and new entrants is to prohibit all non-cost based price differences.[2037] LDDS argues that only cost-based price differentials should be permitted, and that any non-cost-based volume discount should be prohibited, even if arrived at through agreement of the parties.[2038]

855. A third group of commenters argue for a strict reading of the term "nondiscriminatory."[2039] They argue that the plain meaning of the term "nondiscriminatory" without qualification demonstrates that under section 251 even reasonable discrimination is impermissible.[2040] R. Koch contends that if there is *any* discrimination, small entrants will be at a disadvantage.[2041] Finally, they maintain that the higher standard reflects the distinction between the carrier-user relationship being regulated in section 202(a) and the intercarrier relationship addressed in section 251(c).[2042]

856. CMRS providers argue that some state regulations treat CMRS providers differently than wireline new entrants with respect to the rates for interconnection with incumbent LECs. AT&T Wireless contends that the New York and Connecticut Commissions require incumbent LECs to charge two distinct interconnection rates depending on whether the carrier is classified as a CMRS provider or competing provider of local exchange service.[2043] According to AT&T Wireless, in New York, the wireline competitive LEC rate for termination of traffic on the incumbent LEC network is less than one cent per minute and the CMRS provider rate is

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[2036] *See, e.g.*, MCI comments at 71-72; MFS comments at 64; Michigan Commission comments at 18; Municipal Utilities comments at 14-15; Pennsylvania Commission comments at 32; Sprint comments at 64-65.

[2037] Ind. Cable & Telecomm. Ass'n reply at 11-12.

[2038] LDDS reply at 40-41.

[2039] *See, e.g.*, AT&T comments at 68-69; NCTA comments at 31 (section 251(c) requires strict scrutiny of any discrimination, not solely unreasonable discrimination); WinStar comments at 7.

[2040] *See, e.g.*, WinStar comments at 7.

[2041] *See, e.g.*, R. Koch comments at 3.

[2042] NCTA comments at 31.

[2043] Letter from Cathleen A. Massey, AT&T Wireless Services, to William F. Caton, Acting Secretary, FCC, July 2, 1996, filed in CC Docket Nos. 95-185 and 96-98, at 1-3 (*AT&T July 2, 1996 Ex Parte*).

approximately 2.6 cents ($0.026) per minute.[2044] AT&T Wireless further contends that, in order to obtain the lower rate, a CMRS provider in New York must comply with state regulations, such as universal service obligations associated with residential and Lifeline service.[2045] Bell Atlantic NYNEX Mobile submits that in Connecticut, the rate for wireline new entrants' termination of traffic on the incumbent LEC network is less than one cent ($0.01) per minute and the CMRS provider rate is 4.14 cents ($0.0414) per minute.[2046] AT&T Wireless states that California has ordered incumbent LECs to implement interim bill-and-keep compensation for interconnection for wireline entrants' interconnection but not for CMRS providers' interconnection,[2047] and Florida has ruled that no compensation shall be paid to mobile carriers by incumbent LECs for land-originated calls.[2048]

857. In addition to their assertion regarding rate discrimination, CMRS providers maintain that state commissions permit incumbent LECs to treat CMRS providers in a discriminatory manner with respect to the terms and conditions of interconnection.[2049] Bell Atlantic NYNEX Mobile states that in Connecticut, Maryland, New York and Texas, the rates paid by Bell Atlantic NYNEX Mobile to the connecting LEC to terminate calls originated on Bell Atlantic NYNEX Mobile's network are more than twice the rates paid by competing wireline LECs to incumbent LECs.[2050] Bell Atlantic NYNEX Mobile also states that "these disparities have no rational cost

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[2044] *Id.*

[2045] *See Order Instituting Framework for Directory Listings, Carrier Interconnection and Carrier Compensation*, New York Public Service Commission, CASE 94-C-0095 (New York Commission, September 27, 1996) at 15.

[2046] Bell Atlantic NYNEX Mobile comments in CC Docket No. 95-185, at Exhibit A.

[2047] *Competition For Local Exchange Service*, Decision 95-07-054, Appendix A, para. 7 (California Commission, July 24, 1995).

[2048] *See Investigation Into the Rates For Interconnection of Mobile Service Providers With Facilities of Local Exchange Companies*, Docket No. 940235-TL, slip op. at 24 (Florida Commission, Oct. 11, 1995).

[2049] AT&T comments in CC Docket No. 95-185, at 27; AirTouch Communications comments in CC Docket No. 95-185, at 33; Bell Atlantic NYNEX Mobile comments in CC Docket 95-185, at 5-6; Comcast Corporation comments in CC Docket No. 95-185, at 6-7; New Par comments in CC Docket No. 95-185, at 4-5.

[2050] Bell Atlantic NYNEX Mobile comments in CC Docket No. 95-185, at Exhibit A, p.5. Bell Atlantic NYNEX Mobile's Exhibit A shows that LEC charges to competitive providers on an average rate per minute are considerably less than those to CMRS carriers: In Connecticut, Bell Atlantic NYNEX Mobile pays 4.14 cents/min. ($0.0414) to terminate local traffic on a LEC network while competitive providers pay 0.8 cents/min. ($0.008); in Maryland, Bell Atlantic NYNEX Mobile pays 2.27 cents/min. ($0.0227) to terminate local traffic on a LEC network, while competitive providers pay 0.5 cents/min. ($0.005); in New York, Bell Atlantic NYNEX

basis since an incumbent LEC's costs to complete a call received from Bell Atlantic NYNEX Mobile should be no higher than its costs to complete calls received from other carriers."[2051] Similarly, APC states that its interconnection agreements with Bell Atlantic, which are identical in Maryland, Virginia, West Virginia, and District of Columbia, artificially inflate its costs by at least 3.1 cents ($0.031) per minute.[2052]

858. Western Wireless also provides examples of discriminatory interconnection rates by LECs.[2053] Western Wireless states that it has been unable to reach an agreement with any incumbent LECs in its wireless service area that is based on cost or that provides reciprocal compensation.[2054] AT&T Wireless contends that states regularly permit LECs to charge wireless carriers significantly higher rates than competing LECs for intrastate interconnection.[2055] CTIA cites LEC-LEC interconnection agreements in 18 states that provide for rates much below the approximate nationwide average incumbent LEC-CMRS interconnection rate of three cents ($0.03) per minute.[2056]

Mobile pays 2.59 cents/min. ($0.0259) to terminate local traffic on a LEC network, while competitive providers pay only 0.98 cents/min.; and in Texas, Bell Atlantic NYNEX Mobile pays 1.7 cents/min. ($0.017) to terminate local traffic on a LEC network, while competitive providers pay zero cents/min. ($0.0). *Id.*

[2051] *Id.* at 5-6.

[2052] APC comments in CC Docket No. 95-185 at 5-6 (alleging it pays Bell Atlantic a monthly $25 per trunk surcharge between its mobile switching center and Bell Atlantic's tandem, a usage-sensitive charge for transport and switching elements, and $800 a month for termination for SS7 connectivity, while Bell Atlantic pays APC nothing in return).

[2053] Letter from Doane F. Kiechel, counsel to Western Wireless Corporation, to William F. Caton, Acting Secretary, FCC, July 5, 1996, in CC Docket No. 96-98.

[2054] *Id.* at 4.

[2055] *AT&T July 2, 1996 Ex Parte* at 3.

[2056] Letter from Randall S. Coleman, CTIA, to Michele Farquhar, Chief, Wireless Telecommunications Bureau, FCC, July 2, 1996, in CC Docket Nos. 95-185 and 96-98, at Attachments.

c. Discussion

859. We conclude that the term "nondiscriminatory" in the 1996 Act is not synonymous with "unjust and unreasonable discrimination" in section 202(a), but rather is a more stringent standard.[2057] Finding otherwise would fail to give meaning to Congress's decision to use different language. We agree, however, with those parties that argue that cost-based differences in rates are permissible under sections 251 and 252.

860. Section 252(d)(1), for example, requires carriers to base interconnection and network element charges on costs. Where costs differ, rate differences that accurately reflect those differences are not discriminatory. This is consistent with the economic definition of price discrimination, which is "the practice of selling the same product at two or more prices where the price differences do not reflect cost differences . . . An important feature of the economic definition of price discrimination is that it occurs not only when prices are different in the presence of similar costs but also *when the prices are the same and the costs of supplying customers are different.*" [2058] As one economist has recognized, differential pricing is "one of the most prevalent forms of marketing practices" of competitive enterprises.[2059] Strict application of the term "nondiscriminatory" as urged by those commenters who argue that prices must be uniform would itself be discriminatory according to the economic definition of price discrimination. If the 1996 Act is read to allow no price distinctions between companies that impose very different interconnection costs on LECs, competition for all competitors, including small companies, could be impaired. Thus, we find that price differences, such as volume and term discounts, when based upon legitimate variations in costs are permissible under the 1996 Act, if justified.

861. On the other hand, price differences based not on cost differences but on such considerations as competitive relationships, the technology used by the requesting carrier, the nature of the service the requesting carrier provides, or other factors not reflecting costs, the requirements of the Act, or applicable rules, would be discriminatory and not permissible under the new standard. Such examples include the imposition of different rates, terms and conditions based on the fact that the competing provider does or does not compete with the incumbent LEC, or offers service via wireless rather than wireline facilities. We find that it would be unlawfully discriminatory, in violation of sections 251 and 252, if an incumbent LEC were to charge one

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[2057] *See supra*, Section IV.G, discussing nondiscriminatory terms and conditions for interconnection, and *supra*, Section V.G., discussing nondiscriminatory terms and conditions for unbundled network elements.

[2058] David L. Kaserman & John W. Mayo, Government & Business: *The Economics of Antitrust & Regulation* at 273-74 (1995) (*citing* George J. Stigler, *The Theory of Price* (3d ed. 1966)) (emphasis added).

[2059] Hal R. Varian, "Price Discrimination," in *Handbook of Industrial Organization*, vol.1, p. 598 (R. Schmalensee and R.D. Willig eds., 1989).

class of interconnecting carriers, such as CMRS providers, higher rates for interconnection than it charges other carriers, unless the different rates could be justified by differences in the costs incurred by the incumbent LEC.

862. State regulations permitting non-cost based discriminatory treatment are prohibited by the 1996 Act. This conclusion is consistent with both the letter and the spirit of the 1996 Act and our determination that the pricing for interconnection, unbundled elements, and transport and termination of traffic should not vary based on the identity or classification of the interconnector.[2060]

[2060] *See infra*, Section XI.A., discussing transport and termination rates.

VIII. RESALE

863. Section 251(c)(4) imposes a duty on incumbent LECs to offer certain services for resale at wholesale rates. Specifically, section 251(c)(4) requires an incumbent LEC:

> (A) to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers; and
>
> (B) not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service, except that a State commission may, consistent with regulations prescribed by the Commission under this section, prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such service to a different category of subscribers.[2061]

864. The requirement that incumbent LECs offer services at wholesale rates is described in section 252(d)(3), which sets forth the pricing standard that states must use in arbitrating agreements and reviewing rates under BOC statements of generally available terms and conditions:

> [A] State commission shall determine wholesale rates on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier.

Section VIII.A. of this Order discusses the scope of section 251(c)(4). Section VIII.B. addresses the determination of "wholesale rates." Section VIII.C. considers the issue of conditions or limitations on resale under this section, Section VIII.D. discusses the resale obligations under section 251(b)(1), and Section VIII.E. considers the application of access charges in the resale environment.

[2061] 47 U.S.C. § 251(c)(4).

A. Scope of Section 251(c)(4)

1. Background and Comments

865. In the NPRM, we sought comment generally on the scope of section 251(c)(4).[2062] AT&T and MCI request that the Commission adopt a minimum list of services that should be available for resale under section 251(c)(4).[2063] Cable & Wireless, the Telecommunications Resellers Association, and others argue for an expansive definition of "telecommunications services."[2064] For example, MCI argues that we should explicitly identify the following as telecommunications services that must be made available for resale: measured-rate business, flat-rate business, measured-rate residential, flat-rate residential; custom calling features (including all CLASS services); call blocking services; voice messaging; Integrated Services Digital Network (ISDN), Basic Rate Interface (BRI), and Primary Rate Interface (PRI); flat-rated and measured trunk services (including all types of PBX trunks); Automatic Number Identification (ANI) over T-1; data services; promotions, optional calling plans, special pricing plans; calling card, directory services, operator services; intraLATA toll; public access line service; semi-public coin telephone service; foreign exchange services; video dialtone; and Centrex and all feature packages.[2065]

866. Incumbent LECs on the other hand, argue for a much more limited set of services, primarily those generally thought of as basic telephone services.[2066] For example, SBC lists the following as examples of services that should be excluded: billing and collection; enhanced billing products; enhanced white page listings; inside wire; BDS/LAN; customer premises equipment; and information services.[2067]

867. Some commenters argue that parties seeking discounted telecommunications services for their own telephony needs should not be allowed to purchase services at wholesale prices. For example, Roseville Telephone argues that (1) requests for discounted resale services must come from carriers, not from end users; (2) a wholesale customer must resell 95 percent of the

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[2062] NPRM at para. 173.

[2063] AT&T comments at 77 n.113; MCI comments at 84.

[2064] Cable & Wireless comments at 38-39; Telecommunications Resellers Ass'n comments at 18 n.47; AT&T comments at 76-78; MCI comments at 84.

[2065] MCI comments at 84.

[2066] *See, e.g.*, MECA comments at 60; NYNEX comments at 76-7; SBC reply at 13.

[2067] SBC comments at 67-68.

services it purchases at wholesale prices to unaffiliated companies; and (3) limits should be placed on how much of what wholesale service is sold to any one subscriber.[2068] Similarly, GTE argues that new entrants must resell service they purchase under section 251(c)(4) and not simply use such services for their own internal or administrative purposes.[2069] Cincinnati Bell requests that we explicitly state that resellers of incumbent LEC service must be telecommunications carriers.[2070] Conversely, AT&T opposes predicating the ability to purchase services at wholesale rates on the percentage of customers that purchase the resold service.[2071]

868. Some parties address the application of section 251(c)(4) to the services incumbent LECs sell to independent public payphone providers. The American Public Communications Council contends that independent public payphone providers are not "telecommunications carriers."[2072] The American Public Communications Council cites the definition in section 3(44) that excludes "aggregators," as defined in section 226[2073] and points out that we have previously found that independent public payphone providers are aggregators insofar as they exercise control over payphones.[2074] Thus, the American Public Communications Council argues, services sold to independent public payphone providers by incumbent LECs would be "telecommunications service[s] that [an incumbent LEC] provides at retail to subscribers who are not telecommunications carriers," thereby making such services subject to section 251(c)(4).[2075] The American Public Communications Council also argues that nothing in section 251 requires an entity purchasing services for resale to be a "telecommunications carrier."[2076] NYNEX argues that

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[2068] Roseville Tel. comments at 3-5.

[2069] GTE comments at 47.

[2070] Cincinnati Bell comments at 31.

[2071] AT&T comments at 80 n.120.

[2072] American Public Communications Council comments at 2-3.

[2073] 47 U.S.C. § 153(44). Section 226(a)(2) defines "aggregator" as "any person that, in the ordinary course of its operations, makes telephones available to the public or to transient users of its premises, for interstate telephone calls using a provider of operator services. 47 U.S.C. § 226(a)(2).

[2074] American Public Communications Council comments at 2 (citing *Policies and Rules Concerning Operator Service Providers, Report and Order*, 6 FCC Rcd 2744 (1991), *recon.* 7 FCC Rcd 3882 (1992)).

[2075] American Public Communications Council at 3.

[2076] *Id.*

independent public payphone providers do not purchase these services for resale, but for their own use.[2077] Additionally, NYNEX argues, independent payphone providers do not interpose themselves between incumbent LECs and their existing retail customers, and thus do not enable incumbent LECs to avoid some portion of costs they incur in dealing with those customers.[2078] MFS argues that no resale relationship exists between an incumbent LEC and an independent public payphone provider.[2079]

869. Parties dispute whether specially-priced bundles of services must be offered for resale. SNET argues that LECs are not required to resell bundled services, as long as the services are all offered separately. SNET contends that requiring wholesale offerings of bundled services would deter competitive offerings by incumbent LECs.[2080] SBC argues that bundled services are not single services and therefore not subject to the resale provisions of the 1996 Act.[2081] The Telecommunications Resellers Association, TCC, LDDS, and MCI take the opposite position,[2082] noting that bundled items are often sold at prices well below the sum of their stand-alone prices.

870. The Telecommunications Resellers Association and Cable & Wireless argue that, where the incumbent LEC offers services only on a bundled basis, these services should be unbundled and offered separately, at wholesale rates.[2083] AT&T specifically argues that it should be allowed to purchase local exchange service without operator services.[2084] Pacific Telesis, NYNEX, and NCTA argue that incumbent LECs should not be subject to this requirement so long as the services are not offered to retail customers on a stand-alone basis.[2085] Bell Atlantic opposes AT&T's claim that Bell Atlantic should be required to provide local service without

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[2077] NYNEX reply at 39.

[2078] *Id.*

[2079] MFS reply at 32.

[2080] SNET comments at 34.

[2081] *Id.* at 72-73.

[2082] Telecommunications Resellers Ass'n comments at 18; TCC comments at 44; LDDS comments at 83; MCI comments at 89.

[2083] *See, e.g.*, Telecommunications Resellers Ass'n comments at 19 n.49; Cable & Wireless comments at 48.

[2084] AT&T comments at 81 n.123.

[2085] PacTel comments at 87; NYNEX comments at 73; NCTA comments at 57.

operator services for resale.[2086]

2. Discussion

871. Section 251(c)(4)(A) imposes on all incumbent LECs the duty to offer for resale "any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers."[2087] We conclude that an incumbent LEC must establish a wholesale rate for each retail service that: (1) meets the statutory definition of a "telecommunications service;" and (2) is provided at retail to subscribers who are not "telecommunications carriers."[2088] We thus find no statutory basis for limiting the resale duty to basic telephone services, as some suggest.

872. We need not prescribe a minimum list of services that are subject to the resale requirement. State commissions, incumbent LECs, and resellers can determine the services that an incumbent LEC must provide at wholesale rates by examining that LEC's retail tariffs. The 1996 Act does not require an incumbent LEC to make a wholesale offering of any service that the incumbent LEC does not offer to retail customers. State commissions, however, may have the power to require incumbent LECs to offer specific intrastate services.[2089]

873. Exchange access services are not subject to the resale requirements of section 251(c)(4). The vast majority of purchasers of interstate access services are telecommunications carriers, not end users. It is true that incumbent LEC interstate access tariffs do not contain any limitation that prevents end users from buying these services, and that end users do occasionally purchase some access services, including special access.[2090] Feature Group A,[2091] and certain

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[2086] Bell Atlantic reply at 25.

[2087] 47 U.S.C. § 251(c)(4)(A).

[2088] "Telecommunications service" is defined in section 3(46) to mean "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." 47 U.S.C. § 153(46) "Telecommunications" is, in turn, defined in section 3(43) as "the transmission, between or among points specified by the user, of information of the user's choosing without change in the form or content of the information as sent and received." 47 U.S.C. § 153(43). "Telecommunications carrier" is defined in section 3(44) to mean "any provider of telecommunications services, except that such term does not include aggregators of telecommunications services (as defined in section 226)." 47 U.S.C. § 153(44).

[2089] *See, e.g.*, Illinois Public Utilities Act, Section 13-505.5.

[2090] End users may purchase special access from incumbent LECs in order to use high volume services offered by IXCs, such as AT&T's Megacom service.

Feature Group D elements for large private networks.[2092] Despite this fact, we conclude that the language and intent of section 251 clearly demonstrates that exchange access services should not be considered services an incumbent LEC "provides at retail to subscribers who are not telecommunications carriers" under section 251(c)(4). We note that virtually all commenters in this proceeding agree, or assume without stating, that exchange access services are not subject to the resale requirements of section 251(c)(4).[2093]

874. We find several compelling reasons to conclude that exchange access services should not be subject to resale requirements. First, these services are predominantly offered to, and taken by, IXCs, not end users. Part 69 of our rules defines these charges as "carrier's carrier charges,"[2094] and the specific part 69 rules that describe each interstate switched access element refer to charges assessed on "interexchange carriers" rather than end users.[2095] The mere fact that fundamentally non-retail services are offered pursuant to tariffs that do not restrict their availability, and that a small number of end users do purchase some of these services, does not alter the essential nature of the services. Moreover, because access services are designed for, and sold to, IXCs as an input component to the IXC's own retail services, LECs would not avoid any "retail" costs when offering these services at "wholesale" to those same IXCs. Congress clearly intended section 251(c)(4) to apply to services targeted to end user subscribers, because only those services would involve an appreciable level of avoided costs that could be used to generate a wholesale rate. Furthermore, as explained in the following paragraph, section 251(c)(4) does not entitle subscribers to obtain services at wholesale rates for their own use. Permitting IXCs to purchase access services at wholesale rates for their own use would be inconsistent with this requirement.

875. We conclude that section 251(c)(4) does not require incumbent LECs to make

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[2091] Feature Group A is similar to a local exchange service, but is used for interstate access. In such circumstances, the end user dials a seven-digit number to reach the LEC's "dial tone office" serving an IXC, where the LEC switches the call to the IXC's POP via a dedicated line-side connection. Feature Group A represents approximately one percent of incumbent LEC transport revenues.

[2092] Feature Group D is the set of elements through which IXCs today almost universally purchase switched access services from incumbent LECs.

[2093] *See, e.g.*, Cincinnati Bell comments at 34; Citizens Utilities comments at 25; NYNEX comments at 35 n.70; Rural Tel. Coalition comments at 20; J. Staurulakis comments at 6; SBC reply at 13; USTA reply at 31; Wisconsin Commission comments at Attachment, pp. 7-8.

[2094] 47 U.S.C. § 69.5(b).

[2095] The one exception, as discussed below, is the SLC, which is assessed on end users regardless of who purchases the access services from the incumbent LEC.

services available for resale at wholesale rates to parties who are not "telecommunications carriers" or who are purchasing service for their own use. The wholesale pricing requirement is intended to facilitate competition on a resale basis. Further, the negotiation process established by Congress for the implementation of section 251 requires incumbent LECs to negotiate agreements, including resale agreements, with "requesting telecommunications carrier or carriers,"[2096] not with end users or other entities. We further discuss the definition of "telecommunications carrier" in Section IX. of the Order.

876. With regard to independent public payphone providers, however, we agree with the American Public Communication Council's argument that such carriers are not "telecommunications carriers" under section 3(44). We therefore also agree with the American Public Communications Council's contention that the services independent public payphone providers obtain from incumbent LECs are telecommunications services that incumbent LECs provide "at retail to subscribers who are not telecommunications carriers" and that such services should be available at wholesale rates to telecommunications carriers. Because we conclude that independent public payphone providers are not "telecommunications carriers," however, we conclude that incumbent LECs need not make available service to independent public payphone providers at wholesale rates. This is consistent with our finding that wholesale offerings must be purchased for the purpose of resale by "telecommunications carriers."

877. We conclude that the plain language of the 1996 Act requires that the incumbent LEC make available at wholesale rates retail services that are actually composed of other retail services, *i.e.*, bundled service offerings. Section 251(c)(4) states that the incumbent LEC must offer for resale "any telecommunications service" provided at retail to subscribers who are not telecommunications carriers. The resale provision of the 1996 Act does not contain any language exempting services if those services can be duplicated or approximated by combining other services. On the other hand, section 251(c)(4) does not impose on incumbent LECs the obligation to disaggregate a retail service into more discrete retail services. The 1996 Act merely requires that any retail services offered to customers be made available for resale.

B. Wholesale Pricing

1. Background

878. As discussed above, section 251(c)(4) requires incumbent LECs to offer at "wholesale rates" any telecommunications services that the carrier provides at retail to subscribers who are not telecommunications carriers. Section 252(d)(3) establishes the standard that states must use in determining wholesale rates in arbitrations or in reviewing wholesale rates under BOC statements of generally available terms and conditions. Specifically, section 252(d)(3) provides that wholesale rates shall be set "on the basis of retail rates charged to subscribers for

[2096] 47 U.S.C.§ 252(a)(1).

the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier."[2097]

879. In the NPRM, we generally sought comment on the meaning of the term "wholesale rates" in section 251(c)(4).[2098] We asked if we could and should establish principles for the states to apply in order to determine wholesale prices in an expeditious and consistent manner. We also sought comment on whether we should issue rules for states to apply in determining avoided costs. We stated that we could, for example, determine that states are permitted under the 1996 Act to direct incumbent LECs to quantify their costs for any marketing, billing, collection, and similar activities that are associated with offering retail, but not wholesale, services.[2099] We also sought comment on whether avoided costs should include a share of common costs and general overhead or "markup" assigned to such costs. LECs would then reduce retail rates by this amount, offset by any portion of expenses that they incur in the provision of wholesale rates.[2100] We noted that this approach appeared to be consistent with the 1996 Act, but would create certain administrative difficulties because all of the information regarding costs is under the control of the incumbent LECs.[2101] We also asked for comment on several alternative approaches. For example, we asked whether we could establish a uniform set of presumptions regarding avoided costs that states could adopt and that would apply in the absence of a quantification of such costs by incumbent LECs.[2102] Additionally, we asked whether we should identify specific accounts or portions of accounts in the Commission's Uniform System of Accounts ("USOA")[2103] that the states should include as avoided costs.[2104] We also requested comment on whether we should

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[2097] 47 U.S.C. § 252(d)(3).

[2098] NPRM at para. 179.

[2099] *Id.* at para. 180.

[2100] *Id.*

[2101] *Id.*

[2102] *Id.* at para. 181.

[2103] 47 C.F.R. § 32.

[2104] NPRM at para. 181.

establish rules that allocate avoided costs across services.[2105] We asked whether incumbent LECs should be allowed, or required, to vary the percentage wholesale discounts across different services based on the degree the avoided costs relate to those services.[2106] Finally, we asked whether we should adopt a uniform percentage discount off of the retail rate of each service.[2107]

2. Comments

880. Most commenters other than incumbent LECs and some states advocate establishment of national pricing rules regarding arbitrated rates for competitors' acquisition of services for resale under section 251(c)(4).[2108] Incumbent LECs and state commissions argue that we do not have the authority to establish such rules and, even assuming such authority exists, we should not exercise it.[2109] Bay Springs, *et al.*, GVNW, and the Rural Telephone Coalition argue that establishing national wholesale pricing rules would insufficiently recognize differences in LECs' operations, resulting in inadequate compensation for small incumbent LECs.[2110]

881. Many commenters preface their arguments concerning wholesale discounts calculation with a general discussion of the role of resale in creating a competitive local exchange market. IXCs and resellers argue that resale is the quickest method of developing ubiquitous competition and therefore encourage the Commission to adopt of national rules that would result

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[2105] *Id.* at para. 182.

[2106] *Id.*

[2107] *Id.*

[2108] *See, e.g.*, AT&T comments at 82; Cable & Wireless comments at 37; CompTel comments at 96; MFS comments at 72; LCI comments at 31; Telecommunications Resellers Ass'n comments at 24; Teleport comments at 55-56; TCC comments at 45.

[2109] *See, e.g.*, BellSouth comments at 67; SBC comments at 74; District of Columbia Commission comments at 32; Pennsylvania Commission comments at 37.

[2110] Bay Springs, *et al.*, comments at 17; GVNW comments at 40; Rural Tel. Coalition comments at 21. For example, the Rural Telephone Coalition points out that setting a national wholesale discount based on certain assumed levels of marketing expenses overstates avoided costs for small and rural incumbent LECs because such carriers face less competition and therefore have fewer marketing expenses. Rural Telephone Coalition comments at 21. Similarly, Bay Springs, *et al.*, GVNW, and the Rural Telephone Coalition argue that smaller incumbent LECs will not be able to avoid as many shared costs because their smaller staffing and operational functions are less responsive to the overall size of the carriers' operations. Bay Springs, *et al.*, comments at 17; GVNW comments at 40; Rural Tel. Coalition comments at 21.

in substantial wholesale discounts.[2111] AT&T argues that a discount that does not permit viable competition should be presumed unreasonable.[2112] Cable & Wireless and the Telecommunications Resellers Ass'n point out that resale will be a particularly important market entry strategy for small businesses that cannot afford the investments necessary to construct their own facilities or purchase unbundled elements.[2113]

882. Incumbent LECs, cable companies, CAPs, and Sprint generally argue for low wholesale discounts.[2114] Facility-based competitors and potential competitors, such as MFS and cable operators, argue that we should focus our efforts on encouraging facilities-based competition. Such parties, including incumbent LECs, claim that large resale discounts will discourage the development of facilities by making it unnecessary for a new entrant to construct its own facilities in order to compete effectively on the basis of price.[2115] MFS and GTE state that wholesale pricing should only be applied in the absence of facilities-based competition and that once such competition exists, we should forbear from imposing wholesale pricing on incumbent LEC services offered for resale.[2116] Incumbent LECs, cable operators, and Sprint oppose AT&T's proposal that discounts that do not permit viable competition should be presumed unreasonable.[2117]

883. Parties favoring national rules regarding resale differ as to the form such rules should take. Some propose that we establish a methodology for calculating avoided costs. For

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[2111] *See, e.g.*, AT&T reply at Appendix E (Avoided Cost Model); Cable & Wireless comments at 38.

[2112] AT&T comments at 85.

[2113] Cable & Wireless at 35; Telecommunications Resellers Ass'n at 15. The Competition Policy Institute similarly argues that resale will bring both large and small (resale) carriers into the market. Competition Policy Institute comments at 24.

[2114] *See, e.g.*, GTE reply at 25-26; NYNEX comments at 40-41; NCTA comments at 23; TCI comments at 8; MFS reply at 34-36; Sprint reply at 41.

[2115] *See, e.g.*, NCTA comments at 29-30; Comcast comments at 21; Cox comments at 32; Time Warner comments at 70; MFS comments at 72; U S West comments, Exhibit A (Federal Implementation of the Telecommunications Act of 1996) at 26; BellSouth comments at Attachment (Interconnection and Economic Efficiency), p. 19; Bell Atlantic comments at Attachment (Declaration of Robert W. Crandall), pp. 4-5.

[2116] This forbearance would be pursuant to 47 U.S.C. § 160. MFS comments at 72 n.80; GTE reply at 26 n.44.

[2117] *See, e.g.*, Bell Atlantic reply at 24; Time Warner reply at 22; Sprint reply at 40.

example, certain parties advocate a rule requiring the use of long-run incremental cost.[2118] Others advocate some form of proxies or presumptions to determine avoided costs. NEXTLINK argues that the Commission should establish a uniform set of presumptions regarding the types of costs that are to be avoided and require that calculations of avoided costs be based on publicly available sources.[2119] NEXTLINK contends that these requirements would allow rapid identification of avoided costs and should lead to the development of presumptive percentage discounts that will apply to retail rates.[2120]

884. Incumbent LECs and MFS also argue that "avoided" costs are those that are actually avoided by such carriers instead of costs that are theoretically "avoidable."[2121] GTE argues that an "avoidable" standard improperly measures avoided costs in the long run versus actually avoided costs.[2122] IXCs and resellers argue that the standard should be "avoidable" costs; otherwise, incumbent LECs will be able to game their accounting systems and business practices to minimize actually "avoided" expense.[2123]

885. A number of parties propose that this Commission specify various USOA accounts as avoided costs.[2124] Several parties introduced models or studies that use accounting data to calculate wholesale discounts. These proposals are summarized in detail in the next section.

[2118] *See, e.g.*, GSA/DoD comments at 11.

[2119] NEXTLINK comments at 33.

[2120] *Id.* Also, the Telecommunications Resellers Ass'n advocates establishing a minimal discount, to which states may add, but not delete, unless they petition the FCC for express exemption. Telecommunications Resellers Ass'n comments at 24-25.

[2121] *See, e.g.*, GTE reply at 25-26; NYNEX comments at 81; SBC reply at 15 n.35; USTA reply at 30; MFS comments at 72.

[2122] *See* Rebuttal Testimony of Douglas E. Wellemeyer, *Rulemaking on the Commission's Own Motion to Govern Open Access to Bottleneck Services and Establish a Framework for Network Architecture Development of Dominant Carrier Networks*, R. 93-04-003 and I. 93-04-002 (California Commission July 10, 1996), submitted as attachment to Letter from Whitney Hatch, Assistant Vice President--Regulatory Affairs, GTE, to John Nakahata, Senior Legal Advisor, Chairman Reed E. Hundt, FCC, July 18, 1996.

[2123] *See, e.g.*, AT&T comments at 84 n.129; Cable & Wireless reply at 29.

[2124] *See* AT&T comments at 83-84 n.130-131; GCI comment at 15; MCI comments at Attachment 2 (Pricing of Wholesale Services); TCC comments at 45-46; Telecommunications Resellers Ass'n comments at 25-26; Sprint comments at Appendix C. While not providing specific USOA accounts, several parties encourage the Commission to identify these accounts. *See*, e.g., ACSI comments at 61.

886. Some parties recommend that we adopt a specific percentage discount from the retail rate. For example, the Massachusetts Attorney General recommends an interim discount of 25 percent until carrier-specific cost studies can be performed.[2125] ACTA suggests that we adopt a 25 percent discount as a national standard.[2126] Several cable interests recommend ten percent maximum discounts, at least until avoided cost studies can be performed.[2127] The Telecommunications Resellers Association suggests that discounts in the range of 30 to 50 percent off the retail rate are necessary to allow resellers to provide competition.[2128] AT&T argues that, whatever discount is selected, states should be allowed to increase it to promote competition.[2129] Furthermore, AT&T argues that states should be allowed to impose penalties in the form of increased discounts for failure to provide service of equivalent quality offered to incumbent LEC customers or to provide electronic interfaces to the incumbent LEC network.[2130] Incumbent LECs and MFS argue that the 1996 Act does not authorize the service quality penalties or competition-enhancing increased discounts suggested by AT&T.[2131]

887. MFS, Teleport, Time Warner, the Massachusetts Commission, and a number of incumbent LECs argue that joint, common, and overhead costs should not be included in the calculation of avoided costs.[2132] They argue that these costs are not avoided because they will continue to be incurred in providing wholesale service. AT&T, MCI, and others favor inclusion of a portion of joint, common, and overhead costs in avoided costs because these costs will decrease as the overall level of operations of an incumbent LEC decrease (as a result of

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[2125] Mass. Attorney General comments at 24.

[2126] ACTA comments at 31-32.

[2127] *See, e.g.*, Comcast comments at 21; NCTA comments at 41.

[2128] Telecommunications Resellers Ass'n comments at 24.

[2129] AT&T comments at 84.

[2130] *Id.* at 84-85.

[2131] *See, e.g.*, MFS reply at 36; Bell Atlantic reply at 24; Sprint reply at 42.

[2132] *See, e.g.*, MFS comments at 74; Teleport comments at 56-57; Time Warner comments at 77; Mass. Commission comments at 14-15; Ameritech comments at 80; BellSouth comments at 67; Cincinnati Bell comments at 35; GTE comments at 51; Lincoln Tel. reply at 8; U S West comments at 68-69; PacTel comments at 90; Rural Tel. Coalition reply at 15; USTA comments at Attachment (Affidavit of Jerry A. Hausman), p. 11.

downscaling their retail operations).[2133]

888. There is significant disagreement about whether wholesale rates should take into account any additional costs incumbent LECs incur in providing wholesale service, such as those relating to wholesale marketing and billing operations. Incumbent LECs, facilities-based competitors, Sprint, and others argue that wholesale rates must include such costs to ensure recovery from the cost-causing parties -- resellers.[2134] Some incumbent LECs note that these additional costs could also be recovered through a separate charge.[2135] IXCs and resellers argue that the plain language of the section 252(d)(3) does not provide for the recognition of these costs.[2136] They also add that allowing incumbent LECs to recover these costs from resellers discourages efficiency in their wholesale operations.[2137]

889. A number of incumbent LECs oppose application of a single percentage discount rate for all services, arguing that avoided costs will vary among different services.[2138] Some state commissions also recommend against adoption of a uniform rate.[2139] MFS argues that, because section 252(d)(3) refers to retail rates charged to subscribers "for the telecommunications service requested," a uniform wholesale discount rate would frustrate Congressional intent.[2140] Advocates of a uniform discount, however, contend that incumbent LECs will be able to game any system involving a nonuniform allocation of avoided cost, because the information regarding such costs

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[2133] *See, e.g.*, TCC comments at 45-46; AT&T reply at Appendix E (Avoided Cost Model); MCI comments at Attachment 2 (Pricing of Wholesale Services), p. 9; Texas Public Utility Counsel comments at 45-46.

[2134] *See, e.g.*, Ameritech comments at 80; Bell Atlantic comments at 44-45; BellSouth comments at Attachment (Interconnection and Economic Efficiency), p. 20; Citizens Utilities comments at 25; USTA comments at Attachment (Affidavit of Jerry A. Hausman), p.12, reply at 29; MFS comments at 73-74; Teleport comments at 57; Time Warner comments at 78; Ohio Commission comments at 59-60, 66; Sprint comments at 72; J. Staurulakis comments at 10.

[2135] *See, e.g.*, BellSouth comments at 67; NYNEX comments at 83.

[2136] *See, e.g.*, AT&T reply at 10; LDDS reply at 45; TCC comments at 47; Cable & Wireless reply at 28-29; Telecommunications Resellers Ass'n reply at 18.

[2137] LDDS reply at 45. LDDS argues that such costs should be recovered in a competitively-neutral manner. *Id.*

[2138] *See, e.g.*, Bell Atlantic comments at 46; USTA comments at 74-75; MFS comments at 73.

[2139] *See, e.g.*, California Commission comments at 37-38.

[2140] MFS comments at 73

is under their control.[2141] Advocates of a uniform discount also argue that apportioning avoided costs over specific services can be difficult, while a uniform rate is simple to apply. Ameritech argues that the wholesale rate structure of an incumbent LEC should not mirror its retail rate structure. Rather, it should be based on a weighted average of all retail rates provided by the incumbent LEC, less avoided cost.[2142]

3. The Models and Study

890. MCI and AT&T introduced models, and Sprint submitted a study for calculating wholesale rates. This section describes each of these proposals and summarizes the criticisms directed against them. AT&T and MCI offer models which, they contend, can be used to generate discount rates for each incumbent LEC's retail offerings. As an example of the avoided cost approach Sprint advocates, Sprint submits a study based on its United Telephone subsidiary operations in Tennessee.[2143]

891. MCI's model uses publicly available USOA data.[2144] MCI analyzes three categories of avoided cost: (1) marketing, billing, and collection costs; (2) "other costs"; and (3) common costs allocated to avoided cost activities. MCI identifies the following USOA accounts as avoided marketing, billing, and collection costs:

Account 6611 (product management)
Account 6612 (sales)
Account 6613 (product advertising)
Account 6621 (call completion services)
Account 6622 (number services)
Account 6623 (customer services)
Account 6722 (external relations)
Account 6727 (research and development)

[2141] *See, e.g.*, Cable & Wireless comments at 47; TCC comments at 47, Telecommunications Resellers Ass'n reply at 18-19; NEXTLINK comments at 33.

[2142] Ameritech comments at 58. For example, this would average various time-of-day plans and usage plans.

[2143] Sprint comments at Appendix C (Avoided Cost Study: Tennessee United Telephone–S.E., Inc.).

[2144] MCI comments at Attachment 2 (Pricing of Wholesale Services).

MCI treats as "other" avoided costs all of the expenses recorded in the following accounts:

Account 6113 (aircraft expense)
Account 6341 (large PBX expense)
Account 6351 (public telephone terminal equipment expense)
Account 6511 (property held for future telecommunications use)
Account 6512 (provisioning expense)
Account 6562 (depreciation expense--property held for future telecommunications use)
Account 6564 (amortization expense--intangible)

MCI's model also allocates to avoided cost activities a portion of the general overhead and general support expenses recorded in the following accounts:

general overhead
Account 6711 (executive)
Account 6712 (planning)
Account 6721 (accounting and finance)
Account 6723 (human resources)
Account 6724 (information management)
Account 6725 (legal)
Account 6726 (procurement)
Account 6728 (other general and administrative)
Account 6790 (provision for uncollectible notes receivable)

general support
Account 6121 (land and building expense)
Account 6122 (furniture and artworks expense)
Account 6123 (office equipment expense)
Account 6124 (general purpose computers expense)

MCI uses an iterative process to determine separate avoided cost percentages for general overhead costs and for general support costs.[2145] The resulting percentages are based on the relative ratios

[2145] The formulae used by MCI in calculating certain overhead and general support costs are dependent on variables affected by the result of the calculation of such costs. Iteration is a means of solving for variables in such circumstances.

of avoided costs to total operating expense.[2146] MCI's model assumes that incumbent LECs incur no additional expenses in providing wholesale services.

892. After total avoided costs are determined, MCI subtracts the total avoided costs from total operating expenses to derive total wholesale expenses. MCI then calculates wholesale service revenue using a formula that allows the incumbent LEC the same proportional mark-up above costs on wholesale services as on its retail services.[2147] The formula sets the ratio of total revenue less total expenses to total revenue (retail markup) equal to the ratio of wholesale revenue less wholesale expenses to wholesale revenues (allowable wholesale markup) then computes wholesale revenue (and rates) by solving for that variable in a simple equation.[2148] MCI computes a wholesale discount rate as one minus the ratio of wholesale revenue over total revenue. Wholesale rates are computed by reducing retail rates by the wholesale discount.

893. MCI proposes that states use its model to calculate a single wholesale discount rate for each incumbent LEC that would apply in every state in which that incumbent LEC does business and for all services the incumbent LEC provides for resale. States would apply that rate

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[2146] Total Avoided Expense = [Not Avoided Expenses * 0%] + [Totally Avoided Expenses * 100%] + [Partially Avoided Expenses * a%] + [Partially Avoided Expenses * b%]

Where:

$$a = \%\ \text{Corporate Operations Avoidable} = \frac{\text{Total Avoided Expenses}}{\text{Total Expenses - Depreciation \& Amortization Expense}}$$

$$b = \%\ \text{General Support Avoidable} = \frac{\text{Total Avoided Expenses}}{\text{Total Expenses - General Support}}$$

[2147] $$\text{Wholesale Price Discount} = 1 - \frac{\text{Wholesale Service Revenue}}{\text{Total Operating Revenue}}$$

Where:

$$\text{Wholesale Service Revenue} = \frac{\text{Total Wholesale Expenses}}{(1 - \text{Base Margin})}$$

$$\text{Total Wholesale Expenses} = \text{Total Operating Expenses} - \text{Total Avoided Costs}$$

$$\text{Base Margin} = \frac{\text{Total Operating Revenue - Total Operating Expenses}}{\text{Total Operating Revenue}}$$

[2148] $$\frac{\text{Retail Revenue - Total Expenses}}{\text{Retail Revenue}} = \frac{\text{wholesale revenue - (total expenses - avoided expenses)}}{\text{wholesale revenue}}$$

$$\text{Wholesale Revenue} = \text{Retail Revenue} - \left[\text{Avoided expenses} \times \left[\frac{\text{Retail Revenue}}{\text{Total Expenses}}\right]\right]$$

This is as compared to: Wholesale Revenue = Retail Revenue - Avoided Expenses

to each of the incumbent LECs' retail services. For the seven BOCs and GTE, MCI's calculated wholesale discount factors range from 25 to 35 percent.[2149] MCI suggests that its study be declared presumptively valid by the Commission, but suggests that the Commission allow states to adopt a different resale discount by showing that the model does not produce an accurate result.[2150]

894. Sprint, several incumbent LECs, and potential facilities-based entrants, criticize the MCI model. Lincoln Telephone faults the underlying MCI study for relying on a sample of only eight companies, arguing that the limited sample does not capture the variety of billing, costing and collecting arrangements of all existing carriers.[2151] Several incumbent LECs, although not criticizing the MCI study specifically, oppose any approach that utilizes USOA accounts,[2152] or calculates the resale discount by deducting avoidable, as opposed to actually avoided, costs.[2153] Others attack MCI's method of computing wholesale rates once avoided costs are measured.[2154] MFS argues that there is no statutory basis for MCI's use of a formula that removes the markup associated with avoided retail expenses from the retail rates.[2155]

895. AT&T's avoided cost model is similar to MCI's model in that it is an embedded cost approach that starts with publicly-available accounting data.[2156] AT&T's model, however, involves several additional layers of calculations. The model assigns incumbent LEC Automated Record Management Information Systems (ARMIS) revenue and expense data to five lines of business (units). For the local business unit, which it uses as the applicable unit for resale under section 251(c)(4), avoidable expenses are computed by USOA account. AT&T argues that all of

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[2149] MCI comments at Attachment 2 (Pricing of Wholesale Services), p. 12.

[2150] MCI comments at 90.

[2151] Lincoln Tel. comments at 8-9.

[2152] *See, e.g.*, BellSouth reply at 41; PacTel reply at 45-46.

[2153] *See, e.g.*, SBC reply at 15; NYNEX reply at 40; Ameritech reply at 37-39.

[2154] MFS reply at 36.

[2155] *Id.* This was also a point debated by incumbent LECs in various state proceedings. *See, e.g., Petition for a Total Local Exchange Wholesale Service Tariff from Illinois Bell Telephone Company*, Nos. 95-0458 and 95-0531 (consol.) (Illinois Commission June 26, 1996) at 5-20. Teleport argues that the Illinois Commission's decision to include a portion of profit contribution was incorrect. Teleport comments at 59.

[2156] AT&T reply at Appendix E (Avoided Cost Model).

the costs associated with the following USOA accounts categories should be excluded as avoided costs, many of which are summary accounts and subsume a set of other accounts:

Account 5300 (uncollectibles)
Account 6220 (operator systems expense) (if appropriate)
Account 6533 (testing expense)
Account 6534 (plant operations administration expense)
Account 6610 (marketing expense)
Account 6620 (customer service expense)

AT&T further argues that the portion of the following USOA accounts associated with the incumbent LEC's retail operations should be excluded as avoided costs:

Account 6110 (network support expense)
Account 6120 (general support expense)
Account 6560 (depreciation expense)
Account 6710 (executive and planning expense)
Account 6720 (general and administrative expense)
Account 7240 (operating other taxes)
Account 7540 (other interest deductions)

AT&T also recommends partial avoidance of "Total Returns," which refers to portions of the retail rate that contributes to an incumbent LEC's earnings. Ultimately, under AT&T's model, the sum of avoided direct and indirect retail costs is divided by the local service-related revenues to derive the avoided cost discount. AT&T applies its model to each state, with the exception of Alaska, and derives discount rates that range from 23 percent to nearly 56 percent. Parties did not have an opportunity to comment specifically on the AT&T model during the pleading cycle of this proceeding because it was submitted with AT&T's reply. However, AT&T identified in its initial comments the list of fully and partially avoided USOA accounts that were ultimately used in its model. Criticisms of these classifications of fully and partially avoided costs are discussed below.

896. Sprint submits a sample study of its LEC subsidiary operations in Tennessee as an example of how the avoided cost approach advocated by Sprint would be applied.[2157] It was undertaken at the request of the Tennessee Commission to be used under the 1996 Act for calculating wholesale costs. Specifically, the study examines rates for resale of bundled services, focusing on those categories of costs defined in the 1996 Act (marketing, billing, collection, and other costs). Sprint describes its study as employing an activity-based cost approach that identifies the avoided cost by cost category and assigns these costs to service groups, based on a computed factor that assigns each specific type of expense to the activity that creates or drives

[2157] Sprint comments at Appendix C (Avoided Cost Study: Tennessee United Telephone--S.E., Inc.).

that expense. Sprint does not provide the worksheets detailing this cost assignment because Sprint considers the worksheets to be proprietary. Costs are identified at the subaccount level. Sprint computes the percentage of avoided costs of providing simple access service at wholesale as a percentage of simple access revenue to be 4.76 percent. Sprint computes a 7.19 percent figure for other services. In its reply comments, Sprint suggests that the AT&T and MCI models significantly overstate incumbent LEC avoided costs.

897. Parties also commented on the specific USOA accounts that should be used to identify avoided costs. We summarize below the comments with respect to the various accounts:

Marketing expenses--Account 6611 (product management), Account 6612 (sales), and Account 6613 (product advertising):

Resellers and most IXCs, other than Sprint, all support identification of these accounts as completely avoidable, both because they are explicitly mentioned in the 1996 Act and because these expenses would not be necessary in a wholesale operation.[2158] Incumbent LECs, Sprint, MFS, and Time Warner argue that expenses recorded in these accounts would, in fact, be incurred in connection with the provision of wholesale services such as marketing to wholesalers.[2159]

Services expenses--Account 6621 (call completion services), Account 6622 (number services), and Account 6623 (customer services):

IXCs and resellers contend that all of the expenses recorded in these accounts should be treated as avoidable costs because a reseller will either purchase these services separately or provide them itself.[2160] Incumbent LECs and Sprint argue that these services have no relation to local retail service and therefore cannot be included in avoided costs used to compute wholesale local service rates.[2161]

[2158] *See, e.g.*, Cable & Wireless comments at 46 n.77; Telecommunications Resellers Ass'n comments at 25-26; AT&T comments at 84 n.130; CompTel comments at 96-97; MCI comments at Attachment 2 (Pricing of Wholesale Services), p. 5-6.

[2159] *See, e.g.*, Ameritech reply at 38; Bell Atlantic reply at 23; GTE reply at 25 n.40; MFS reply at 35; Time Warner reply at 21; USTA reply at 30; Sprint reply at 38.

[2160] *See, e.g.*, AT&T comments at 84 n.130; MCI comments at Attachment 2 (Pricing of Wholesale Services), p. 6; Cable & Wireless comments at 46 n.77; Telecommunications Resellers Ass'n comments at 25-26. CompTel states that such accounts should be avoided where appropriate. CompTel comments at 96-97.

[2161] *See, e.g.*, Bell Atlantic reply at 23 (with respect to account 6623); USTA reply at 30 (account 6623 includes costs devoted to customer service relating to interexchange service); Sprint reply at 38-39 (also identifies account 6623 as relating to separately billed services). PacTel agrees that costs of directory

Information origination/termination expenses and other property, plant and equipment expenses--Account 6341 (large PBX expense), Account 6351 (public telephone terminal equipment expense), Account 6511 (property held for future telecommunications use), and Account 6512 (provisioning expense):

MCI and Cable & Wireless identify accounts 6341 (large PBX expense), 6351 (public telephone terminal equipment expense), 6511 (property held for future telecommunications use) and 6512 (provisioning expense) as completely avoidable,[2162] while incumbent LECs, MFS and Sprint argue that these expenses are not associated with retail activities.[2163]

Account 6220 (operator systems expense):

AT&T, TCC, and GCI argue that this account is wholly avoidable where resellers choose not to purchase operator services[2164] while Sprint argues that the account is unrelated to local service.[2165]

Account 6790 (provision for uncollectible notes receivable)/5300 (uncollectible revenue):

AT&T, TCC, and GCI argue that the sum recorded in account 5300 represents a revenue offset that is wholly avoidable.[2166] MCI chooses to measure uncollectibles using account 6790, arguing that expenses in this account are partially avoidable.[2167] Sprint and Time Warner disagree with the contention that uncollectibles are avoidable at all, claiming that uncollectibles may actually increase in a wholesale operation.[2168]

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assistance call allowances, directory listing, and telephone directories will continue to be incurred. PacTel reply at 46.

[2162] MCI comments at Attachment 2 (Pricing of Wholesale Services), p. 8; Cable & Wireless comments at 46 n.77.

[2163] MFS reply at 35-36; Sprint reply at 38; GTE reply at 25 n.40 (at least with respect to accounts 6341 and 6351).

[2164] AT&T reply at Appendix E (Avoided Cost Model); TCC comments at 45 n.45; GCI comments at 1.

[2165] Sprint reply at 38.

[2166] AT&T comments at 84 n.130; AT&T reply, Appendix E (Avoided Cost Model); TCC comments at 45 n.45; GCI comments at 1.

[2167] MCI comments at Attachment 2 (Pricing of Wholesale Services), p. 9.

[2168] Sprint reply at 37; Time Warner reply at 21.

Network support expenses (Accounts 6112-6116):

AT&T, TCC, GCI, and the Telecommunications Resellers Association assert that all of these accounts are partially avoidable.[2169] MCI only discusses account 6113 (aircraft expense), identifying it as completely avoidable because it is not related to wholesale services.[2170] Sprint and MFS disagree, arguing that there is no evidence that costs in these accounts will decrease with wholesale offerings because these expenses will have to continue to be incurred.[2171]

General support expenses (Accounts 6121-6124) and Account 6711 (executive), Account 6712 (planning), and Accounts 6721-6728 (general and administrative expenses):

Resellers and IXCs contend that the shared expenses recorded in these accounts are partially avoidable.[2172] MCI and Cable & Wireless identify accounts 6722 (external relations) and 6727 (research and development) as completely avoidable.[2173] MCI argues that overhead costs support all of the activities, including the activities that are avoided when services are sold at wholesale. Therefore, according to MCI, a portion of overhead expenses must be treated as avoided cost.[2174] AT&T argues that wholesaling will necessarily lead to an overall reduction in the size of an incumbent LEC's operations and thus to a reduction in shared expenses.[2175] Sprint and Time Warner argue that there is no evidence to support a conclusion that resale will lead to a general reduction in shared expenses.[2176]

[2169] AT&T comments at 84 n.131; TCC comments at 46 n.46; GCI comments at 1; Telecommunications Resellers Ass'n comments at 25-26.

[2170] MCI comments at Attachment 2 (Pricing of Wholesale Services), p. 8.

[2171] MFS reply at 35 (only discusses account 6113); Sprint reply at 39-40.

[2172] *See, e.g.*, Telecommunications Resellers Ass'n comments at 25-26; AT&T comments at 84 n.131.

[2173] MCI comments at Attachment 2 (Pricing of Wholesale Services), p. 6-7; Cable & Wireless comments at 47 n.79.

[2174] MCI comments at Attachment 2 (Pricing of Wholesale Services), p. 9.

[2175] AT&T reply, Appendix E (Avoided Cost Model) at 2.

[2176] Sprint reply at 39-40; Time Warner reply at 21

Depreciation and amortization expenses (Accounts 6561-6565) and operating taxes (Accounts 7220-7240).

Resellers and IXCs also argue to varying degrees that such expenses are partially avoidable.[2177] MCI and Cable & Wireless argue for the complete avoidance of accounts 6562 (depreciation expense--property held for future telecommunications use) and 6564 (amortization expense--intangible).[2178] MFS, Sprint, and Time Warner argue that these costs will continue to be incurred for wholesale operations.[2179]

Other partially avoided accounts:

AT&T, TCC, and GCI argue that accounts 6533 (testing expenses), 6534 (plant operations administration expense), and 7540 (other interest), and total returns are partially avoidable[2180] while Sprint disagrees.[2181]

4. State Decisions

898. Several state commissions have already made interim or final determinations with respect to wholesale rates. Some, like the California and Maryland commissions, did not purport to apply or interpret the 1996 Act. Others, including the Illinois and Georgia commissions, explicitly applied section 252(d)(3) in reaching their decisions. Post-1996 Act state decisions announced to date are summarized below.

899. *California:* The California Commission adopted interim rules, effective March 31, 1996, for the resale of local exchange services by competitive LECs within the areas served by Pacific and GTE.[2182] Although the record in that proceeding was closed before the passage of the 1996 Act, the California Commission applied a "retail rates minus avoided cost" standard similar

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[2177] *See, e.g.*, Telecommunications Resellers Ass'n comments at 25-26; AT&T comments at 84 n.131; CompTel comments at 97.

[2178] MCI comments at Attachment 2 (Pricing of Wholesale Services), p. 9; Cable & Wireless comments at 47 n.79.

[2179] MFS reply at 35-36 (account 6564 is not related to retail); Sprint reply at 39-40; Time Warner reply at 21.

[2180] AT&T comments at 84 nn.130-31; TCC comments at 46 n.46; GCI comments at 1. Sprint does not comment on account 7540.

[2181] Sprint reply at 39-40.

[2182] *Order Instituting Rulemaking on the Commission's Own Motion into Competition for Local Exchange Service*, R. 95-04-043 and I. 95-04-044 (California Commission April 26, 1996). Although the final order was not issued until April 26, 1996, it became effective March 31, 1996.

to that contained in section 252(d)(3) for purposes of setting interim rates. The California Commission used an embedded cost study and USOA accounting data to calculate business discounts rates of 17 percent for PacTel and 12 percent for GTE. Because it had previously found that residential rates were already below direct embedded cost, the California Commission applied to residential services a reduced discount rate of 10 percent for PacTel and 7 percent for GTE. In arriving at this conclusion, the California Commission considered uncollectibles, marketing, and customer service expenses to be partially avoidable, to varying degrees.

900. *Colorado*: The Colorado Commission established a business discount rate of 16 percent and a residential discount rate of 9 percent.[2183] Using Colorado-specific embedded cost information previously filed by U S West as part of an annual report to that commission, the Colorado Commission calculated avoided costs for five categories of services. The Colorado Commission treated the following costs as totally avoided: uncollectibles; direct expense associated with operator services; customer operations (product management, sales, and product advertising); call completion; and number services. The Colorado Commission also considered 95 percent of the costs of customer services to be avoidable. General purpose computer expense and related depreciation, and general corporate overheads, were treated as partially avoided. The Colorado Commission concluded that wholesale discounts should be as follows: residential, 9 percent; business, 16 percent; toll services, 30 percent; central office-based features, 50 percent; all other services, 18 percent.

901. *Georgia*: The Georgia Commission established a 20.3 percent discount rate for wholesale residential service and a 17.3 percent discount rate for wholesale business service.[2184] The Georgia Commission used embedded cost information to calculate avoided direct expenses. The Georgia Commission also found that a percentage of general support, administrative, and corporate operations expenses should be considered avoided costs. In computing its final discounts, the Georgia Commission apportioned total avoided expense between residential and business services according to BellSouth's revenues for the two categories. Prior to such apportionment, the Georgia Commission's discount was 18.74 percent.

902. *Illinois*: The Illinois Commission released an order on June 26, 1996, setting wholesale discount rates for Ameritech and Centel local exchange services.[2185] The Illinois Commission applied the section 252(d)(3) pricing standard, but rejected use of embedded cost

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[2183] *U S West Communications, Inc. Filing Advice Letter No. 2610 in Compliance with Commission Decision No. C96-521 Adopting Emergency Rules*, Docket No. 96S-233T (Colorado Commission June 21, 1996).

[2184] *Petition of AT&T for the Commission to Establish Resale Rules, Rates, Terms, and Conditions and Initiate Unbundling of Services*, Docket No. 6352U (Georgia Commission June 21, 1996).

[2185] *Petition for a Total Local Exchange Wholesale Service Tariff from Illinois Bell Telephone Company*, Nos. 95-0458 and 95-0531 (consol.) (Illinois Commission June 26, 1996).

studies as inconsistent with the Commission's established cost of service rules. Instead, the Illinois Commission based its analysis on a methodology that begins with retail rates, then subtracts: (1) the "total assigned cost" of retail functions; and (2) a *pro rata* share of contribution attributable to the avoided retail costs. Total assigned costs include the long-run incremental costs of a service plus some shared and administrative costs. Contribution is the difference between retail price and long-run incremental cost. The Illinois Commission expects that this methodology, when applied to individual Ameritech services using the carrier's most recently-filed cost studies, will produce an average discount rate of 20.07 percent.[2186] The Illinois Commission applied the same rate to Centel, pending completion by Centel of the cost studies needed to apply the Illinois Commission's adopted methodology.

903. *Louisiana:* The Louisiana Commission established regulations concerning resale of telecommunications services on March 15, 1996.[2187] As an interim measure, until the Louisiana Commission can determine wholesale rates based on TSLRIC cost studies, the commission has set wholesale rates at the incumbent LEC's current tariffed retail rates minus 10 percent. This calculation reflects the incumbent LEC's avoidance of retail costs, including but not limited to, sales, marketing and customer services associated with the resold items.

904. *Maryland:* The Maryland Commission adopted, without analyzing cost studies, an interim discount rate of 10 percent, pending completion of the instant rulemaking proceeding.[2188]

905. *New York:* The New York Commission established temporary wholesale discounts for NYNEX and Rochester Telephone on July 18 of this year.[2189] The New York Commission calculates for NYNEX a 17 percent discount for residential service and an 11 percent discount for business service. Separate avoided cost percentages were derived for different shared expense categories, ranging from five percent for general and administrative expenses to 12.7 percent for

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[2186] The Illinois Commission notes that the pricing methodology that it adopted would yield an average discount of 20.07 percent if applied at the individual service level and 16.63 percent if applied to the "family" service level. *Id.* at 10. Illinois decided that the individual service application avoided certain pricing anomalies and was more consistent with the 1996 Act. *Id.* at 20.

[2187] *In re: Regulations for Competition in the Local Telecommunications Market*, Docket U-200883 (Louisiana Commission March 15, 1996).

[2188] *Wholesale Rates for Telecommunications Services Ruling on AT&T's Petition for a Reduction on the Wholesale Rates of Bell Atlantic–Maryland, Inc.*, Case No. 8721 (Maryland Commission June 27, 1996).

[2189] *Joint Complaint of AT&T Communications of New York, Inc., MCI Telecommunications Corporation, WorldCom, Inc. d/b/a LDDS WorldCom and the Empire Association of Long Distance Telephone Companies, Inc. Against New York Telephone Company Concerning Wholesale Provisioning of Local Exchange Service by New York Telephone Company and Sections of New York Telephone's Tariff No. 900*, Case 95-C-0657 (New York Commission July 18, 1996); *Petition of Rochester Telephone Corp. for Approval of a Proposed Restructuring Plan*, Case 93-C-0103 (New York Commission July 18, 1996).

network support expense. For marketing categories, 20 percent of product management, 50 percent of sales, and 50 percent of advertising expenses were considered avoidable. All uncollectibles were considered avoidable. Calculating these and other avoided costs, the New York Commission arrived at a 15 percent discount. Because the New York Commission observed that business lines produce higher overall revenue and thus artificially inflate avoided cost for business lines (and undervalue the avoided cost for residential lines), a 17 percent discount was set for residential service while only an 11 percent discount was set for business service. A uniform 13.5 percent discount was ordered for Rochester Telephone, based on a New York Commission analysis of Rochester's 1995 annual report, using principles similar to those applied to NYNEX.

906. *Ohio*: The Ohio Commission has established rules for pricing wholesale services for resale, but has not publicly released calculations of specific discounts for particular services.[2190] The Ohio Commission established a presumption that all expenses contained in the following USOA accounts will be avoided: 5300 (uncollectible revenue), 6611 (product management), 6612 (sales), 6613 (product advertising), 6621 (call completion service), 6622 (number services expense), and 6623 (customer service).[2191] The Ohio Commission's rules require resellers seeking to avoid additional costs to prove that such costs would be avoided in wholesale operations. Beyond the avoided expenses discussed above, the Ohio Commission requires avoided costs to include "direct and indirect costs of all activities eliminated due to the wholesale provisioning."

5. Discussion

907. Resale will be an important entry strategy for many new entrants, especially in the short term when they are building their own facilities. Further, in some areas and for some new entrants, we expect that the resale option will remain an important entry strategy over the longer term. Resale will also be an important entry strategy for small businesses that may lack capital to compete in the local exchange market by purchasing unbundled elements or by building their own networks. In light of the strategic importance of resale to the development of competition, we conclude that it is especially important to promulgate national rules for use by state commissions in setting wholesale rates. For the same reasons discussed in Section II.D of the Order, we believe that we have legal authority under the 1996 Act to articulate principles that will apply to the arbitration or review of wholesale rates. We also believe that articulating such principles will promote expeditious and efficient entry into the local exchange market. Clear resale rules will create incentives for parties to reach agreement on resale arrangements in voluntary negotiations. Clear rules will also aid states in conducting arbitrations that will be administratively workable

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[2190] *Commission Investigation Relative to the Establishment of Local Exchange Competition and Other Competitive Issues*, Case No. 95-845-TP-COI (Ohio Commission June 12, 1996).

[2191] The Ohio Commission also lists account 6610, which is the summary account for marketing expenses (accounts 6611-6613).

and will produce results that satisfy the intent of the 1996 Act. The rules we adopt and the determinations we make in this area are crafted to achieve these purposes. We also note that clear resale rules should minimize regulatory burdens and uncertainty for all parties, including small entities and small incumbent LECs.[2192]

908. The statutory pricing standard for wholesale rates requires state commissions to (1) identify what marketing, billing, collection, and other costs will be avoided by incumbent LECs when they provide services at wholesale; and (2) calculate the portion of the retail prices for those services that is attributable to the avoided costs. Our rules provide two methods for making these determinations. The first, and preferred, method requires state commissions to identify and calculate avoided costs based on avoided cost studies. The second method allows states to select, on an interim basis, a discount rate from within a default range of discount rates adopted by this Commission. They may then calculate the portion of a retail price that is attributable to avoided costs by multiplying the retail price by the discount rate.

909. We adopt a minimum set of criteria for avoided cost studies used to determine wholesale discount rates. The record before us demonstrates that avoided cost studies can produce widely varying results, depending in large part upon how the proponent of the study interprets the language of section 252(d)(3). The criteria we adopt are designed to ensure that states apply consistent interpretations of the 1996 Act in setting wholesale rates based on avoided cost studies which should facilitate swift entry by national and regional resellers, which may include small entities.[2193] At the same time, our criteria are intended to leave the state commissions broad latitude in selecting costing methodologies that comport with their own ratemaking practices for retail services. Thus, for example, our rules for identifying avoided costs by USOA expense account are cast as rebuttable presumptions, and we do not adopt as presumptively correct any avoided cost model.

910. Based on the comments filed in this proceeding and on our analysis of state decisions setting wholesale discounts, we adopt a default range of rates that will permit a state commission to select a reasonable default wholesale rate between 17 and 25 percent below retail rate levels. A default wholesale discount rate shall be used if: (1) an avoided cost study that satisfies the criteria we set forth below does not exist; (2) a state commission has not completed its review of such an avoided cost study; or (3) a rate established by a state commission before release of this Order is based on a study that does not comply with the criteria described in the following section. A state commission must establish wholesale rates based on avoided cost studies within a reasonable time from when the default rate was selected. This approach will enable state commissions to complete arbitration proceedings within the statutory time frames even if it is infeasible to conduct full-scale avoided cost studies that comply with the criteria

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[2192] *See* Regulatory Flexibility Act, 5 U.S.C. §§ 601 *et seq.*

[2193] *See Id.*

described below for each incumbent LEC.

a. Criteria for Cost Studies

911. There has been considerable debate on the record in this proceeding and before the state commissions on whether section 252(d)(3) embodies an "avoided" cost standard or an "avoidable" cost standard. We find that "the portion [of the retail rate] . . . attributable to costs that will be avoided" includes all of the costs that the LEC incurs in maintaining a retail, as opposed to a wholesale, business. In other words, the avoided costs are those that an incumbent LEC would no longer incur if it were to cease retail operations and instead provide all of its services through resellers. Thus, we reject the arguments of incumbent LECs and others who maintain that the LEC must actually experience a reduction in its operating expenses for a cost to be considered "avoided" for purposes of section 252(d)(3). We do not believe that Congress intended to allow incumbent LECs to sustain artificially high wholesale prices by declining to reduce their expenditures to the degree that certain costs are readily avoidable. We therefore interpret the 1996 Act as requiring states to make an objective assessment of what costs are reasonably avoidable when a LEC sells its services wholesale. We note that Colorado, Georgia, Illinois, New York, and Ohio commissions have all interpreted the 1996 Act in this manner.[2194]

912. We find that, under this "reasonably avoidable" standard discussed above, an avoided cost study must include indirect, or shared, costs as well as direct costs. We agree with MCI, AT&T, and the California, Illinois, Ohio, Colorado, and Georgia commissions that some indirect or shared costs are avoidable and likely to be avoided when a LEC provides retail services to a reseller instead of to the end user. This is because indirect or shared costs, such as general overheads, support all of the LEC's functions, including marketing, sales, billing and collection, and other avoided retail functions. Therefore, a portion of indirect costs must be considered "attributable to costs that will be avoided" pursuant to section 252(d)(3). It is true that expenses recorded in indirect or shared expense accounts will continue to be incurred for wholesale operations. It is also true, however, that the overall level of indirect expenses can reasonably be

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[2194] *See, e.g., U S West Communications, Inc. Filing Advice Letter No. 2610 in Compliance with Commission Decision No. C96-521 Adopting Emergency Rules*, Docket No. 96S-233T (Colorado Commission June 21, 1996) at paras. 12-13; *Petition of AT&T for the Commission to Establish Resale Rules, Rates, Terms, and Conditions and Initiate Unbundling of Services*, Docket No. 6352U (Georgia Commission June 21, 1996); *Petition for a Total Local Exchange Wholesale Service Tariff from Illinois Bell Telephone Company*, Nos. 95-0458 and 95-0531 (consol.) (Illinois Commission June 26, 1996) at 27-34; *Joint Complaint of AT&T Communications of New York, Inc., MCI Telecommunications Corporation, WorldCom, Inc. d/b/a LDDS WorldCom and the Empire Association of Long Distance Telephone Companies, Inc. Against New York Telephone Company Concerning Wholesale Provisioning of Local Exchange Service by New York Telephone Company and Sections of New York Telephone's Tariff No. 900*, Case 95-C-0657 (New York Commission July 18, 1996); *Petition of Rochester Telephone Corp. for Approval of a Proposed Restructuring Plan*, Case 93-C-0103 (New York July 18, 1996); *Commission Investigation Relative to the Establishment of Local Exchange Competition and Other Competitive Issues*, Case No. 95-845-TP-COI (Ohio Commission June 12, 1990) at 30-31.

expected to decrease as a result of a lower level of overall operations resulting from a reduction in retail activity.

913. A portion of contribution, profits, or mark-up may also be considered "attributable to costs that will be avoided"[2195] when services are sold wholesale. MCI's model makes this attribution by means of a calculation that applies the same mark-up to wholesale services as to retail services. The Illinois Commission achieved a similar effect by removing a *pro rata* portion of contribution from the retail rate for each service. In AT&T's model, the portion of return on investment (profits) that was attributable to assets used in avoided retail activities was treated as an avoided cost. We find that these approaches are consistent with the 1996 Act.

914. An avoided cost study may not calculate avoided costs based on non-cost factors or policy arguments, nor may it make disallowances for reasons not provided for in section 252(d)(3). The language of section 252(d)(3) makes no provision for selecting a wholesale discount rate on policy grounds. We therefore reject NCTA's argument that discount rates should be ten percent or less in order to avoid discouraging facilities-based competition, as well as AT&T's suggestion that wholesale discount rates should be set at levels that ensure the viability of the reseller's business. We also reject, for example, MCI's assertion that no external relations or research and development costs should be allowed in wholesale rates because the activities represented by those costs are contrary to the interests of the LEC competitors that purchase wholesale services.[2196] Our analysis also precludes a state commission from adopting AT&T's suggestion that an increment should be added to the base discount rate to compensate resellers for alleged deficiencies in the provisioning of services.

915. The 1996 Act requires that wholesale rates be based on existing retail rates, and thus clearly precludes use of a "bottom up" TSLRIC study to establish wholesale rates that are not related to the rates for the underlying retail services. We thus reject the suggestions of those parties that ask us to require use of TSLRIC to set wholesale rates. The 1996 Act does not, however, preclude use of TSLRIC cost studies to identify the portion of a retail rate that is attributable to avoided retail costs. TSLRIC studies would be entirely appropriate in states where the retail rates were established using a TSLRIC method. For example, the Illinois Commission calculated its wholesale rate using an avoided cost formula and long run incremental cost studies. Embedded cost studies, such as the studies used by the Georgia Commission, may also be used to identify avoided costs. Ideally, a state would use a study methodology that is consistent with the manner in which it sets retail rates.

916. We neither prohibit nor require use of a single, uniform discount rate for all of an incumbent LEC's services. We recognize that a uniform rate is simple to apply, and avoids the

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[2195] 47 U.S.C. § 252(d)(3).

[2196] *See* MCI comments at Attachment 2 (Pricing of Wholesale Services), p. 6-7.

need to allocate avoided costs among services. Therefore, our default wholesale discount is to be applied uniformly. On the other hand, we also agree with parties who observe that avoided costs may, in fact, vary among services. Accordingly, we allow a state to approve nonuniform wholesale discount rates, as long as those rates are set on the basis of an avoided cost study that includes a demonstration of the percentage of avoided costs that is attributable to each service or group of services.

917. All costs recorded in accounts 6611 (product management), 6612 (sales), 6613 (product advertising) and 6623 (customer services) are presumed to be avoidable. The costs in these accounts are the direct costs of serving customers. All costs recorded in accounts 6621 (call completion services) and 6622 (number services) are also presumed avoidable, because resellers have stated they will either provide these services themselves or contract for them separately from the LEC or from third parties. These presumptions regarding accounts 6611-6613 and 6621-6623 may be rebutted if an incumbent LEC proves to the state commission that specific costs in these accounts will be incurred with respect to services sold at wholesale, or that costs in these accounts are not included in the retail prices of the resold services.

918. General support expenses (accounts 6121-6124), corporate operations expenses (accounts 6711, 6712, 6721-6728), and telecommunications uncollectibles (account 5301) are presumed to be avoided in proportion to the avoided direct expenses identified in the previous paragraph. Expenses recorded in these accounts are tied to the overall level of operations in which an incumbent LEC engages. Because the advent of wholesale operations will reduce the overall level of operations -- for example, staffing should decrease because customer inquiries and billing and collection activity will decrease -- overhead and support expenses are in part avoided. We select the revenue offset account of 5301 rather than accounts 5300 or 6790 because account 5301 most directly represents overheads attributable to the services being resold.

919. Plant-specific and plant non-specific expenses (other than general support expenses) are presumptively not avoidable.

920. In the case of carriers designated as Class B under section 32.11 of our rules that use certain summary accounts in lieu of accounts designated in this subsection of the Order, our avoided cost study criteria shall apply to the relevant summary account in its entirety.[2197]

b. Default Range of Wholesale Discount Rates

921. Parties to this proceeding present evidence or arguments supporting wholesale discount rates ranging from 4.76 percent to 55 percent:

[2197] *See* Regulatory Flexibility Act, 5 U.S.C. §§ 601 *et seq.*

Sprint/United Telephone study	
Simple Access service:	4.76%
Other services:	7.19%
NCTA	10.0%
Comcast	10.0%
Massachusetts Attorney General	25.0%
ACTA	25.0%
MCI Model	25.6-33.2%[2198]
Telecommunications Resellers Ass'n	30.0-50.0%
AT&T Model	23.05%-55.52%[2199]

922. States applying wholesale pricing standards similar to the standards in section 252(d)(3) have set the following wholesale discounts:

California	
PacTel	
Business	17.0%
Residential	10.0%
GTE	
Business	12.0%
Residential	7.0%
Colorado	
Residential	9.0%
Business	16.0%
Toll Services	30.0%
Central Office-Based Features	50.0%[2200]
All other services	18.0%
Georgia	
Residential	20.3%
Business	17.3%

[2198] MCI calculated rates based on actual accounting data for the years 1990-1995 for each RBOC and for GTE. For 1995 the rates ranged from 25.6 percent for U S West to 33.2 percent for Ameritech. MCI also calculates rates for 1996 using estimated data. MCI comments at Attachment 2 (Pricing of Wholesale Services), p. 1.

[2199] AT&T calculated separate discount rates for each RBOC study area and for SNET and GTE Hawaiian Tel.

[2200] Central office-based services are custom calling features such as speed dialing and CLASS features, such as caller ID. *U S West Communications, Inc. Filing Advice Letter No. 2610 in Compliance with Commission Decision No. C96-521 Adopting Emergency Rules*, Docket No. 96S-233T (Colorado Commission June 21, 1996) at para. 13.

Illinois	20.07%[2201]
New York	
NYNEX	
Business	17.0%
Residential	11.0%
Rochester Telephone	13.5%

923. We find unpersuasive various arguments presented by parties at the lower and higher ends of the range of possible discounts. The Sprint/United Telephone study produces unreasonably low measures of avoided costs because the study considers only avoided direct expenses in five accounts. As explained above, we interpret the statutory language providing for a wholesale price that excludes the "portion [of a retail rate] attributable to any marketing, billing, collection, and other costs that will be avoided"[2202] to include indirect as well as direct costs. The proposals of NCTA and Comcast for a maximum discount of 10 percent are premised on the view that any greater discount would unduly discourage facilities-based competition. Section 252(d)(3), however, requires wholesale prices to be set based on avoided costs, not on any policy preference for facilities-based competition. For the same statutory reason, we reject as inconsistent with section 252(d)(3) the policy arguments of the Telecommunications Resellers Association and AT&T that we should establish national wholesale discounts at levels that will ensure that resale of local exchange services is a viable business.[2203]

924. We find AT&T's model unsuitable for purposes of establishing in this proceeding a range for default wholesale discount rates. The AT&T model does in many respects satisfy the general criteria we establish above for avoided cost studies. The model, however, incorporates numerous assumptions, cost allocation factors, and studies, and because AT&T submitted its model with its reply comments, and other parties have not analyzed the model in detail. We find that we would need to develop a more complete record on the AT&T model before deciding whether to endorse it. We do not, however, preclude a state commission from considering in a wholesale rate proceeding evidence developed using this model.

925. We find that we can use MCI's model, with some modifications, along with the results of certain state proceedings, to establish a range of rates that would produce an acceptable default wholesale discount rate that reasonably approximates the amount of avoided costs that should be subtracted from the retail rate. A default rate is to be used only in three instances: (1)

[2201] The Illinois Commission requires wholesale discounts to be computed on a service-specific basis. The 20.07 percent figure represents an "average" discount using such a methodology.

[2202] 47 U.S.C. § 252(d)(3).

[2203] *See* AT&T comments at 81-86; Telecommunications Resellers Ass'n comments at 24.

in a state arbitration proceeding if an avoided cost study that satisfies the criteria we set forth above does not exist; (2) where a state has not completed its review of such an avoided cost study; (3) where a rate established by a state before the release date of this Order is based on a study that does not comply with the criteria described in the previous section. We emphasize that the default rate is to be used as an interim measure only, and should be replaced with an avoided cost study within a reasonable time. The MCI model is a reasonable attempt at estimating avoided cost in accordance with section 252(d)(3) using only publicly-available data. We find, however, that we should modify certain features of the model.

926. First, MCI treats account 6722 (external relations) and account 6727 (research and development) as avoidable costs. MCI argues that purchasers of wholesale services are competing with LECs and, therefore, should not be forced to fund regulatory activities reflected in account 6722. MCI claims that research and development are not of practical use for the services that resellers will purchase. As explained above, this type of disallowance is not contemplated by the avoided cost standard of section 252(d)(3). We therefore adjust the model to treat these costs in the same manner as other overhead expense accounts.

927. Second, MCI treats a number of accounts as "other avoided costs" on the grounds that the expenses in those accounts are not relevant to the provision of telecommunications services that an incumbent LEC currently provides.[2204] Public telephone terminal equipment expense and large PBX expense are not "avoided" precisely because they are unrelated to the retail services being discounted. We would not expect these expenses to be included in retail service rates for resold services; but if these expenses were included in retail rates, they would not be avoided when the services are purchased by resellers. The rest of MCI's "other" accounts contain costs that support all of the telecommunications services offered by the company. MCI has not shown that any of these costs are either reduced or eliminated when services are sold at wholesale. We, therefore, adjust the MCI model so as not to treat these accounts as avoidable costs.

928. Third, MCI treats accounts 6611 (product management), 6612 (sales), 6613 (product advertising), and 6623 (customer services) as costs that are entirely avoided with respect to services purchased at wholesale. We agree that a large portion of the expenses in these accounts is avoided when service is sold at wholesale. We also agree, however, with parties that argue that some expenses in these accounts will continue to be incurred with respect to wholesale products and customers, and that some new expenses may be incurred in addressing the needs of resellers as customers. No party in this proceeding has suggested a specific adjustment to the MCI model that would account for these costs of the wholesale operation. We note that, in their

[2204] Based on this rationale, MCI excludes account 6113 (aircraft expense), account 6341 (large PBX expense), account 6511 (property held for future telecommunications use expense), account 6351 (public telephone terminal equipment expense), account 6512 (provisioning expense), account 6562 (depreciation expense for property held for future telecommunications use), and account 6564 (amortization expense, intangible).

own proceedings, several states have made varying estimates concerning the level of wholesale-related expenses in these accounts. Colorado, for example, estimated that none of the costs in accounts 6611-6613 would relate to wholesale services, and that only five percent of the costs in account 6623 would be incurred in a wholesale operation.[2205] The Georgia Commission, on the other hand, decided that 25 percent of sales and product advertising expenses would continue to be incurred in the wholesale operation.[2206] Given the lack of evidence, and the wide range of estimates that have been made by these states, we find it reasonable to assume, for purposes of determining a default range of wholesale discount rates, that ten percent of costs in accounts 6611, 6612, 6613, and 6623 are not avoided by selling services at wholesale.

929. Fourth, MCI uses a complex formula to calculate the portions of overhead and general support expense that are attributable to avoided costs. We find that this formula is constructed in a way that tends to inflate the results of the calculation. We have, therefore, substituted a more straightforward approach in which we apply to each indirect expense category the ratio of avoided direct expense to total expenses. We also identify a slightly different list of accounts representing indirect costs than that proposed by MCI.

930. With the modifications described above, and using actual 1995 data, MCI's model produces the following results for the RBOCs and GTE:

U S West	18.80%
GTE	18.81%
BellSouth	19.20%
Bell Atlantic	19.99%
SBC	20.11%
NYNEX	21.31%
Pacific	23.87%
Ameritech	25.98%

931. We also take into account the experience of those state commissions, Illinois and Georgia, that have undertaken or approved detailed avoided cost studies under the pricing standard of section 252(d)(3) of the 1996 Act. Applying the statutory standard to the examination of significant cost studies, those commissions derived average wholesale discounts of

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[2205] *U S West Communications, Inc. Filing Advice Letter No. 2610 in Compliance with Commission Decision No. C96-521 Adopting Emergency Rules*, Docket No. 96S-233T (Colorado Commission June 21, 1996) at para. 12 and n.20. The Colorado Commission explained that it chose 5 percent because "some small portion of customer services will remain for the interfaces of Operational Support Systems of [U S West] and the resellers, but nowhere near the amount necessary for direct customer contact services." *Id.* n.20.

[2206] *Petition of AT&T for the Commission to Establish Resale Rules, Rates, Terms, and Conditions and Initiate Unbundling of Services*, Docket No. 6352U (Georgia Commission June 21, 1996) at Appendix 1. The Georgia Commission characterized its calculations with respect to sales expense as "conservative at best."

18.74 percent[2207] and 20.07 percent. We find that these decisions present evidence of an appropriate wholesale discount that should be given more weight than state commission decisions that have set their discounts under other pricing standards or only on an interim basis.[2208]

932. Accordingly, based on the record before us, we establish a range of default discounts of 17-25 percent that is to be used in the absence of an avoided cost study that meets the criteria set forth above. A state commission that has not set wholesale prices based on avoided cost studies that meet the criteria set forth above as of the release date of this Order shall use a default wholesale discount rate between 17 and 25 percent. A state should articulate the basis for selecting a particular discount rate. If this default discount rate is used, the state commission must establish wholesale rates based on avoided cost studies within a reasonable time. The avoided cost study must comply with the criteria for avoided cost studies described above. A state commission may submit an avoided cost study to this Commission for a determination of whether it complies with these criteria. If a party (either a reseller or an incumbent LEC) believes that a state commission has failed to act within a reasonable period of time, that party may file a petition for declaratory ruling with this Commission, asking us to determine whether the state has failed to comply with this rule. We will, in making such determinations, consider the particular circumstances in the state involved. If a state commission has adopted as of the release date of this Order an interim wholesale pricing decision that relies on an avoided cost study that meets the criteria set forth above, the state commission may continue to require an incumbent LEC to offer services for resale under such interim wholesale prices in lieu of the default discount range, so long as the state commission's interim pricing rules are fully enforceable by resellers and followed by a final decision within a reasonable period of time that adopts an avoided cost study that meets the criteria set forth above.

933. We select the 17 to 25 percent range of default discounts based on our evaluation of the record. The adjusted results of the MCI model taken together with the results of those state proceedings discussed above that indicated they applied the statutory standard produces, a range between 18.74 and 25.98 percent. A majority of these wholesale discount rates fall between 18.74 and 21.11 percent. Other state commissions, such as California and New York, that have

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[2207] Prior to apportioning avoided costs between business and residential services, the Georgia Commission's avoided cost computation would have yielded an aggregate wholesale discount rate of 18.74 percent. This figure is computed by dividing the total avoided costs computed by the Georgia Commission by the total BellSouth residential and business revenues (which were used individually both to apportion total avoided costs between residential and business service and as the denominator in the final wholesale discount calculations).

[2208] *See, e.g., Order Instituting Rulemaking on the Commission's Own Motion into Competition for Local Exchange Service*, R. 95-04-043 and I. 95-04-044 (California Commission April 26, 1996); *U S West Communications, Inc. Filing Advice Letter No. 2610 in Compliance with Commission Decision No. C96-521 Adopting Emergency Rules*, Docket No. 96S-233T (Colorado Commission June 21, 1996); *Wholesale Rates for Telecommunications Services Ruling on AT&T's Petition for a Reduction on the Wholesale Rates of Bell Atlantic–Maryland, Inc.*, Case No. 8721 (Maryland Commission June 27, 1996).

employed avoided cost studies have produced wholesale discount rates somewhat below the low end of this range. Furthermore, it has been argued that smaller incumbent LECs' avoided costs are likely to be less than those of the larger incumbent LECs, whose data was used by MCI. Therefore, to allow for these considerations, we select 17 percent as the lower end of the range.[2209] We select 25 percent as the top of the range because it approximates the top of the range of results produced by the modified MCI model. This range gives state commissions flexibility in addressing circumstances of incumbent LECs serving their states and permits resale to proceed until such time as the state commission can review a fully-compliant avoided cost study.

934. We have considered the economic impact of our rules in this section on small incumbent LECs. For example, Bay Springs, *et al.*, argues that national wholesale pricing rules will insufficiently consider operational differences between small and large incumbent LECs.[2210] We take this into consideration in setting the default discount rate and in requiring state commissions to perform carrier-specific avoided cost studies within a reasonable period of time that will reflect carrier-to-carrier differences. We believe, however, that the procompetitive goals of the 1996 Act require us to establish a default discount rate for state commissions to use in the absence of avoided cost studies that comply with the criteria we set forth above. The presumptions we establish in conducting avoided cost studies regarding the avoidability of certain expenses may be rebutted by evidence that certain costs are not avoided, which should minimize any economic impact of our decisions on small incumbent LECs. We also note that certain small incumbent LECs are not subject to our rules under section 251(f)(1) of the 1996 Act, unless otherwise determined by a state commission, and certain other small incumbent LECs may seek relief from their state commissions from our rules under section 251(f)(2) of the 1996 Act.

C. Conditions and Limitations

935. Section 251(c)(4) requires incumbent LECs to make their services available for resale without unreasonable or discriminatory conditions or limitations. This portion of this Order addresses various issues relating to conditions or limitations on resale. It first discusses restrictions, generally, in Section VIII.C.1. Next, it turns to promotional and discounted offerings and the conditions that may attach to such offerings in Section VIII.C.2., and then to refusals to resell residential and below-cost services in Section VIII.C.3. Limitations on the categories of customers to whom a reseller may sell incumbent LEC services are discussed in VIII.C.4. Resale restrictions in the form of withdrawal of service are discussed in VIII.C.5. Finally, Section VIII.C.6. discusses resale restrictions relating to provisioning.

1. Restrictions, Generally, and Burden of Proof

[2209] *See* Regulatory Flexibility Act, 5 U.S.C. §§ 601 *et seq.*

[2210] Bay Springs, *et al.*, comments at 17.

a. Background and Comments

936. In the NPRM, we asked whether incumbent LECs should have the burden of proving that restrictions on resale are reasonable and nondiscriminatory.[2211] We stated our belief that, given the pro-competitive goals of the 1996 Act and the view that restrictions and conditions were likely to be evidence of an exercise of market power, the range of permissible restrictions should be quite narrow.[2212]

937. A number of parties, including IXCs, resellers, and some state commissions, agree that incumbent LECs should have the burden of justifying any restrictions they impose on the resale of their services.[2213] For example, Jones Intercable proposes a requirement that incumbent LECs prove that a proposed condition or restriction will directly advance an important public policy objective and that the benefits of the condition plainly outweigh its anticompetitive effects.[2214] Many add the caveat that the only permissible restriction should be the cross-class restriction, section 251(c)(4)(B), prohibiting resellers that obtain at wholesale rates telecommunications services that are available at retail only to a category of subscribers from offering such services to a different category of subscribers.[2215] The Texas Public Utility Counsel suggests that the relevant determination is whether an incumbent LEC could impose the condition in question in a competitive market.[2216]

938. Incumbent LECs support various restrictions and limitations.[2217] BellSouth and the Ohio Consumers' Counsel further suggest that the burden of justifying restrictions and limitations

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[2211] NPRM at para. 175.

[2212] *Id.*

[2213] *See, e.g.*, ACSI comments at 60; California Commission comments at 35-37; CFA/CU comments at 17; Citizens Utilities comments at 27; Colorado Commission comments at 52-53; Jones Intercable comments at 24; MFS comments at 70; NEXTLINK comments at 30; Pennsylvania Commission comments at 36; Ohio Commission comments at 62; TCC comments at 43; Telecommunications Resellers Ass'n comments at 20; Washington Commission comments at 32.

[2214] Jones Intercable comments at 32-33.

[2215] *See, e.g.*, CFA/CU comments at 17; Citizens Utilities at 27; Colorado Commission comments at 52-53; TCC comments at 43. Many of these parties offer a narrow interpretation of section 251(c)(4)(B), which will be discussed, *infra*.

[2216] Texas Public Utilities Counsel reply at 42.

[2217] *See, e.g.*, BellSouth comments at 66.

should not be placed on LECs.[2218]

b. Discussion

939. We conclude that resale restrictions are presumptively unreasonable. Incumbent LECs can rebut this presumption, but only if the restrictions are narrowly tailored. Such resale restrictions are not limited to those found in the resale agreement. They include conditions and limitations contained in the incumbent LEC's underlying tariff. As we explained in the NPRM, the ability of incumbent LECs to impose resale restrictions and conditions is likely to be evidence of market power and may reflect an attempt by incumbent LECs to preserve their market position. In a competitive market, an individual seller (an incumbent LEC) would not be able to impose significant restrictions and conditions on buyers because such buyers turn to other sellers. Recognizing that incumbent LECs possess market power, Congress prohibited unreasonable restrictions and conditions on resale. We, as well as state commissions, are unable to predict every potential restriction or limitation an incumbent LEC may seek to impose on a reseller. Given the probability that restrictions and conditions may have anticompetitive results, we conclude that it is consistent with the procompetitive goals of the 1996 Act to presume resale restrictions and conditions to be unreasonable and therefore in violation of section 251(c)(4). This presumption should reduce unnecessary burdens on resellers seeking to enter local exchange markets, which may include small entities, by reducing the time and expense of proving affirmatively that such restrictions are unreasonable.[2219] We discuss several specific restrictions below including certain restrictions for which we conclude the presumption of unreasonableness shall not apply. We also discuss certain restrictions that we will presume are reasonable.

2. Promotions and Discounts

a. Background and Comments

940. In the NPRM, we asked whether an incumbent LEC's obligation to make their services available for resale at wholesale rates applies to discounted and promotional offerings and, if so, how.[2220] We also asked; if the wholesale pricing obligation applies to promotions and discounts, whether the reseller entrant's customer must take service pursuant to the same restrictions that apply to the incumbent LEC's retail customers.[2221]

[2218] BellSouth comments at 65; Ohio Consumers' Counsel comments at 35.

[2219] *See* Regulatory Flexibility Act, 5 U.S.C. §§ 601 *et seq.*

[2220] NPRM at para. 175.

[2221] *Id.*

941. Incumbent LECs and Time Warner argue that they should not be required to offer discounted and promotional offerings at wholesale rates.[2222] These parties argue that promotions and discounts are merely subsets of standard offerings, or that promotions and discounts are only devices for marketing underlying "telecommunications services."[2223] Thus, these parties argue, a discounted and promotional offering is not in itself a "telecommunications service" that is subject to the resale requirement as long as the standard offering is made available for resale at wholesale rates.[2224]

942. Incumbent LECs argue that requiring promotions and discounts to be made available at wholesale rates will discourage such offerings. According to incumbent LECs, promotions and discounts serve as a means by which incumbent LECs differentiate their services from resellers' offerings.[2225] Furthermore, they contend that establishing a system where resellers' service and pricing options track incumbent LECs' promotions and discounts would promote collusion rather than competition.[2226] SBC notes that resellers will have access to volume discounts (through aggregating) that will allow them to compete with promotions and discounts offered by incumbent LECs.[2227] Incumbent LECs argue that many promotions, such as offering installation at no charge for new customers for limited periods, are short-term and used as marketing tools.[2228] Some parties suggest that the wholesale rate obligation should, at least, not attach to offerings that are only available for a limited period of time.[2229] Specifically, some parties recommend that we not permit incumbent LECs not to offer wholesale rates for offerings that are only available for 120 days or less.[2230]

[2222] *See, e.g.*, Ameritech comments at 57; Bell Atlantic comments at 46; MECA comments at 60; NYNEX comments at 76; SNET comments at 34; Time Warner comments at 73; U S West comments at 67; USTA comments at 72. Some parties commented only with respect to promotional offerings. *See, e.g.*, BellSouth comments at 66; Cincinnati Bell comments at 34; PacTel comments at 87; SBC comments at 72.

[2223] *See, e.g.*, Ameritech comments at 57; NYNEX comments at 76.

[2224] *See, e.g.*, Bell Atlantic reply at 23-24; GTE comments at 50; MECA comments at 60; NYNEX comments at 76; Time Warner comments at 73.

[2225] *See, e.g.*, BellSouth comments at Attachment (Interconnection and Economic Efficiency), p. 22; Cincinnati Bell comments at 33; USTA comments at Attachment (Affidavit of Jerry Hausman), p.14.

[2226] GTE comments at 50.

[2227] SBC comments at 72-73.

[2228] *See, e.g.*, NYNEX comments at 76 (promotions are merely short term waivers of nonrecurring charges).

[2229] Ameritech comments at 56-57; GTE reply at 27 n.49; Ohio Consumer's Counsel comments at 36; PacTel reply at 45.

[2230] *See, e.g.*, Ameritech comments at 57.

943. Some parties also contend that section 251(c)(4) resale obligations should not apply to contract,[2231] trial,[2232] or community service offerings.[2233] GTE and U S West argue that high volume rate offerings should not be subject to the wholesale rate obligation because they are already discounted.[2234] Ameritech and Bell Atlantic argue that contract offerings are not subject to resale because they are not made generally available.[2235]

944. IXCs, resellers, and DoJ argue that if incumbent LECs are not required to offer promotions and other discounts at wholesale rates, incumbent LECs will be able to undercut rates that resellers offer.[2236] They contend that services, classes of customers, or even individual customers could be strategically targeted by the incumbent LECs.[2237] The Telecommunications Resellers Association and others argue that price reductions that are designed to drive competitors from the market do not produce long-term gains for consumers.[2238] The Ohio Consumers' Counsel argues that, if the Commission were to exempt short-term promotional offerings, 120 days is too long to be considered short-term.[2239] IXCs and resellers contend that contract offerings should be made available for resale.[2240]

945. Incumbent LECs, some state commissions, and the Ohio Consumers' Counsel argue that if promotions and discounts are subject to wholesale pricing, reseller end-users must take

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[2231] BellSouth comments at 66; USTA comments at 72.

[2232] Bell Atlantic reply at 23-24; SBC comments at 71; USTA comments at 72.

[2233] J. Staurulakis comments at 7. LDDS advocates that resale of community service offerings be limited to the class of subscribers eligible to receive such offerings. LDDS comments at 84.

[2234] GTE comments at 49-50; U S West comments at 68.

[2235] Ameritech reply at 47; Bell Atlantic reply at 24.

[2236] *See, e.g.*, AT&T comments at 83; Cable & Wireless comments at 37; Telecommunications Resellers Ass'n reply at 13; DoJ comments at 54-55. For this reason, the Washington Commission made its support of promotional and discount resale restrictions contingent on rules that would prevent incumbent LECs from pricing such offerings below rates offered to resellers. Washington Commission comments at 32.

[2237] *See, e.g.*, Telecommunications Resellers Ass'n reply at 13.

[2238] Telecommunications Resellers Ass'n reply at 13.

[2239] Ohio Consumers' Counsel reply at 30.

[2240] *See, e.g.*, LDDS reply at 43; Telecommunications Resellers Ass'n reply at 14.

such promotions and discounts under the same conditions as incumbent LEC end users.[2241] Resellers argue, however, that incumbent LECs will use this latitude to engage in anticompetitive practices by creating conditions that will have an unnecessarily greater impact on typical reseller end users than incumbent LEC end users.[2242]

946. Incumbent LECs also seek to limit reseller end user eligibility to purchase resold incumbent LEC high-volume offerings to those eligible to receive such offerings directly from the incumbent LEC.[2243] Such a limitation would prevent high-volume services from being resold to low-volume customers. MFS argues that such restrictions should be considered per se unreasonable because this is a significant source of the resellers' competitive advantage.[2244] The Ohio and Pennsylvania Commissions also support resellers' rights to aggregate low volume customers to take advantage of the resulting buying power.[2245]

947. U S West generally argues that resellers should make the same type of purchasing commitments made by current purchasers of wholesale services.[2246] Often, U S West argues, wholesalers are required to concentrate their purchases on services from a limited number of switches in order to receive volume discounts. U S West argues that incumbent LECs should be allowed to require the same types of commitments from resellers purchasing such services.[2247] U S West and GTE propose allowing incumbent LECs to impose term requirements on resold offerings.[2248] Cable & Wireless opposes both of these requirements and suggests that they be made presumptively unreasonable.[2249]

[2241] *See, e.g.*, SBC reply at 15 n.34, PacTel comments at 45 n.95; Alabama Commission comments at 26; Ohio Consumers' Counsel comments at 35-36.

[2242] *See, e.g.*, Cable & Wireless comments at 42; Telecommunications Resellers Ass'n comments at 19 n.50.

[2243] *See, e.g.*, GTE comments at 49-50; California Commission comments at 35-37; PacTel reply at 45 n.95.

[2244] MFS comments at 70.

[2245] Ohio Commission comments at 65; Pennsylvania Commission comments at 36. The Ohio Commission, however, specifically states that it is opposed to federal rules on this subject. Ohio Commission at 65.

[2246] U S West comments at 67.

[2247] *Id.*

[2248] U S West comments at 67; GTE comments at 47.

[2249] Cable & Wireless comments at 48-49.

b. Discussion

948. Section 251(c)(4) provides that incumbent LECs must offer for resale at wholesale rates "any telecommunications service" that the carrier provides at retail to noncarrier subscribers. This language makes no exception for promotional or discounted offerings, including contract and other customer-specific offerings. We therefore conclude that no basis exists for creating a general exemption from the wholesale requirement for all promotional or discount service offerings made by incumbent LECs. A contrary result would permit incumbent LECs to avoid the statutory resale obligation by shifting their customers to nonstandard offerings, thereby eviscerating the resale provisions of the 1996 Act. In discussing promotions here, we are only referring to price discounts from standard offerings that will remain available for resale at wholesale rates, *i.e.*, temporary price discounts.[2250]

949. There remains, however, the question of whether all short-term promotional prices are "retail rates" for purposes of calculating wholesale rates pursuant to section 252(d)(3). The 1996 Act does not define "retail rate;" nor is there any indication that Congress considered the issue. In view of this ambiguity, we conclude that "retail rate" should be interpreted in light of the pro-competitive policies underlying the 1996 Act. We recognize that promotions that are limited in length may serve procompetitive ends through enhancing marketing and sales-based competition and we do not wish to unnecessarily restrict such offerings. We believe that, if promotions are of limited duration, their procompetitive effects will outweigh any potential anticompetitive effects. We therefore conclude that short-term promotional prices do not constitute retail rates for the underlying services and are thus not subject to the wholesale rate obligation.

950. We must also determine when a promotional price ceases to be "short term" and must therefore be treated as a retail rate for an underlying service. Incumbent LEC commenters support 120 days as the maximum period for such promotions. This has been criticized as being too long. We are concerned that excluding promotions that are offered for as long as four months may unreasonably hamper the efforts of new competitors that seek to enter local markets through resale. We believe that promotions of up to 90 days, when subjected to the conditions outlined below, will have significantly lower anticompetitive potential, especially as compared to the potential procompetitive marketing uses of such promotions. We therefore establish a presumption that promotional prices offered for a period of 90 days or less need not be offered at a discount to resellers. Promotional offerings greater than 90 days in duration must be offered for resale at wholesale rates pursuant to section 251(c)(4)(A). To preclude the potential for abuse of promotional discounts, any benefit of the promotion must be realized within the time period of the promotion, *e.g.*, no benefit can be realized more than ninety days after the promotional offering is taken by the customer if the promotional offering was for ninety days. In addition, an incumbent LEC may not use promotional offerings to evade the wholesale obligation, for example

[2250] Limited time offerings of service are still subject to resale pursuant to *supra* Section VIII.A.

by consecutively offering a series of 90-day promotions.

951. We find unconvincing the arguments that the offerings under section 251(c)(4) should not apply to volume-based discounts. The 1996 Act on its face does not exclude such offerings from the wholesale obligation. If a service is sold to end users, it is a retail service, even if it is priced as a volume-based discount off the price of another retail service. The avoidable costs for a service with volume-based discounts, however, may be different than without volume contracts.

952. We are concerned that conditions that attach to promotions and discounts could be used to avoid the resale obligation to the detriment of competition. Allowing certain incumbent LEC end user restrictions to be made automatically binding on reseller end users could further exacerbate the potential anticompetitive effects. We recognize, however, that there may be reasonable restrictions on promotions and discounts. We conclude that the substance and specificity of rules concerning which discount and promotion restrictions may be applied to resellers in marketing their services to end users is a decision best left to state commissions, which are more familiar with the particular business practices of their incumbent LECs and local market conditions. These rules are to be developed, as necessary, for use in the arbitration process under section 252.

953. With respect to volume discount offerings, however, we conclude that it is presumptively unreasonable for incumbent LECs to require individual reseller end users to comply with incumbent LEC high-volume discount minimum usage requirements, so long as the reseller, in aggregate, under the relevant tariff, meets the minimal level of demand. The Commission traditionally has not permitted such restrictions on the resale of volume discount offers.[2251] We believe restrictions on resale of volume discounts will frequently produce anticompetitive results without sufficient justification. We, therefore, conclude that such restrictions should be considered presumptively unreasonable. We note, however, that in calculating the proper wholesale rate, incumbent LECs may prove that their avoided costs differ when selling in large volumes.

3. Below-Cost and Residential Service

a. Background and Comments

954. Responding to our general questions regarding the scope of limitations that may be

[2251] *See, e.g., Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities*, Docket No. 20097, Report and Order, 60 FCC 2d 261, 308-16 (1976) (divisions of full time private line circuits will enable smaller users to make efficient, discrete use of private line offerings, and such advantages will be in terms of cost savings and selectivity rather than technical advantages).

placed on competitors' resale of incumbent LEC services.[2252] parties addressed in their comments whether below-cost and residential services are subject to section 251(c)(4). Generally, those arguing against application of the wholesale discount also argue against requiring or even allowing resale of below-cost services. Incumbent LECs, including small incumbent LECs serving higher cost areas, and some state commissions argue that restrictions on resale of below-cost services are permissible.[2253] They argue that these services are often funded through internal subsidies that diminish with the onset of competition.[2254] GTE argues that there simply are no costs to avoid where below-cost services are offered at wholesale.[2255] GTE and PacTel argue that, if we were to apply wholesale pricing to services offered below cost, we should delay doing so until states have had the opportunity to rebalance rates.[2256]

955. Potential competitors, primarily IXCs, argue that incumbent LEC losses will not be increased as a result of resale of these services, even at a discount, so long as the services are only sold to the same class of customers to whom the incumbent LEC's offering is available.[2257] Jones Intercable further argues that not allowing resellers to "serve" customers currently subscribing to below-cost service violates the universal service provisions of the 1996 Act.[2258] The Telecommunications Resellers Association notes that establishing rules based on whether a service is offered below, at, or above cost will invite lengthy regulatory disputes.[2259] Additionally, TCC points out that incumbent LECs will continue to receive access revenue even from resold service and such revenue will continue to subsidize such services.[2260]

[2252] NPRM at para. 175.

[2253] *See, e.g.*, MECA comments at 60; SBC comments at 71-72; SNET comments at 31-32; U S West comments at 67; GTE comments at 46 (acknowledging, however, that its position on this might change depending on the outcome of universal service reform); Oregon Commission comments at 31. Additionally, incumbent LECs argue that steps should be taken to ensure that the underlying provider of the service continues to receive universal service payments. *See, e.g.*, NYNEX comments at 84.

[2254] SNET comments at 31-32. Bell Atlantic argues that this might even be considered an unconstitutional taking. Bell Atlantic reply at Attachment 2 (Epstein Declaration), p. 7.

[2255] GTE comments at 46.

[2256] PacTel reply at 44; GTE reply at 26-27.

[2257] *See, e.g.*, AT&T comments at 80; California Commission reply at 21-22; Competition Policy Institute comments at 24; GCI comments at 1, 14; LDDS comments at 84; MCI comments at 89; Sprint reply at 35-37; TCC comments at 44 n.44; Telecommunications Resellers Ass'n reply at 15.

[2258] Jones Intercable comments at 32-33.

[2259] Telecommunications Resellers Ass'n reply at 15.

[2260] TCC comments at 44 n.44.

b. Discussion

956. Subject to the cross-class restrictions discussed below, we believe that below-cost services are subject to the wholesale rate obligation under section 251(c)(4). First, the 1996 Act applies to "any telecommunications service" and thus, by its terms, does not exclude these types of services. Given the goal of the 1996 Act to encourage competition, we decline to limit the resale obligation with respect to certain services where the 1996 Act does not specifically do so. Second, simply because a service may be priced at below-cost levels does not justify denying customers of such a service the benefits of resale competition. We note that, unlike the pricing standard for unbundled elements, the resale pricing standard is not based on cost plus a reasonable profit. The resale pricing standard gives the end user the benefit of an implicit subsidy in the case of below-cost service, whether the end user is served by the incumbent or by a reseller, just as it continues to take the contribution if the service is priced above cost. So long as resale of the service is generally restricted to those customers eligible to receive such service from the incumbent LEC, as discussed below, demand is unlikely to be significantly increased by resale competition. Thus, differences in incumbent LEC revenue resulting from the resale of below-cost services should be accompanied by proportionate decreases in expenditures that are avoided because the service is being offered at wholesale.

957. We have considered the economic impact of our rules in this section on small incumbent LECs. For example, MECA argues that services incumbent LECs offer at below cost rates should not be subject to resale under section 251(c)(4). We do not adopt MECA's proposal. As explained above, we conclude that the 1996 Act provides that below-cost services are subject to the section 251(c)(4) resale obligation and that differences in incumbent LEC revenue resulting from the resale of below-cost services should be accompanied by decreases in expenditures that are avoided because the service is being offered at wholesale. Therefore, resale of below-cost services at wholesale rates should not adversely impact small incumbent LECs.[2261] We also note that certain small incumbent LECs are not subject to our rules under section 251(f)(1) of the 1996 Act, unless otherwise determined by a state commission, and certain other small incumbent LECs may seek relief from their state commissions from our rules under section 251(f)(2) of the 1996 Act.

4. Cross-Class Selling

a. Background

958. In the NPRM, we sought comment on the meaning of section 251(c)(4)(B) which provides that "[a] State commission may, consistent with regulations prescribed by the Commission under this section, prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from

[2261] *See* Regulatory Flexibility Act, 5 U.S.C. §§ 601 *et seq.*

offering such service to a different category of subscribers."[2262] We suggested that competing telecommunications carriers should not be allowed to purchase a subsidized service that is offered to a specific category of subscribers and then resell such service to other customers. We tentatively concluded, for example, that it might be reasonable for a state to restrict the resale of a residential exchange service that is limited to low-income consumers, such as the existing Lifeline program.[2263] We noted that we have generally not allowed carriers to prevent other carriers from purchasing high-volume, low-price offerings to resell to a broad pool of lower volume customers.[2264] Similarly, we inquired into the propriety of practices such as limiting the resale of flat-rated service.[2265]

b. Comments

959. There is a general consensus among incumbent LECs, IXCs, and others that resale of residential service should be limited to customers eligible to take such service from the incumbent LEC under section 251(c)(4)(B).[2266] There is a similar consensus that resale of Lifeline service should be limited to those eligible to receive such service from the incumbent LEC.[2267] Some argue that section 251(c)(4)(B) is only applicable to classes of subscribers whose service is explicitly subsidized or provided at below-cost rates and that broader cross-class restrictions should be considered unreasonable.[2268] Ohio Consumers' Counsel argues that residential services that may be offered above cost are still offered at a lower profit margin than business services for public policy reasons, justifying the inclusion of all residential services in

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[2262] NPRM at para. 176.

[2263] *Id.*

[2264] *Id.*

[2265] This practice of limiting the resale of flat-rated services was listed as an example of state practices on which we sought comment in the NPRM at para. 177.

[2266] *See, e.g.*, ACTA comments at 25; Ameritech comments at 54; California Commission comments at 35-37; CFA/CU comments at 16; Comptel reply at 43 n.114; GTE comments at 49-50; GVNW comments at 39; Illinois Ind. Tel. Ass'n comments at 6; MCI comments at 89; NCTA comments at 57; PacTel comments at 87; Sprint comments at 70. Texas Public Utility Counsel argues that the residential cross class selling restrictions should merely prohibit the resale of flat-rated residential service to business customers. Texas Public Utility Counsel comments at 44-45.

[2267] *See, e.g.*, California Commission comments at 36-37; LDDS comments at 84; NYNEX comments at 80.

[2268] *See, e.g.*, AT&T reply at 38-39; DOJ comments at 54; Telecommunications Resellers Association comments at 17 n.46.

the scope of section 251(c)(4)(B).[2269]

960. NYNEX and the Massachusetts Commission argue that incumbent LECs may prohibit the resale of flat-rated services.[2270] They argue that resale of services to multiple-use customers would be unfair to incumbent LECs. National Private Telecommunications Association and Jones Intercable advocate that incumbent LECs should not be allowed to impose resale restrictions that would prevent the offering of shared tenant services operations. Shared tenant services operations involve using trunking to serve multiple unit dwellings with fewer lines than would be needed if each unit separately subscribed to service directly from the incumbent LEC.[2271]

961. Finally, some parties express concern that incumbent LECs will create multitudes of classes in order to prevent resellers, as a practical matter, from competing to provide such services and recommend that any new classes be presumed unreasonable.[2272]

c. Discussion

962. There is general agreement that residential services should not be resold to nonresidential end users, and we conclude that restrictions prohibiting such cross-class reselling of residential services are reasonable. We conclude that section 251(c)(4)(B) permits states to prohibit resellers from selling residential services to customers ineligible to subscribe to such services from the incumbent LEC. For example, this would prevent resellers from reselling wholesale-priced residential service to business customers. We also conclude that section 251(c)(4)(B) allows states to make similar prohibitions on the resale of Lifeline or any other means-tested service offering to end users not eligible to subscribe to such service offerings. State commissions have established rate structures that take into account certain desired balances between residential and business rates and the goal of maximizing access by low-income consumers to telecommunications services. We do not wish to disturb these efforts by prohibiting or overly narrowing state commissions' ability to impose such restrictions on resale.

963. Shared tenant services are made possible through the resale and trunking of flat-rated services to multiple customers. We do not believe that these or other efficient uses of technology should be discouraged through restrictions on the resale of flat-rated offerings to multiple end users, even if incumbent LECs have not always priced such offerings assuming these

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[2269] Ohio Consumers' Counsel comments at 36.

[2270] NYNEX comments at 80; Mass. Commission comments at 5; MECA comments at 61.

[2271] National Private Telecommunications Ass'n reply at 4-5; Jones Intercable reply at 27.

[2272] CompTel comments at 102.

usage patterns. We therefore conclude that such restrictions are presumptively unreasonable.

964. We also conclude that all other cross-class selling restrictions should be presumed unreasonable. Without clear statutory direction concerning potentially allowable cross-class restrictions, we are not inclined to allow the imposition of restrictions that could fetter the emergence of competition. As with volume discount and flat-rated offerings, we will allow incumbent LECs to rebut this presumption by proving to the state commission that the class restriction is reasonable and nondiscriminatory.

5. Incumbent LEC Withdrawal of Services

a. Background

965. In the NPRM, we sought comment on whether an incumbent LEC can avoid making a service available at wholesale rates by ceasing to offer the retail service on a retail basis, or whether the incumbent should first be required to make a showing that withdrawing the offering is in the public interest or that competitors will continue to have an alternative way of providing service. We also asked if access to unbundled elements addresses the concern that incumbent LECs could withdraw retail services.[2273]

b. Comments

966. A number of large incumbent LECs and USTA argue that incumbent LECs should be allowed to withdraw services unilaterally and unconditionally.[2274] These parties argue that they have the right to make their own business decisions and the right to terminate the offering of a service that they feel is unprofitable.[2275] Some potential competitors also supported the ability of incumbent LECs to withdraw service, but explicitly conditioned such support on bilateral "grandfathering" of existing customers, *i.e.*, allowing current end users of the terminated service to continue to purchase the service at least for a limited time.[2276] These services then would not be required to be offered for resale because they are no longer offered to the public.[2277] Thus, these parties argue that there would be a permissible restriction on the resale of "grandfathered" services permitting resale only to "grandfathered" customers. Some incumbent LECs suggest that potential concerns over incumbent LEC withdrawal of service would be eliminated if both

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[2273] NPRM at para. 175.

[2274] *See, e.g.*, Ameritech comments at 54-55; GTE comments at 48; SBC comments at 73.

[2275] *See, e.g.*, Ameritech reply at 48; GTE comments at 48-49; MECA comments at 60-61.

[2276] *See, e.g.*, Cable & Wireless comments at 42-43.

[2277] *See, e.g.*, SBC comments at 73; J. Staurulakis comments at 5-6.

resellers and incumbent LECs could compete for grandfathered customers.[2278]

967. Several commenters, primarily IXCs, resellers, and state commissions, expressed concern about the incumbent LECs' ability to circumvent resale obligations by withdrawing services that resellers are able to use to compete effectively.[2279] IXCs, resellers, some state commissions, and others argue that unilateral withdrawals of service should be considered presumptively unreasonable.[2280] Several commenters discuss U S West's attempted withdrawal of Centrex service, a small business service that resellers frequently wish to purchase to compete with incumbent LECs, as an example of such behavior.[2281] Others ask us to require that there be a substitutable alternative to a withdrawn service before it could be withdrawn.[2282] The Telecommunications Resellers Association and Cable & Wireless argue that even the existence of a competitive alternative is not sufficient to prevent anticompetitive behavior because such a standard represents an open invitation to strategic manipulation of service offerings and pricing.[2283] Both the Ohio Commission and the Competition Policy Institute argue that access to unbundled elements does not alleviate concerns about incumbent LEC withdrawal of service offerings.[2284]

c. Discussion

968. We are concerned that the incumbent LECs' ability to withdraw services may have anticompetitive effects where resellers are purchasing such services for resale in competition with the incumbent. We decline to issue general rules on this subject because we conclude that this is a matter best left to state commissions. Many state commissions have rules regarding the

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[2278] Ameritech reply at 49; NYNEX reply at 37.

[2279] *See, e.g.*, ACTA comments at 9; AT&T reply 37-38; CompTel comments at 101; DOJ comments at 55; Florida Commission comments at 36; MCI comments at 85; Sprint reply at 35-37; Telecommunications Resellers Ass'n comments 18-19.

[2280] *See, e.g.*, AT&T reply at 37-38; Cable & Wireless comments at 43; Ohio Commission comments at 63-64; Pennsylvania Commission comments at 36; Washington Commission comments at 32-33; ASCI comments at 59-60; Competition Policy Institute comments at 25.

[2281] *See, e.g.*, ACTA comments at 9; MCI comments at 87-88; TCC comments at 44.

[2282] Competition Policy Institute comments at 25; GST comments at 32; MFS comments at 71-72; Ohio Commission comments at 65. MCI and Frontier propose that a showing that there is no demand for a service would also be sufficient. MCI comments at 88; Frontier comments at 28. DoJ argues that unilateral withdrawal should only be allowed if the service is shown to be obsolete. DoJ comments at 55-56.

[2283] Telecommunications Resellers Ass'n comments at 19 n.49; Cable & Wireless comments at 43.

[2284] Ohio Commission comments at 64; Competition Policy Institute comments at 26.

withdrawal of retail services and have experience regulating such matters. States can assess, for example, the universal service implications of an incumbent LEC's proposal to withdraw a retail service. Therefore, we conclude that our general presumption that incumbent LEC restrictions on resale are unreasonable does not apply to incumbent LEC withdrawal of service. States must ensure that procedural mechanisms exist for processing complaints regarding incumbent LEC withdrawals of services. We find it important, however, to ensure that grandfathered customers -- subscribers to the service being withdrawn who are allowed by an incumbent LEC to continue purchasing services -- not be denied the benefits of competition. We conclude that, when an incumbent LEC grandfathers its own customers of a withdrawn service, such grandfathering should also extend to reseller end users. For the duration of any grandfathering period, all grandfathered customers should have the right to purchase such grandfathered services either directly from the incumbent LEC or indirectly through a reseller.[2285] The incumbent LEC shall offer wholesale rates for such grandfathered services to resellers for the purpose of serving grandfathered customers.

6. Provisioning

a. Comments

969. Resellers and IXCs express concern that incumbent LECs are not making, and will not make, services available for resale in a timely manner or fail to provide a minimal level of operational support and service quality.[2286] Such resellers and IXCs also argue that incumbent LEC claims of capacity shortages should not excuse failures to provide timely service or to treat resellers on an equal basis with other incumbent LEC customers.[2287] Cable & Wireless argues that customer changeover charges should not be allowed to exceed the same Primary Interexchange Carrier ("PIC") charge that is imposed when customers switch from one IXC to another.[2288] TCC proposes a set of rules regarding nondiscriminatory treatment of resellers and reporting requirements to implement such rules.[2289] These rules include provision of unbranded or rebranded operator and directory assistance services, a proposal also supported by AT&T, TCC, and ACSI.[2290] Incumbent LECs argue that refusing to build out their networks to handle reseller

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[2285] *See Petition for a Total Local Exchange Wholesale Service Tariff from Illinois Bell Telephone Company*, Nos. 95-0458 and 95-0531 (consol.) (Illinois Commission June 26, 1996) at 38.

[2286] *See, e.g.*, Telecommunications Resellers Ass'n comments at 20-23; MCI comments at 88-89.

[2287] *See, e.g.*, Telecommunications Resellers Ass'n reply at 16 n.34; LDDS reply at 43.

[2288] Cable & Wireless comments at 49-50.

[2289] *See* TCC reply at 29-33.

[2290] *See* AT&T comments at 81 n.123; TCC reply at 31; ACSI comments at 47-48.

requests when they lack capacity is a reasonable course of action to prevent stranded investment should the reseller eventually build facilities of its own.[2391]

b. Discussion

970. We conclude that service made available for resale be at least equal in quality to that provided by the incumbent LEC to itself or to any subsidiary, affiliate, or any other party to which the carrier directly provides the service, such as end users. Practices to the contrary violate the 1996 Act's prohibition of discriminatory restrictions, limitations, or prohibitions on resale. This requirement includes differences imperceptible to end users because such differences may still provide incumbent LECs with advantages in the marketplace. Additionally, we conclude that incumbent LEC services are to be provisioned for resale with the same timeliness as they are provisioned to that incumbent LEC's subsidiaries, affiliates, or other parties to whom the carrier directly provides the service, such as end users. This equivalent timeliness requirement also applies to incumbent LEC claims of capacity limitations and incumbent LEC requirements relating to such limitations, such as potential down payments. We note that common carrier obligations, established by federal and state law and our rules, continue to apply to incumbent LECs in their relations with resellers. With regard to customer changeover charges, we conclude that states should determine reasonable and nondiscriminatory rates for such charges.

971. Brand identification is likely to play a major role in markets where resellers compete with incumbent LECs for the provision of local and toll service. This brand identification is critical to reseller attempts to compete with incumbent LECs and will minimize consumer confusion. Incumbent LECs are advantaged when reseller end users are advised that the service is being provided by the reseller's primary competitor. We therefore conclude that where operator, call completion, or directory assistance service is part of the service or service package an incumbent LEC offers for resale, failure by an incumbent LEC to comply with reseller branding requests presumptively constitutes an unreasonable restriction on resale. This presumption may be rebutted by an incumbent LEC proving to the state commission that it lacks the capability to comply with unbranding or rebranding requests. We recognize that an incumbent LEC may incur costs in complying with a request for unbranding or rebranding. Because we do not have a record on which to determine the level of fees or wholesale pricing offsets that may reasonably be assessed to recover these costs, we leave such determinations to the state commissions.

D. Resale Obligations of LECs Under Section 251(b)(1)

972. Section 251(b)(1) imposes a duty on all LECs to offer certain services for resale.

[2391] *See, e.g.*, U S West comments, Exhibit A (Federal Implementation of the Telecommunications Act of 1996) at 25-26. Incumbent LECs argue that they should be able to require minimum volume and term discounts if they must build out facilities. *See* Ameritech at 54; MECA comments at 60.

Specifically, section 251(b)(1) requires LECs "not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications services."[2292]

1. Background

973. In the NPRM, we sought comment generally on the relationship of section 251(b)(1) to section 251(c)(4).[2293] We sought comment on whether all LECs are prohibited from imposing unreasonable restrictions on resale of their services, but only incumbent LECs that provide retail services to subscribers that are not telecommunications carriers are required to make such services available at wholesale rates to requesting telecommunications carriers.[2294] We also sought comment on what types of resale restrictions should be permitted under section 251(b)(1) and stated our belief that few, if any, conditions or limitations should be permitted for the same reasons that resale restrictions are sharply limited under section 251(c)(4).[2295] We also asked what standards should be adopted for determining whether resale restrictions should be permitted, and whether presumptions should be established.[2296]

2. Comments

974. A variety of commenters, including Cable & Wireless, Teleport, and several state commissions, support the view that wholesale pricing does not apply to nonincumbent LECs.[2297] A similar group of parties argue that the prohibition on unreasonable or discriminatory resale restrictions applies to nonincumbent LECs.[2298] The Ohio Consumers' Counsel contends that although nothing in section 251 requires states to create wholesale pricing for section 251(b)(1) resale, nothing in the 1996 Act prevents imposition of such pricing.[2299]

975. The Telecommunications Resellers Association argues that all resale restrictions by

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[2292] 47 U.S.C. § 251(c)(4).

[2293] NPRM at para. 173.

[2294] *Id.* at para. 174.

[2295] *Id.*

[2296] *Id.* at para. 197.

[2297] *See, e.g.*, Cable & Wireless comments at 38 n.68; Teleport comments at 55; Pennsylvania Commission comments at 35.

[2298] Ohio Commission comments at 60-61; Pennsylvania Commission comments at 35; Teleport comments at 55; Cincinnati Bell comments at 31.

[2299] Ohio Consumers' Counsel comments at 35.

all LECs should be presumed unreasonable.[2300] MFS and Citizens Utilities contend that resale restrictions in sections 251(b)(1) and 251(c)(4)(B) should be interpreted in the same way.[2301] MFS and GST both argue that any restriction of a type that has been found reasonable for incumbent LECs should be presumed reasonable for all other LECs.[2302] NCTA asserts that new competitors have a great incentive to minimize costs, which will often involve using resellers for distribution purposes.[2303] They argue that to ensure that the resale obligations of entrants do not adversely impact their ability to engage in facilities-based competition with incumbent LECs, the Commission should defer the duty of facilities-based competitors to engage in resale.[2304]

3. Discussion

976. There are two differences between the resale obligations in section 251(b)(1) and in section 251(c)(4): the scope of services that must be resold and the pricing of such resale offerings. Section 251(b)(1) requires resale of all telecommunications services offered by the carrier while section 251(c)(4) only applies to telecommunications services that the carrier provides at retail to subscribers who are not telecommunications carriers. Thus, the scope of services to which section 251(b)(1) applies is larger and necessarily includes all services subject to resale under section 251(c)(4). We need not prescribe a minimum list of services that are subject to the 251(b)(1) resale requirement for the same reasons that we specified for not prescribing such a list in Section VIII.A. of this Order. We note that section 251(b)(1) clearly omits a wholesale pricing requirement. We therefore conclude that the 1996 Act does not impose wholesale pricing requirements on nonincumbent LECs. Nonincumbent LECs definitionally lack the market power possessed by incumbent LECs[2305] and were therefore not made subject to the wholesale pricing obligation in the 1996 Act. Their wholesale rates will face competition by incumbent LECs, making a wholesale pricing requirement for nonincumbent LECs unnecessary.

977. Sections 251(b)(1) and 251(c)(4) contain the same statutory standards regarding resale restrictions. Therefore, we conclude that our rules concerning resale restrictions under section 251(b)(1), such as the general presumption that all resale restrictions are unreasonable, should be the same as under section 251(c)(4). We conclude that any restriction of a type that has been found reasonable for incumbent LECs should be deemed reasonable for all other LECs

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[2300] Telecommunications Resellers Ass'n comments at 53.

[2301] MFS comments at 69; Citizens Utilities comments at 27.

[2302] MFS comments at 75-76; GST comments at 33.

[2303] NCTA comments at 20-21.

[2304] *Id.* at 21.

[2305] *See* 47 U.S.C. § 251(h)(2).

as well.

E. Application of Access Charges

1. Background

978. In the NPRM, we suggested that an entrant that merely resold a bundled retail service purchased at wholesale rates would not receive access revenues.[2306] In other words, IXCs must still pay access charges to incumbent LECs for originating and terminating interstate traffic of an end user served by a telecommunications carrier that resells incumbent LEC services under section 251(c)(4).

2. Comments

979. Parties that commented on this issue generally agree with our analysis in the NPRM. Some commenters argue that incumbent LECs, including small incumbent LECs, should continue to receive access charge revenues when resellers purchase wholesale services under section 251(c)(4).[2307] The Rural Telephone Coalition argues that retail local service rates, upon which wholesale rates will be based, have been developed with the assumption that incumbent LECs will receive access charge revenues.[2308] The Wisconsin Commission points out that Wisconsin law currently prevents resale of access services performed by at least small LECs.[2309] On the other hand, the Texas Office of Public Utility Counsel asserts that switched access services are offered to end users and should be subject to resale.[2310] While they did not explicitly address the issue, some potential competitors alluded to their assumptions that such access charges would continue to be retained by the incumbent LEC.[2311]

3. Discussion

980. We conclude that the 1996 Act requires that incumbent LECs continue to receive access charge revenues when local services are resold under section 251(c)(4). IXCs must still

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[2306] NPRM at para. 186.

[2307] Rural Tel. Coalition comments at 20; Citizens Utilities comments at 25; J. Staurulakis comments at 6.

[2308] Rural Tel. Coalition comments at 20. USTA makes a similar point, and emphasizes that incumbent LECs should continue to recover the SLC under these circumstances. USTA reply at 31.

[2309] Wisconsin Commission comments at Attachment, pp. 7-8.

[2310] Texas Public Utility Counsel reply at 17-18.

[2311] *See, e.g.*, TCC comments at 44 n.44; LDDS comments at 81; LDDS reply at 42, 46.

pay access charges to incumbent LECs for originating or terminating interstate traffic, even when their end user is served by a telecommunications carrier that resells incumbent LEC retail services. Resale, as defined in section 251(b)(1) and 251(c)(4), involves services, in contrast to section 251(c)(3), which governs sale of network elements. New entrants that purchase retail local exchange services from an incumbent LEC at wholesale rates are entitled to resell only those retail services, and not any other services -- such as exchange access -- the LEC may offer using the same facilities. IXCs must therefore still purchase access services from incumbent LECs outside of the resale framework of 251(c)(4), through existing interstate access tariffs.[2312]

981. Most existing interstate access charges are recovered from IXCs, and therefore can easily be recovered by incumbent LECs whether or not the incumbent LEC retains its billing relationship with the end user subscriber. To allow incumbent LECs to continue recovering the subscriber line charge (SLC), however, the mechanism for assessment of the SLC must be modified. The SLC is currently assessed directly on end users as a monthly charge.[2313] When an end user customer receives local exchange service from a reseller, however, the incumbent LEC will have no direct commercial relationship with that end user. Because the end user would not be a customer of the incumbent LEC, the incumbent LEC could not bill SLC directly to the end user as specified under our existing rules.

982. In March 1995, in the *Rochester Waiver Order*, we granted Rochester Telephone waivers to permit Rochester Telephone to recover the SLC from carriers that purchase local exchange service for resale, rather than recovering the SLC directly from end users.[2314] In that order, we stated that by offering the local exchange service for resale and by unbundling subscriber lines from other network functions, Rochester Telephone created a situation where it would no longer have a direct relationship with end users, IXCs, or both, and that such a situation was not contemplated when the Commission created the rules governing the recovery of access charges. We also permitted Rochester Telephone to bill to resellers the PIC change charge, which is assessed by incumbent local exchange carriers on end users that wish to change their primary interexchange carrier (PIC).

983. The resale requirements of the 1996 Act create a situation for the entire industry that is analogous to the situation Rochester Telephone faced in 1995. We therefore conclude that similar relief is warranted here with respect to the SLC, so that incumbent LECs can recover the SLC from resellers, as we conclude the 1996 Act mandates. Although the PIC change charge is

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[2312] As discussed above, a different result occurs in the context of unbundled network elements. Purchasers of unbundled network elements in effect stand in the shoes of the LEC, and are entitled to revenues from all of the services provided using those elements.

[2313] 47 C.F.R. § 69.104.

[2314] *Rochester Telephone Corporation, Petition for Waivers to Implement its Open Market Plan, Order*, 10 FCC Rcd 6776 (1995) *(Rochester Waiver Order)*.

not a part of access charges, and is assessed only when an end user changes his or her primary interexchange carrier, this charge has similar characteristics to the SLC and therefore should also be subject to the rule we adopt. Incumbent LECs may assess the SLC and the PIC change charge on telecommunications carriers that resell incumbent LEC services under section 251(c)(4).

984. Although incumbent LECs may continue to recover the SLC when other carriers resell their local exchange services, the SLC is not subject to the wholesale pricing standard of section 252(d)(3). As described above, resellers of local exchange service are not reselling access services; they are purchasing these services from incumbent LECs in the same manner they do today. The SLC is a component of interstate access charges, not of intrastate local service rates. Consistent with the principles of cost-causation and economic efficiency, we have required the portion of interstate allocated loop costs represented by the SLC to be recovered from end users, rather than from carriers as with other access charges. Although the SLC is listed on end user monthly local service bills, this charge does not represent a "telecommunications service [an incumbent LEC] provides at retail to subscribers." Rather, the SLC, like other interstate access charges, relates solely to incumbent LEC interstate access services, which are provided to other carriers rather than retail subscribers and which we have concluded are not subject to the resale requirements of section 251(c)(4). Therefore, the reseller shall pay the SLC to the incumbent LEC for each subscriber taking resold service. The specific SLC that applies depends upon the identity of the end user served by the reselling telecommunications carrier.

IX. DUTIES IMPOSED ON "TELECOMMUNICATIONS CARRIERS" BY SECTION 251(a)

A. Background

985. Section 251(a) imposes two fundamental duties on all telecommunications carriers: (1) "to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers;" and (2) "not to install network features, functions, or capabilities that do not comply with the guidelines and standards established pursuant to sections 255 or 256."[2315] In this proceeding we determine which carriers are "telecommunications carriers" as defined in section 3(44) of the Act.[2316] In the NPRM, we tentatively concluded that, pursuant to the statute's definition of "telecommunications carrier" and "telecommunications service," to the extent a carrier is engaged in providing for a fee local, interexchange, or international services, directly to the public or to such classes of users as to be effectively available directly to the public, that carrier falls within the definition of "telecommunications carrier." We sought comment on which carriers are included under this definition, and on whether a provider may qualify as a telecommunications carrier for some purposes but not others.[2317]

986. We also tentatively concluded that we should determine whether the provision of mobile satellite services is Commercial Mobile Radio Services (CMRS) or Private Mobile Radio Service (PMRS) based on the factors set forth in the *CMRS Second Report and Order*.[2318] We

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[2315] 47 U.S.C. § 251(a). Section 255 addresses access by persons with disabilities and ensures that manufacturers and providers of telecommunications will design equipment and provide service that is accessible to, and usable by, individuals with disabilities. Section 256 provides for coordination for interconnectivity "to promote nondiscriminatory accessibility by the broadest number of users and vendors of communications products and services." 47 U.S.C. §§ 255, 256.

[2316] The term telecommunications carrier means "any provider of telecommunications services, except that such term does not include aggregators of telecommunications services (as defined in section 226). A telecommunications carrier shall be treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunications services, except that the Commission shall determine whether the provision of fixed and mobile satellite service shall be treated as common carriage." 47 U.S.C. § 153(44).

[2317] NPRM at para. 246.

[2318] NPRM at para. 247. The Commission makes this determination by looking at an array of public interest considerations (*e.g.*, the types of services being offered and the number of licensees being authorized). *See, e.g., Amendment of Parts 2, 22 and 25 of the Commission's Rules to Allocate Spectrum for, and To Establish Other Rules and Policies Pertaining to the Use of Radio Frequencies in a Land Mobile Satellite Service for the Provision of Various Common Carrier Services*, GN Docket No. 84-1234, Second Report and Order, 2 FCC Rcd 485, 490 (1987); *Amendment to the Commission's Rules to Allocate Spectrum for, and to Establish Other Rules and Policies Pertaining to a Radiodetermination Satellite Service*, GN Docket No. 84-689, Second Report and Order, 104 FCC 2d 650, 665-66 (1986).

sought comment on the meaning of offering service "directly or indirectly" to the public in the context of section 251(a)(1) and on whether section 251(a) allows non-incumbent LECs discretion to interconnect directly or indirectly with a requesting carrier.[2319] We also sought comment on what other actions we should take to ensure that carriers do not install network features, functions, or capabilities that are inconsistent with guidelines and standards established pursuant to sections 255 and 256.

B. Comments

987. Parties generally agree with our tentative conclusion that, to the extent a carrier is engaged in providing for a fee local, interexchange, or international services, directly to the public or to such classes of users as to be effectively available to the public, that carrier falls within the definition of "telecommunications carrier."[2320] BellSouth claims that the term "telecommunications carrier" should be synonymous with "common carrier."[2321] The Texas Commission argues that the obligations of section 251(a) should apply to all telecommunications carriers -- incumbent LECs and non-incumbent LECs alike.[2322] Metricom argues, however, that because non-dominant carriers lack incentives to deny interconnection to other carriers, the Commission should forbear from imposing any interconnection requirements upon such carriers.[2323] UTC argues that a party must be offering commercial telecommunications services to be a telecommunications carrier.[2324] UTC contends that utilities and other private system operators engage in a cost-sharing for construction and operation of private telecommunications networks. UTC claims that this should not constitute a "fee" in the sense of being a payment for receiving a telecommunications service. UTC further argues that the mere provision of infrastructure, such as "dark fiber" or wholesale capacity, to third-party carriers does not constitute a direct offering to the public, and thus does not qualify carriers offering such infrastructure as telecommunications carriers under the Act. Several CMRS carriers contend that

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[2319] NPRM at para 248.

[2320] *See, e.g.*, Louisiana Commission comments at 21; Illinois Commission comments at 81-82; Pennsylvania Commission comments at 41; BellSouth comments at 75.

[2321] BellSouth comments at 75; COMAV comments at 60; *accord* United Cerebral Palsy Ass'n at 3 and American Foundation for the Blind at 3 (favoring a broad definition of telecommunications carrier that includes any provider of access to any network available to the public).

[2322] Texas Commission comments at 34; NWRA comments at 12-13 (arguing that both facilities based carriers and resellers meet the definition of telecommunications carriers).

[2323] Metricom comments at 3.

[2324] UTC comments at 5-7.

CMRS providers are telecommunications carriers within the meaning of the Act.[2325]

988. The Illinois Commission argues that, if a company provides both telecommunications and information services, it must be classified as a telecommunications carrier for purposes of section 251.[2326] BellSouth claims, however, that a carrier may be a common carrier for some purposes, but not for others. For example, BellSouth argues that, when a common carrier also provides an information service, it is a common carrier for the provision of the telecommunications service, but a non-common carrier for the provision of the information service.[2327] ATSI contends that enhanced service providers are telecommunications carriers and entitled to the benefits of section 251.[2328]

989. The Illinois Commission argues that the Commission should continue to define mobile satellite service (MSS) as either CMRS or PMRS according to the Commission's factors set forth in the *Second CMRS Report and Order*.[2329] It argues, however, that if an MSS provider offers substitute services for those of a landline LEC, the MSS provider should also be defined as a LEC and treated accordingly under state and federal law.

990. With regard to the phrase "directly or indirectly" in section 251(a), Arch and Sprint argue that the goal is to ensure that all subscribers of one carrier are able to reach all subscribers of other carriers. They claim that this is achieved when two competitors interconnect to an incumbent LEC's network.[2330] Comcast asserts that requiring competitors to interconnect "directly or indirectly" reflects the Act's goal of applying less stringent obligations to carriers lacking market power by enabling competitors to interconnect with other carriers in a cost efficient

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[2325] *See, e.g.*, Nextel comments at 6-7; NWRA comments at 12-13; Metricom comments at 1-7; COMAV comments at 60.

[2326] Illinois Commission comments at 81.

[2327] BellSouth comments at 75. UTC claims that only those portions of a Utility's network that is being used in the offering of telecommunications services is subject to the Act's interconnection obligations. Portions that are used on a private basis only are not. Bundling information services with telecommunications services should only create common carrier obligations to the extent that would apply if the telecommunications services were offered by themselves. UTC comments at 9-10.

[2328] ATSI reply at 6 (enhanced service providers (ESPs) must have access to network elements at terms and conditions that allow ESPs to offer competitive services in the marketplace).

[2329] Illinois Commission comments at 81.

[2330] Arch comments at 18; Sprint comments at 89. The parties add that carriers should be permitted, on a voluntary basis, to establish direct interconnection. *Id.*

manner.[2331] The Texas Commission argues that the obligations under section 251(a) should apply to all telecommunications carriers, incumbent and non-incumbents, alike. The Texas Commission claims that, if "non-[incumbent] LECs are allowed the discretion to determine whether to offer direct or indirect connection to another carrier, then the goal of encouraging the most efficient interconnection and thereby bringing the benefits of a competitive market to all consumers will not be realized."[2332]

991. The Commission received few comments on the meaning of section 251(a)(2). Commenters representing individuals with disabilities state that the term "network features, functions, and capabilities" should be defined as broadly as possible to ensure that individuals with disabilities have access to the network.[2333] The American Foundation for the Blind also suggests that any service deployed by a telecommunications carrier, or by a provider connecting to a telecommunications network, and intended for public use should be considered an installation of "features, functions, or capabilities."[2334] The United Cerebral Palsy Associations state that there are currently proceedings underway by both the Commission and by the United States Architectural & Transportation Barriers Compliance Board (Access Board) as part of the section 255 mandate. The United Cerebral Palsy Associations urge the Commission to state that the Commission has the power to enforce both the standards developed in its proceedings and those of the Access Board.[2335]

C. Discussion

992. A "telecommunications carrier" is defined as "any provider of telecommunications services, except that such term does not include aggregators of telecommunications services (as defined in section 226)."[2336] A telecommunications carrier shall be treated as a common carrier under the Act "only to the extent that it is engaged in providing telecommunications services, except that the Commission shall determine whether the provision of fixed and mobile satellite service shall be treated as common carriage."[2337] A "telecommunications service" is defined as

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[2331] Comcast comments at 16-17.

[2332] Texas Commission comments at 34.

[2333] *See, e.g.*, American Foundation for the Blind comments at 2; United Cerebral Palsy Ass'n comments at 2.

[2334] American Foundation for the Blind comments at 2.

[2335] United Cerebral Palsy Ass'n comments at 2.

[2336] 47 U.S.C. § 153(44). The term "aggregator" is defined as "any person that, in the ordinary course of its operations, makes telephones available to the public or to transient users of its premises, for interstate telephone calls using a provider of operator services." 47 U.S.C. § 226(a)(2).

[2337] 47 U.S.C. § 153 (44).

the "offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used."[2338] We conclude that to the extent a carrier is engaged in providing for a fee domestic or international telecommunications, directly to the public or to such classes of users as to be effectively available directly to the public, the carrier falls within the definition of "telecommunications carrier."[2339] We find that this definition is consistent with the 1996 Act,[2340] and there is nothing in the record in this proceeding that suggests that this definition should not be adopted. Also, enhanced service providers, to the extent that they are providing telecommunications services, are entitled to the rights under section 251(a).

993. We believe, as a general policy matter, that all telecommunications carriers that compete with each other should be treated alike regardless of the technology used unless there is a compelling reason to do otherwise. We agree with those parties that argue that all CMRS providers are telecommunications carriers and are thus obligated to comply with section 251(a).[2341] These carriers meet the definition of "telecommunications carrier" because they are providers of telecommunications services as defined in the 1996 Act and are thus entitled to the benefits of section 251(c), which include the right to request interconnection and obtain access to unbundled elements at any technically feasible point in an incumbent LEC's network. PMRS is defined as any mobile service that is not a commercial service or the functional equivalent of a commercial mobile service.[2342] We conclude that to the extent a PMRS provider uses capacity to provide domestic or international telecommunications for a fee directly to the public, it will fall within the definition of "telecommunications carrier" under the Act and will be subject to the duties listed in section 251(a).[2343]

[2338] 47 U.S.C. § 153(44). "Telecommunications" is defined in the Act as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 153(43).

[2339] NPRM at para. 246.

[2340] 47 U.S.C. § 153(44), 153(46).

[2341] The term "CMRS" is defined as "any mobile service . . . that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public." 47 U.S.C. § 332(d)(1). CMRS includes, among others, some private paging, personal communications services, business radio services, and mobile service that is the functional equivalent of a commercial mobile radio service. 47 C.F.R. § 20.9.

[2342] 47 U.S.C. § 332(d)(3).

[2343] The Commission held in the *CMRS Second Report and Order* that any PMRS provider that "employs spectrum for not-for-profit services, such as an internal operation, but also uses its excess capacity to make available a service that is intended to receive compensation, will be deemed to be a 'for profit' service to the extent of such excess capacity activities." *Implementation of Section 3(n) and 332 of the Communications Act*, Second Report and

994. We conclude that cost-sharing for the construction and operation of private telecommunications networks is not within the definition of "telecommunications services" and thus such operators of private networks are not subject to the requirements of section 251(a). We believe that such methods of cost-sharing do not equate to a "fee directly to the public" under the definition of "telecommunications service."[2344] Conversely, to the extent an operator of a private telecommunications network is offering "telecommunications"[2345] for a fee directly to the public, or to such classes of users as to be effectively available directly to the public (*i.e.*, providing a telecommunications service),[2346] the operator is a telecommunications carrier and is subject to the duties in section 251(a). Providing to the public telecommunications (*e.g.*, selling excess capacity on private fiber or wireless networks), constitutes a telecommunications service and thus subjects the operator of such a network to the duties of section 251(a) to that extent.

995. We conclude that, if a company provides both telecommunications and information services, it must be classified as a telecommunications carrier for purposes of section 251, and is subject to the obligations under section 251(a), to the extent that it is acting as a telecommunications carrier. We also conclude that telecommunications carriers that have interconnected or gained access under sections 251(a)(1), 251(c)(2), or 251(c)(3), may offer information services through the same arrangement, so long as they are offering telecommunications services through the same arrangement as well. Under a contrary conclusion, a competitor would be precluded from offering information services in competition with the incumbent LEC under the same arrangement, thus increasing the transaction cost for the competitor. We find this to be contrary to the pro-competitive spirit of the 1996 Act. By rejecting this outcome we provide competitors the opportunity to compete effectively with the incumbent by offering a full range of services to end users without having to provide some services inefficiently through distinct facilities or agreements. In addition, we conclude that enhanced service providers that do not also provide domestic or international telecommunications, and are thus not telecommunications carriers within the meaning of the Act, may not interconnect under section 251.

996. Consistent with our tentative conclusion in the NPRM, we will determine whether the provision of mobile satellite service (MSS) is CMRS (and therefore common carriage) or

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Order, GN Docket No. 93-252, 9 FCC Rcd 1411, 1429 (1994) *(CMRS Second Report and Order)*.

[2344] 47 U.S.C. § 153(46).

[2345] The term "telecommunications" means "the transmission, between or among points specified by the user, of information of the user's choosing, without change in form or content of the information as sent and received." 47 U.S.C. § 153(43).

[2346] 47 U.S.C. § 153(46).

PMRS based on the factors set forth in the *CMRS Second Report and Order*.[2347] Commenters have not raised objections to the Commission's tentative conclusion on this issue.

997. Regarding the issue of interconnecting "directly or indirectly" with the facilities of other telecommunications carriers, we conclude that telecommunications carriers should be permitted to provide interconnection pursuant to section 251(a) either directly or indirectly, based upon their most efficient technical and economic choices. The interconnection obligations under section 251(a) differ from the obligations under section 251(c). Unlike section 251(c), which applies to incumbent LECs, section 251(a) interconnection applies to all telecommunications carriers including those with no market power. Given the lack of market power by telecommunication carriers required to provide interconnection via section 251(a), and the clear language of the statute, we find that indirect connection (*e.g.*, two non-incumbent LECs interconnecting with an incumbent LEC's network) satisfies a telecommunications carrier's duty to interconnect pursuant to section 251(a). We decline to adopt, at this time, Metricom's suggestion to forbear under section 10 of the 1996 Act[2348] from imposing any interconnection requirements upon non-dominant carriers. We believe that, even for telecommunications carriers with no market power, the duty to interconnect directly or indirectly is central to the 1996 Act and achieves important policy objectives. Nothing in the record convinces us that we should forbear from imposing the provisions of section 251(a) on non-dominant carriers. In fact, section 251 distinguishes between dominant and non-dominant carriers, and imposes a number of additional obligations exclusively on incumbent LECs.[2349] Similarly, we also do not agree with the Texas Commission's argument that the obligations of section 251(a) should apply equally to all telecommunications carriers. Section 251 is clear in imposing different obligations on carriers depending upon their classification (*i.e.*, incumbent LEC, LEC, or telecommunications carrier).[2350] For example, section 251(c) specifically imposes obligations upon incumbent LECs to interconnect, upon request, at all technically feasible points. This direct interconnection, however, is not required under section 251(a) of all telecommunications carriers.

998. Section 251(a)(2) prohibits telecommunications carriers from installing network features, functions, and capabilities that do not comply with standards or guidelines established under sections 255 and 256. Because the Commission and the Architectural and Transportation Barriers Compliance Board have not developed standards or guidelines under section 255, we find that it would be premature at this point to attempt to delineate specific requirements or definitions

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[2347] *CMRS Second Report and Order*, 9 FCC Rcd at 1457-58 (1994).

[2348] 47 U.S.C. § 160.

[2349] *See* 47 U.S.C. § 251. The 1996 Act makes further provisions for rural carriers and, upon an appropriate showing, carriers serving fewer than 2 percent of the nation's access lines. *See* 47 U.S.C. § 251(f)(1), (f)(2).

[2350] 47 U.S.C. § 251.

of terms to implement Section 251(a)(2).[2351] Similarly, the Commission has asked its federal advisory committee, the Network Reliability and Interoperability Council, for recommendations on how the Commission should implement Section 256. We intend to issue a further notice of proposed rulemaking seeking comment on what accessibility and compatibility requirements apply to telecommunications carriers who install network features, functions and capabilities.

[2351] The Illinois Commission lists several features which could provide access to individuals with disabilities, such as access to interrupt messages, directory assistance and operator services by users of text telephones (TTYs). Illinois Commission comments at 82-83. Specific accessibility requirements such as those proposed by the Illinois Commission will need to be developed in proceedings to implement section 255, and therefore, we will not set forth any required "features, functions, or capabilities" in this proceeding.

X. COMMERCIAL MOBILE RADIO SERVICE INTERCONNECTION

999. In the NPRM, we sought comment on whether interconnection arrangements between incumbent LECs and CMRS providers fall within the scope of sections 251 and 252. Application of sections 251 and 252 to LEC-CMRS interconnection arrangements involves two distinct issues. One is whether the terms and conditions of the physical interconnection between incumbent LECs and CMRS providers are governed under section 251(c)(2), and the corresponding pricing standards set forth in section 252(d)(1). The second, and perhaps more critical issue from the CMRS providers' perspective, is whether CMRS providers are entitled to reciprocal compensation for transport and termination under section 251(b)(5), and the corresponding pricing standards set forth in section 252(d)(2).[2352]

1000. We tentatively concluded in the NPRM that CMRS providers are not obliged to provide to requesting telecommunications carriers either reciprocal compensation for transport and termination of telecommunications under section 251(b)(5), or interconnection under the provisions of section 251(c)(2), but that CMRS providers may be entitled to request interconnection under section 251(c)(2) for the purposes of providing "telephone exchange service and exchange access."[2353] We sought comment on this tentative conclusion. We also asked for comment on the separate but related question of whether LEC-CMRS transport and termination arrangements fall within the scope of section 251(b)(5). In addition, we sought comment on the relationship between section 251 and section 332(c).[2354] We acknowledged that issues relating to LEC-CMRS interconnection pursuant to section 332(c) were part of an ongoing proceeding initiated before the passage of the 1996 Act[2355] and retained the prerogative of incorporating by reference the comments filed in that docket to the extent necessary. We hereby do so.

[2352] 47 U.S.C. §§ 251, 252.

[2353] 47 U.S.C. §§ 251(b)(5), 251(c)(2).

[2354] 47 U.S.C. §332(c). This section sets forth the regulatory treatment for mobile services, including the common carrier treatment of CMRS providers (except for such provisions of Title II as the Commission may specify), the right of CMRS providers to request (and the Commission to order) physical interconnection with other common carriers and the preemption of state regulation of the entry of or the rates charged by any CMRS providers.

[2355] *Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, Notice of Proposed Rulemaking, CC Docket No. 95-185, 11 FCC Rcd 5020 (1996) (*LEC-CMRS Interconnection NPRM*).

A. CMRS Providers and Obligations of Local Exchange Carriers Under Section 251(b) and Incumbent Local Exchange Carriers Under Section 251(c).

1. Background

1001. Section 251(b) imposes duties only on LECs, and section 251(c) imposes duties only on incumbent LECs. Section 3(26) of the Act defines "local exchange carrier" to mean "any person that is engaged in the provision of telephone exchange service or exchange access," but "does not include a person insofar as such person is engaged in the provision of a commercial mobile service under section 332(c), except to the extent that the Commission finds that such service should be included in the definition of such term."[2356] In the NPRM, we sought comment on whether, and to what extent, CMRS providers should be classified as "local exchange carriers" and therefore subject to the duties and obligations imposed by section 251(b).

2. Comments

1002. Most of the comments on this issue urge that CMRS providers should not be classified as LECs.[2357] Some commenters assert that CMRS was expressly excluded from the definition of a LEC in section 3(a)(2)(44) of the 1996 Act and that the legislative history confirms that Congress intended that the Commission reconsider whether CMRS providers should be classified as LECs only if "future circumstances warrant."[2358] PCIA maintains that there is no basis for classifying CMRS providers as LECs, because CMRS is not yet a substitute for wireline local exchange service for a substantial number of subscribers, and because CMRS licensees lack the control over essential facilities that underlies the adoption of Section 251.[2359] Pronet contends that paging operators do not provide local exchange services, and that Congress did not contemplate treating CMRS providers as LECs.[2360] Some CMRS providers propose that the Commission apply the criteria in section 332(c)(3) in considering whether a CMRS provider should be classified as a LEC -- that the service is a replacement for a substantial portion of the

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[2356] 47 U.S.C. § 153(26).

[2357] 360 Communications comments at 9; Airtouch comments at 9; Bell Atlantic/NYNEX Mobile comments at 5; F. Williamson comments at 8-9; Cox comments at 50-51; PCIA comments at 16.

[2358] *See, e.g.*, Airtouch reply at 4-6 (*citing* H.R. Rep. No. 104-458, 104th Cong., 2d Sess. 115 (1996)); PCIA reply at 6; Bell Atlantic/NYNEX Mobile comments at 4-5; PCIA comments at 16; GTE reply at 40 (Commission already found that CMRS providers should not be regulated as LECs for the purpose of interconnection and the 1996 Act does nothing to alter this conclusion).

[2359] PCIA comments at 17; *accord* Nextel comments at 6.

[2360] Pronet comments at 8.

wireline telephone exchange service within a state.[2361] Nextel argues that a CMRS provider should not be classified as a LEC until it has become a substitute for a land-line telephone exchange service for a substantial portion of the communications within a state.[2362] Omnipoint states that application of the section 332(c)(3) test will permit CMRS providers, which are also small businesses, to be relieved of LEC-type regulatory burdens during their initial entry years, so that they can act as "spirited, if smaller" competitors to the incumbent LEC.[2363] The Ohio Commission contends that the Commission should consider market share, diversity of network, and name recognition in classifying CMRS providers as LECs.[2364]

1003. COMAV and National Wireless Resellers Association, on the other hand, contend that CMRS entities can provide exchange and exchange access services "and thus are *de facto*" LECs.[2365] COMAV also argues that, if a CMRS provider is a subsidiary of an incumbent LEC, it should be treated as an incumbent LEC, and thus be required to unbundle and allow direct interconnection.[2366] NARUC argues that the type of service provided, rather than the technology employed, should determine the appropriate regulatory treatment, and that a CMRS provider should therefore be treated as a LEC if it provides fixed local service.[2367] The Illinois Commission similarly indicates that a CMRS provider should be regulated as a LEC when it establishes a wireless local loop for the express purpose of competing against or bypassing the landline loop.[2368]

3. Discussion

1004. We are not persuaded by those arguing that CMRS providers should be treated as LECs, and decline at this time to treat CMRS providers as LECs. Section 3(26) of the Act, quoted above, makes clear that CMRS providers should not be classified as LECs until the Commission makes a finding that such treatment is warranted. We disagree with COMAV and National Wireless Resellers Association that CMRS providers are *de facto* LECs (and even

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[2361] Cox comments at 51 n.96; Omnipoint comments at 2; Vanguard comments at 21; BellSouth comments at 70; 360 Communications comments at 9; Bell Atlantic/NYNEX Mobile comments at 5.

[2362] Nextel reply at 2.

[2363] Omnipoint comments at 3-4.

[2364] Ohio Commission comments at 68.

[2365] COMAV comments at 2; National Wireless Resellers Assn comments at 7-10.

[2366] COMAV comments at 2, 40-43.

[2367] NARUC comments at 21.

[2368] Illinois Commission comments at 63-64.

incumbent LECs if they are affiliated with a LEC) simply because they provide telephone exchange and exchange access services. Congress recognized that some CMRS providers offer telephone exchange and exchange access services, and concluded that their provision of such services, by itself, did not require CMRS providers to be classified as LECs. We further note that, because the determination as to whether CMRS providers should be defined as LECs is within the Commission's sole discretion, states are preempted from requiring CMRS providers to classify themselves as "local exchange carriers" or be subject to rate and entry regulation as a precondition to participation in interconnection negotiations and arbitrations under sections 251 and 252.

1005. NARUC argues that CMRS providers should be classified as LECs if they provide fixed service.[2369] We are currently seeking comment in our *CMRS Flexibility Proceeding*[2370] on the regulatory treatment to be afforded CMRS providers when they provide fixed services. Thus, we believe that it would be premature to answer that question here, based only on the record in this proceeding. We also decline to adopt the Illinois Commission's suggestion that we find that a CMRS provider is a LEC if the CMRS provider seeks to compete directly with a wireline LEC. Even if we were to accept the Illinois Commission's underlying assumption, the record in this proceeding contains no evidence that wireless local loops have begun to replace wireline loops for the provision of local exchange service. Thus, until such time that we decide otherwise, CMRS providers will not be classified as LECs, and are not subject to the obligations of section 251(b). We further note that, even if we were to classify some CMRS providers as LECs, other types of CMRS providers, such as paging providers, might not be so classified because they do not offer local exchange service or exchange access.

1006. We further note that, because CMRS providers do not fall within the definition of a LEC under section 251(h)(1), they are not subject to the duties and obligations imposed on incumbent LECs under section 251(c).[2371] An incumbent LEC is defined in section 251(h)(1), and includes only those LECs that were, on the date of enactment of the 1996 Act, deemed to be members of NECA pursuant to 47 C.F.R. § 69.601(b), or the successor or assign of a NECA member. Similarly, we do not find that CMRS providers satisfy the criteria set forth in section 251(h)(2), which grants the Commission the discretion to, by rule, provide for the treatment of a LEC as an incumbent LEC if certain conditions are met.[2372]

[2369] NARUC comments at 21.

[2370] *Amendment of the Commission's Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio Services*, WT Docket No. 96-6, First Report and Order and Further Notice of Proposed Rulemaking, FCC 96-283 (released August 1, 1996).

[2371] 47 U.S.C. § 251(h)(1). *See infra*, Section XI.C.

[2372] 47 U.S.C. § 251(h)(2). *See infra*, Section XI.C.

B. Reciprocal Compensation Arrangements Under Section 251(b)(5)

1007. Some parties contend that LEC-CMRS transport and termination arrangements do not fall within the scope of 251(b)(5), which requires LECs to establish reciprocal compensation arrangements for transport and termination.[2373] Other commenters argue that because CMRS providers fall within the definition of "telecommunications carriers," they fall within the scope of section 251(b)(5).[2374]

1008. Under section 251(b)(5), LECs have a duty to establish reciprocal compensation arrangements for the transport and termination of "telecommunications."[2375] Under section 3(43), "[t]he term 'telecommunications' means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."[2376] All CMRS providers offer telecommunications. Accordingly, LECs are obligated, pursuant to section 251(b)(5) (and the corresponding pricing standards of section 252(d)(2)), to enter into reciprocal compensation arrangements with all CMRS providers, including paging providers, for the transport and termination of traffic on each other's networks, pursuant to the rules governing reciprocal compensation set forth in Section XI.B., below.

C. Interconnection Under Section 251(c)(2)

1. Background

1009. Section 251(c)(2)(A) provides that an incumbent LEC must provide interconnection with its local exchange network to "any requesting telecommunications carrier . . . for the transmission and routing of telephone exchange service and exchange access."[2377] In the NPRM, we tentatively concluded that CMRS providers may be entitled to request interconnection under section 251(c)(2) for the purposes of providing telephone exchange service and exchange access.[2378] We sought comment on this tentative conclusion.

2. Comments

[2373] PCIA comments at 13; PageNet comments at 10; APC comments at 1.

[2374] BellSouth comments at 63; National Wireless Resellers Assn comments at 7; Mobilemedia comments at 13.

[2375] 47 U.S.C. § 251(b)(5).

[2376] 47 U.S.C. § 153(43).

[2377] 47 U.S.C. § 251(c)(2)(A).

[2378] 47 U.S.C. § 251(c)(2).

1010. Several commenters argue that many CMRS providers provide telephone exchange service and exchange access as defined by the 1996 Act, and thus section 251(c)(2) should govern their interconnection arrangements with incumbent LECs.[2379] NYNEX contends that all CMRS providers, other than providers of one-way paging, provide telephone exchange service.[2380] The Ohio Commission contends that all voice grade CMRS providers which provide local exchange service may request interconnection under section 251(c)(2).[2381] The Pennsylvania Commission argues that all voice-grade and non-voice grade CMRS providers fit within the definition of telecommunications carriers and fall within the parameters of section 251(c)(2).[2382]

1011. Many wireless carriers argue that interconnection arrangements between incumbent LECs and CMRS providers do not fall within the scope of section 251(c)(2).[2383] CTIA claims that CMRS was intended to be regulated differently than other services because it entails different traffic flows and different termination costs.[2384] Airtouch claims that, if LEC-CMRS interconnection were found to fall within the scope of section 251, the concept of "local exchange areas" could create implementation problems and adverse policy results, thus supporting application of section 332(c)(1)(B).[2385]

3. Discussion

1012. As discussed in the preceding section, CMRS providers meet the statutory definition of "telecommunications carriers."[2386] We also agree with several commenters that many CMRS providers (specifically cellular, broadband PCS and covered SMR) also provide telephone

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[2379] *See, e.g.*, Pennsylvania Commission comments at 34; PacTel comments at 83; Bell Atlantic/NYNEX Mobile comments at 7; Nextel comments at 6-7; API comments at 3; Florida Commission comments at 35-36.

[2380] NYNEX comments at 23.

[2381] Ohio Commission comments at 59.

[2382] Pennsylvania Commission comments at 34.

[2383] *See, e.g.*, AT&T comments at 43; Sprint comments at 70; Bell Atlantic/NYNEX Mobile comments at 2; CTIA comments at 2-3; Nextel comments at 5-6; Omnipoint comments at 3-5; Vanguard comments at 20-22; MECA comments at 59; Arch comments at 12-13; Airtouch reply at 3; Sprint/APC comments at 2-3 (Congress crafted a definition of "local exchange carrier" that excluded CMRS indicating that it did not want CMRS providers treated with all providers of telecommunications services). Sprint/APC claim in their joint comments that it is clear from the 1996 Act as a whole, and from section 332(c), that CMRS providers are entitled to reasonable interconnection from LECs without regard to section 251. Sprint/APC comments at 5.

[2384] CTIA comments at 7; Sprint/APC comments at 3.

[2385] Airtouch reply at 7.

[2386] *See supra*, Section IX.

exchange service and exchange access as defined by the 1996 Act. Incumbent LECs must accordingly make interconnection available to these CMRS providers in conformity with the terms of sections 251(c) and 252, including offering rates, terms, and conditions that are just, reasonable and nondiscriminatory.[2387]

1013. The 1996 Act defines "telephone exchange service" as "service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area . . . and which is covered by the exchange service charge, *or (B) comparable service* provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service."[2388] At a minimum, we find that cellular, broadband PCS, and covered SMR providers fall within the second part of the definition because they provide "comparable service" to telephone exchange service. The services offered by cellular, broadband PCS, and covered SMR providers are comparable because, as a general matter, and as some commenters note, these CMRS carriers provide local, two-way switched voice service as a principal part of their business.[2389] Indeed, the Commission has described cellular service as exchange telephone service[2390] and cellular carriers as "generally engaged in the provision of local exchange telecommunications in conjunction with local telephone companies . . . ."[2391] In addition, although CMRS providers are not currently classified as LECs, the fact that most CMRS providers are capable, both technically and pursuant to the terms of their licenses, of providing fixed services, as LECs do, buttresses our conclusion that these CMRS providers offer services that are "comparable" to telephone exchange service and supports the notion that these services may become a true economic substitute for wireline local

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[2387] 47 U.S.C. § 251(c)(2)(D).

[2388] 47 U.S.C. § 153(47) (emphasis added). This is a broader definition of "telephone exchange service" than had previously existed; Congress changed the definition in the 1996 Act to include services "comparable" to telephone exchange.

[2389] *See, e.g.*, NYNEX comments at 23.

[2390] *See Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carriers*, Memorandum Opinion and Order, 59 Rad. Reg.2d 1275, 1278 (1986).

[2391] *In the Matter of the Need to Promote Competition and Efficient Use of Spectrum For Radio Common Carrier Services*, Memorandum Opinion and Order, 59 Rad. Reg. 2d 1275, 1278 (1986) (*Competition Opinion*); *see also id.* at 1284 (cellular carriers are primarily engaged in the provision of local, intrastate exchange telephone service); *Equal Access and Interconnection Obligations Pertaining to Commercial Radio Services*, CC Docket No. 94-54, Notice of Proposed Rulemaking and Notice of Inquiry, 9 FCC Rcd 5408, 5453 and nn.192, 195 (and cases cited therein) (1994).

exchange service in the future.[2392]

1014. We also believe that other definitions in the Act support the conclusion that cellular, broadband PCS, and covered SMR licensees provide telephone exchange service. The fact that the 1996 Act's definition of a LEC excludes CMRS until the Commission finds that such service should be included in the definition,"[2393] suggests that Congress found that some CMRS providers were providing telephone exchange service or exchange access, but sought to afford the Commission the discretion to decide whether CMRS providers should be treated as LECs under the new Act. Similarly, section 253(f) permits the states to impose certain obligations on "telecommunications carrier[s] that seek[ ] to provide telephone exchange service" in rural areas.[2394] The provision further provides that "[t]his subsection shall not apply . . . to a provider of commercial mobile services."[2395] It would have been unnecessary for the statute to include this exception if some CMRS were not telephone exchange service. Similarly, section 271(c)(1)(A), which sets forth conditions for determining the presence of a facilities-based competitor for purposes of BOC applications to provide in-region, interLATA services, provides that Part 22 [cellular] services "shall not be considered to be telephone exchange services," for purposes of that section.[2396] Again, if Congress did not believe that cellular providers were engaged in the provision of telephone exchange service, it would not have been necessary to exclude cellular providers from this provision.

1015. The arguments that CMRS traffic flows may differ from wireline traffic, that CMRS providers' termination costs may differ from LECs, that CMRS service areas do not coincide with wireline local exchange areas, or that CMRS providers are not LECs, do not alter our conclusion that cellular, broadband PCS, and covered SMR licensees provide telephone exchange service. These considerations are not relevant to the statutory definition of telephone exchange service in section 3(47). Incumbent LECs are required to provide interconnection to CMRS providers who request it for the transmission and routing of telephone exchange service or exchange access, under the plain language of section 251(c)(2).[2397]

[2392] *See Amendment of the Commission's Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio Services*, WT Docket No. 96-6, First Report and Order and Further Notice of Proposed Rulemaking, FCC 96-283 (released August 1, 1996)(amending rules to allow providers of narrowband and broadband PCS, cellular, CMRS SMR, CMRS paging, CMRS 220 MHz service, and for-profit interconnected business radio services to offer fixed wireless services on their assigned spectrum on a co-primary basis with mobile services).

[2393] 47 U.S.C. § 153(26).

[2394] 47 U.S.C. § 253(f).

[2395] *Id.*

[2396] 47 U.S.C. § 271(c)(1)(A).

[2397] 47 U.S.C. § 251(c)(2).

D. Jurisdictional Authority for Regulation of LEC-CMRS Interconnection Rates

1. Background

1016. In the NPRM, we sought comment on the relationship between section 251 and section 332(c).[2398] As noted above, we hereby incorporate by reference the comments filed in CC Docket No. 95-185 to the extent relevant to our analysis. In the NPRM, we noted that we had previously sought comment on the relationship of these two statutory provisions in the LEC-CMRS Interconnection proceeding.[2399] In the LEC-CMRS proceeding, we tentatively concluded that the Commission has sufficient authority to promulgate specific federal requirements for interstate and intrastate LEC-CMRS interconnection arrangements, including the adoption of a specific interim bill and keep arrangement.[2400] However, we reached that tentative conclusion before the enactment of the 1996 Act.

2. Comments

1017. Several wireless firms argue that LEC-CMRS interconnection rates are governed by section 332 rather than (or in addition to) sections 251 and 252.[2401] One argument advanced by some parties is that section 251(i), which provides that "[n]othing in this section shall be construed to limit or otherwise affect the Commission's authority under section 201,"[2402] preserves the Commission's authority over interstate interconnection under section 201.[2403] Thus, they argue, section 251(i) enables the Commission to not apply sections 251 and 252 whenever interstate services are at issue.[2404] Cox states that, because "Section 251 does not prevent the Commission from establishing an interconnection policy for LEC-to-CMRS traffic under its general Section 201 powers, Section 252 has no particular relevance for any interconnection

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[2398] 47 U.S.C. § 332.

[2399] NPRM at para. 169.

[2400] *Id.* at 5072-73.

[2401] *See, e.g.*, AT&T comments at 42; Airtouch comments at 5; Cox comments at 50; CTIA reply at 2; PCIA comments at 3-9.

[2402] 47 U.S.C. § 251(i).

[2403] *See, e.g.*, Cox comments in CC Docket No. 95-185 at 43-44; CTIA comments in CC Docket No. 95-185 at 62; Omnipoint comments at 12; Vanguard Cellular comments at 15.

[2404] Cox comments in CC Docket No. 95-185 at 43-44.

policy established by this proceeding."[2405]

1018. Another theory proposed by several wireless carriers is that section 332 makes all CMRS interconnection issues interstate, including interconnection rates, and thus all CMRS interconnection matters are subject to federal jurisdiction under section 201, and are not governed by sections 251 and 252.[2406] These parties assert that, prior to the 1993 Budget Act, the Commission did not exercise any authority over the intrastate rates of LEC interconnection provided to radio common carriers, but that the 1993 Budget Act changed the Commission's jurisdiction over LEC-CMRS interconnection rates.[2407] Parties rely on two provisions amended or added by the 1993 Budget Act to reach this conclusion. First, they point to section 332(c)(3), entitled "State Preemption," which provides in pertinent part that "*[n]otwithstanding section[ ] 2(b) . . .*, no State or local government shall have any authority to regulate the entry of or *the rates charged by any commercial mobile service* or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services."[2408] Second, commenters point to a limiting clause added to section 2(b), which provides that: "*[e]xcept as provided in section 223 through 227, inclusive, and section 332 . . .*, nothing in this Act shall be construed to apply or to give the Commission jurisdiction [over intrastate telecommunications]."[2409] Cox interprets these cross-references to mean that, "[u]nder this revised framework, the States retain jurisdiction to regulate the 'terms and conditions' of CMRS service delivered to end users and can petition the Commission to regulate CMRS rates when CMRS becomes a substitute for landline telephone service," but that "[i]n the meantime, CMRS is a wholly interstate service and any interconnection to a CMRS provider, regardless of the source, is an interconnection governed by the FCC's interstate jurisdiction under Section 201 of the Communications Act."[2410]

1019. Some parties further argue that section 332(c)(1)(B) gives the Commission exclusive jurisdiction over LEC-to-CMRS interconnection rates.[2411] Cox argues that section

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[2405] *Id.* at 44.

[2406] *Id.* at 39 n.77. *See also, e.g.*, Comcast comments in CC Docket No. 95-185 at 27; PageNet comments in CC Docket No. 95-185 at 37-38.

[2407] *Id.*

[2408] 47 U.S.C. § 332(c)(3)(A) (emphasis added).

[2409] 47 U.S.C. § 152(b) (emphasis added).

[2410] Cox comments in CC Docket No. 95-185 at 38-39.

[2411] *See, e.g.*, CTIA comments in Docket 95-185 at 62; Cox comments in CC Docket No. 95-185 at 44 n.78; Comcast comments in CC Docket No. 95-185 at 32.

332(c)(1)(B) expands the Commission's jurisdiction over CMRS by authorizing the Commission to order any common carrier, regardless of whether it is an intrastate or interstate carrier, to establish physical connections with any CMRS provider. Section 332(c)(1)(B) thus shows, according to Cox, "Congress' intent that the Commission be given full jurisdiction to regulate *all* aspects of CMRS, including interconnection to and from CMRS providers."[2412] Airtouch states that the Commission's section 201 jurisdiction is unaffected by Section 332(c)(1)(B) "except to the extent that the Commission is required to respond to [any CMRS provider's interconnection] request," and thus, section 332(c)(1)(B) does expand the Commission's section 201 authority, but only to the extent that LEC-CMRS interconnection - interstate and/or intrastate - is involved.[2413] CTIA contends that section 332(c)(3) must be read in a way that does not result in a one-sided regulatory scheme for LEC-to-CMRS interconnection and CMRS-to-LEC interconnection.[2414] Thus, according to CTIA, since section 332(c)(3) clearly preempts state regulation of interconnection rates charged *by* CMRS providers, it also preempts state regulation of interconnection rates charged *to* CMRS providers by LECs.[2415]

1020. Some parties contend that, because CMRS providers need interconnection to enter the market, all state regulation of interconnection affecting CMRS (including the intrastate rates charged by LECs) is entry regulation and therefore preempted under section 332(c)(3).[2416] Other commenters argue that section 253(e), which provides that "[n]othing in this section shall affect the application of section 332(c)(3) to commercial mobile service providers," demonstrates the Commission's exclusive jurisdiction over CMRS interconnection rates.[2417] CTIA argues that, "to apply Sections 251 and 252 to the LEC-CMRS relationship in place of Section 332, the Commission would effectively strip Section 332 of any meaning."[2418] Several parties also cite to the legislative history of both the 1993 Budget Act and the 1996 Act as support for their claims

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[2412] Cox comments in CC Docket No. 95-185 at 39 n.78 (emphasis in original).

[2413] Airtouch comments at 6; *Ex Parte* letter from Kathleen Q. Abernathy, Airtouch, to William F. Caton, Acting Secretary, FCC, July 18, 1996, at 1-2.

[2414] CTIA comments in CC Docket No. 95-185 at 73.

[2415] *Id.*

[2416] Omnipoint comments in CC Docket No. 95-185 at 13 (disparate state regulation of interconnection would serve as a prohibited state barrier to entry under section 332(c)(3)); Celpage comments in CC Docket No. 95-185 at 11-12 (inconsistent state regulation of LEC-CMRS interconnection rates would create barriers to entry).

[2417] *See, e.g.*, PageNet comments at 29; *Ex Parte* letter in CC Docket No. 95-185 from Werner K. Hartenberger and Laura H. Phillips, Counsel for Cox Enterprises, Inc., to William F. Caton, Acting Secretary, FCC, February 28, 1996, at 8 (Cox Feb. 28 *Ex Parte*); *see also* Nextel reply at 5.

[2418] CTIA comments at 59-60.

that section 332 governs LEC-CMRS interconnection arrangements.[2419] Some commenters note that the 1996 Act did not explicitly repeal section 332, and state that implicit repeals are disfavored under principles of statutory construction.[2420] In addition, Cox argues that the exception in section 271(c) for cellular providers suggests that Congress considers cellular service to be in an entirely different competitive market from landline local exchange service, thus preserving the Commission's exclusive jurisdiction over LEC-CMRS interconnection granted by the 1993 Budget Act.[2421]

1021. Incumbent LECs and other parties, on the other hand, argue that section 251 controls interconnection between CMRS providers and incumbent LECs.[2422] Several of these parties contend that section 332 only governs the rates CMRS providers charge their end users, not the rates that LECs or CMRS providers charge other telecommunications carriers for interconnection.[2423] NYNEX claims that, while section 332(c)(1)(B) addresses the establishment of physical interconnection, it does not address particular compensation arrangements for interconnection between carriers, which Congress has now addressed in sections 251 and 252.[2424] Parties further note that the language in section 332(c)(1), stating that "this subparagraph shall not be construed as a limitation or expansion of the Commission's authority to order interconnection" expressly limits the Commission's authority to respond to a CMRS provider's request for interconnection and thus does not give the Commission jurisdiction over LEC-CMRS interconnection rates.[2425] BellSouth further argues that subjecting CMRS providers' charges for termination of LEC-originated calls to federal preemption would be inconsistent with Congress's

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[2419] *See e.g.*, Cox comments at 43-44; *Ex Parte* letter in CC Docket No. 95-185 from Robert F. Roche, CTIA, to William F. Caton, Acting Secretary, FCC, February 28, 1996, at 1.

[2420] *See, e.g.*, Cox reply in CC Docket No. 95-185 at 69-70.

[2421] Cox Feb. 28 *Ex Parte* in CC Docket No. 95-185 at 8. Section 271(c)(1)(A) provides that, as one of the preconditions for BOC entry into the in-region, interLATA services market, a BOC must demonstrate the presence of a facilities-based competitor that provides telephone exchange service to residential and business subscribers. This section further provides that, "[f]or the purpose of this subparagraph, services provided pursuant to subpart K of part 22 of the Commission's regulations [cellular], . . . shall not be considered to be telephone exchange services." 47 U.S.C. § 271(c)(1)(A).

[2422] *See, e.g.*, USTA comments at 66-67; NYNEX comments at 23; PacTel comments at 83, reply at 38; Bell Atlantic/NYNEX Mobile comments at 7; BellSouth comments at 63; Pennsylvania Commission comments at 34.

[2423] *See, e.g.*, PacTel reply at 38; U S West comments at 61; *Ex Parte* letter in CC Docket No. 95-185 from Michael K. Kellogg, Counsel for Bell Atlantic and PacTel, to William F. Caton, Acting Secretary, FCC, February 26, 1996, at 4; BellSouth comments in CC Docket No. 95-185 at 34; Pennsylvania Commission comments at 34-35.

[2424] NYNEX reply at 13.

[2425] Ameritech comments in CC Docket No. 95-185 at 11; BellSouth comments in CC Docket No. 95-185 at 34-35.

determination in the 1996 Act that the terms and conditions of interconnection are to be decided by negotiation among LECs and telecommunications carriers, subject to the state review process.[2426]

3. Discussion

1022. Several parties in this proceeding argue that sections 251 and 252 provide the exclusive jurisdictional basis for regulation of LEC-CMRS interconnection rates.[2427] Other parties assert that sections 332 and 201 provide the exclusive jurisdictional basis for regulation of LEC-CMRS interconnection rates.[2428] Some parties have argued that jurisdiction resides concurrently under sections 251 and 252, on the one hand, and under sections 332 and 201 on the other.[2429]

1023. Sections 251, 252, 332 and 201 are designed to achieve the common goal of establishing interconnection and ensuring interconnection on terms and conditions that are just, reasonable, and fair. It is consistent with the broad authority of these provisions to hold that we may apply sections 251 and 252 to LEC-CMRS interconnection. By opting to proceed under sections 251 and 252, we are not finding that section 332 jurisdiction over interconnection has been repealed by implication, or rejecting it as an alternative basis for jurisdiction. We acknowledge that section 332 in tandem with section 201 is a basis for jurisdiction over LEC-CMRS interconnection; we simply decline to define the precise extent of that jurisdiction at this time.

1024. As a practical matter, sections 251 and 252 create a time-limited negotiation and arbitration process to ensure that interconnection agreements will be reached between incumbent LECs and telecommunications carriers, including CMRS providers. We expect that our establishment of pricing methodologies and default proxies which may be used as interim rates will help expedite the parties' negotiations and drive voluntary CMRS-LEC interconnection agreements. We also believe that sections 251 and 252 will foster regulatory parity in that these provisions establish a uniform regulatory scheme governing interconnection between incumbent LECs and all requesting carriers, including CMRS providers. Thus, we believe that sections 251 and 252 will facilitate consistent resolution of interconnection issues for CMRS providers and other carriers requesting interconnection.

[2426] BellSouth comments in CC Docket No. 95-185 at 35.

[2427] *See, e.g.*, USTA comments at 66-67; NYNEX comments at 23; PacTel comments at 83, reply at 38; Bell Atlantic/NYNEX Mobile comments at 7; BellSouth comments at 63; Pennsylvania Commission comments at 34.

[2428] *See, e.g.*, Cox comments in CC Docket No. 95-185 at 43-44; CTIA comments in CC Docket No. 95-185 at 62; Omnipoint comments at 12; Vanguard comments at 15.

[2429] *See, e.g.*, AT&T comments in CC Docket No. 95-185 at 28-30; AT&T comments at 42-44; *see also* PCIA comments in CC Docket No. 95-185 at 23-26; Century Cellunet comments in CC Docket No. 95-185 at 10-14.

1025. Although we are applying sections 251 and 252 to LEC-CMRS interconnection at this time, we preserve the option to revisit this determination in the future. We note that Section 332 generally precludes states from rate and entry regulation of CMRS providers, and thus, differentiates CMRS providers from other carriers.[2430] We also recognize that, based on the combined record in CC Docket No. 95-185 and CC Docket No. 96-68, there have been instances in which state commissions have treated CMRS providers in a discriminatory manner with respect to the terms and conditions of interconnection.[2431] Should the Commission determine that the regulatory scheme established by sections 251 and 252 does not sufficiently address the problems encountered by CMRS providers in obtaining interconnection on terms and conditions that are just, reasonable and nondiscriminatory, the Commission may revisit its determination not to invoke jurisdiction under section 332 to regulate LEC-CMRS interconnection rates.

1026. Our decision to proceed under section 251 as a basis for regulating LEC-CMRS interconnection rates should not be interpreted as undercutting our intent to enforce Section 332(c)(3), for example, where state regulation of interconnection rates might constitute regulation of CMRS entry. In such situations, state action might be precluded by either section 332 or section 253. Such circumstances would require a case-by-case evaluation. We note, however, that we are aware of numerous specific state requirements that may constitute CMRS entry or rate regulation preempted by section 332. For example, many states, such as California, require all telecommunications providers to certify that the public convenience and necessity will be served as a precondition to construction and operation of telecommunications services within the state.[2432] Some states, such as Alaska and Connecticut, also require CMRS providers to certify as service providers other than CMRS in order to obtain the same treatment afforded other telecommunications providers under state law.[2433] Hawaii and Louisiana, in addition to imposing a certification requirement, require CMRS providers and other telecommunications carriers to file

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[2430] In passing section 332 in 1993, Congress stated that it intended to "foster the growth and development of mobile services that, by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure." H.R. Report No. 103-11, 103d. Cong., 1st Sess. 260 (1993).

[2431] *See supra*, Section VII.D.

[2432] CAL. PUBLIC UTILITIES CODE Sections 1001,1005 (West 1995); ALASKA STAT. Section 42.05221 (1995); CONN. GEN. STAT. Section 16-247g (1995); HAW. REV. STAT. Section 269-7.5 (1995); NEB. REV. STAT. Section 86-805 (1995); N.M. STAT. ANN. Section 63-9B-4 (Michie 1996).

[2433] *See In the Matter of Motion for a Declaratory Ruling Concerning Preemption of Alaska Call Routing and Interexchange Certification Regulation as Applies to Cellular Carriers*, File No. WTB/POL 95-2, *Motion for a Declaratory Ruling*, Alaska-3 Cellular d/b/a CellularOne, p.5, para. 11 (filed Sept. 22, 1995); *Decision, Investigation Into Wireless Mutual Compensation Plans*, State of Connecticut, Department of Public Utility control, at 15 (Connecticut Commission Sept. 22, 1995).

tariffs with the state commission.[2434] We will not permit entry regulation through the exercise of states' sections 251/252 authority or otherwise. In this regard, we note that states may not impose on CMRS carriers rate and entry regulation as a pre-condition to participation in interconnection agreements that may be negotiated and arbitrated pursuant to sections 251 and 252. We further note that the Commission is reviewing filings made pursuant to section 253 alleging that particular states or local governments have requirements that constitute entry barriers, in violation of section 253. We will continue to review any allegations on an ongoing basis, including any claims that states or local governments are regulating entry or imposing requirements on CMRS providers that constitute barriers to market entry.

[2434] HAW. REV. STAT. Section 6-80-29 (1996); *see In re Regulations for Competition in the Local Telecommunications Market*, General Order, Louisiana Public Service Commission, §§ 301, 401 (Louisiana Commission March 15, 1996).

XI. OBLIGATIONS IMPOSED ON LECS BY SECTION 251(b)[2435]

A. Reciprocal Compensation for Transport and Termination of Telecommunications

1. Statutory Language

1027. Section 251(b)(5) provides that all LECs, including incumbent LECs, have the duty to "establish reciprocal compensation arrangements for the transport and termination of telecommunications."[2436] Section 252(d)(2) states that, for the purpose of compliance by an incumbent LEC with section 251(b)(5), a state commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless such terms and conditions both: (1) provide for the "mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier," and (2) "determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls."[2437] That subsection further provides that the foregoing language shall not be construed "to preclude arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as bill and keep arrangements),"[2438] or to authorize the Commission or any state to "engage in any rate regulation proceeding to establish with particularity the additional costs of transporting or terminating calls, or require carriers to maintain records with respect to the additional costs of such calls."[2439] The legislative history indicates that "mutual and reciprocal recovery of costs . . . may include a range of compensation schemes, such as in-kind exchange of traffic without cash payment (known as bill-and-keep arrangements)."[2440]

[2435] Additional obligations imposed by section 251(b) are addressed in a separate order. *See* NPRM at paras. 202-219.

[2436] 47 U.S.C. § 251(b)(5).

[2437] 47 U.S.C. § 252(d)(2)(A).

[2438] *Id.* at § 252(d)(2)(B)(i).

[2439] *Id.* at § 252(d)(2)(B)(ii).

[2440] Joint Explanatory Statement at 7.

2. Definition of Transport and Termination of Telecommunications

a. Background

1028. In the NPRM, we sought comment on whether "transport and termination of telecommunications" under section 251(b)(5) is limited to certain types of traffic.[2441] We noted that the statutory provision appears to encompass telecommunications traffic that originates on the network of one LEC and terminates on the network of a competing provider in the same local service area as well as traffic passing between LECs and CMRS providers.[2442] We sought comment on whether section 251(b)(5) also encompasses telecommunications traffic passing between neighboring LECs that do not compete with one another.[2443] We also observed in the NPRM that section 252(d)(2) is entitled "Charges for Transport and Termination of Traffic," and it could be interpreted to permit separate charges for these two components of reciprocal compensation.[2444] We sought comment on this issue.

b. Comments

1029. Numerous commenters contend that section 251(b)(5) applies to traffic originating on the network of one LEC and terminating on the network of another LEC, including both the traffic exchanged between competing LECs and traffic exchanged between neighboring LECs that do not compete with one another.[2445] The Oregon Commission points out that neither section 251 nor any other provision of the Act excludes the transport and termination of telecommunications traffic passing between neighboring LECs that do not compete with one another.[2446] Several incumbent LECs, however, contend that the requirements imposed on LECs by section 251(b), including reciprocal compensation for transport and termination of traffic, make no sense except in the context of LECs offering service in the same geographic area, because these requirements are relevant only to the competitive relationship between such carriers.[2447] In addition, several commenters contend that parties and states will need to determine the local service area within

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[2441] NPRM at para. 231.

[2442] NPRM at para. 230.

[2443] *Id.*

[2444] NPRM at para. 231.

[2445] *See, e.g.*, Ohio Commission comments at 68-69; MFS comments at 76; Time Warner comments at 85-86.

[2446] Oregon Commission comments at 35.

[2447] PacTel comments at 95-96; NYNEX comments at 85; *see also* Florida Commission comments at 38-39.

which the compensation right applies.[2448] RTC asserts that elimination of multicompany existing extended area service (EAS)[2449] would cause great rate disruption around the country.[2450]

1030. A wide range of commenters also contend that reciprocal compensation should apply to arrangements between CMRS providers and LECs.[2451] Numerous commenters in the *LEC-CMRS Interconnection* proceeding have argued that CMRS providers do not receive reciprocal compensation for the transport and termination of traffic from incumbent LECs,[2452] and in some cases incumbent LECs require CMRS providers to compensate the LEC for wireline-originated traffic terminated on their wireless systems.[2453] PageNet, however, contends that section 251 is not directly applicable to interconnection arrangements between incumbent LECs and CMRS providers.[2454] Instead, it argues that incumbent LEC to CMRS interconnection is governed by section 332 of the 1934 Act.[2455] Several wireless providers argue that neither CMRS nor traditional paging service fits the Act's definition of a local exchange service and, therefore, these services are exempt from section 251(b) requirements.[2456] Paging companies commented in the *LEC-CMRS Interconnection* proceeding that, despite the fact that paging companies must terminate incoming incumbent LEC calls, the paging companies pay the LECs for call

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[2448] *See* GTE comments at 54; Continental comments at 12-13 (asserting that a new entrant should not be required to pay toll access charges to terminate its customers within its local calling area); NCTA reply at 17 (arguing that the Commission should reject incumbent LECs' arguments that reciprocal compensation arrangements between incumbent LECs and competitive LECs are only applicable to the termination of incumbent LEC-defined local traffic). *But see* PacTel reply at 48 (arguing that transport and termination does not extend to all intraLATA calls because such a requirement would read access charges out of the Act).

[2449] EAS is considered an interexchange service between non-competing LECs.

[2450] RTC reply at v; *see also* GVNW comments at 41 (Historical interconnection arrangements between neighboring incumbent LECs should not be used as a basis for determining appropriate compensation between carriers competing in the same service areas under a statutory mandate to base compensation on the cost of terminating a call).

[2451] *See, e.g.*, Ohio Commission comments at 68-69; NYNEX comments at 85; ProNet comments at 11-12.

[2452] *See, e.g.*, RCC comments in CC Docket No. 95-185 at 5; 360 Degrees comments in CC Docket No. 95-185 at 3; Western Wireless comments in CC Docket No. 95-185 at 13; Omnipoint reply in CC Docket No. 95-185 at 3-7.

[2453] *See, e.g.*, CMT Partners comments in CC Docket No. 95-185 at 4; Century Cellunet comments in CC Docket No. 95-185 at 4; Nextel Communications comments in CC Docket No. 95-185 at 5; Centennial Cellular Corp. comments in CC Docket No. 95-185 at 9.

[2454] PageNet comments at 12-14.

[2455] *Id.*; *see also* PCIA comments at 1-12; Mobilemedia comments at 5-12; Arch comments at 17.

[2456] *See, e.g.*, ProNet comments at 7; Arch comments at 17; BANM comments at 2.

origination, rather than receive compensation for call termination.[2457] They also contend that paging companies should be permitted to charge reasonable call termination fees to the LECs.[2458]

1031. Incumbent LECs as well as other commenters contend that transport and termination should be treated as two distinct functions.[2459] They generally define transport as carrying traffic between switches within a network, while termination is characterized as delivering traffic through the last end-office switch to the end user.[2460] The Texas Public Utility Counsel argues that, to the extent that transport functions and call termination functions have different cost structures, the Act would mandate a two-part pricing structure.[2461] U S West notes that, while there is no natural substitute for termination, transport is interoffice and would generally be interchangeable with similar network elements or tariffed access services.[2462] In addition, Citizens Utilities contends that, depending on the location of the physical interconnection point between two carriers and each carrier's network design, the terminating carrier may or may not perform any transport service in the call delivery process.[2463] Therefore, it argues that the transport function logically should be unbundled from the termination function.[2464] USTA and potential new entrants, however, argue that transport and termination describe a single function, the costs of which should be recovered from a single charge for purposes of reciprocal compensation.[2465] GST believes that subdivision of transport and termination as a means of applying asymmetrical rate structures conflicts with the statute's command of reciprocal compensation, and gives LECs incentives to tilt the balance of payment

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[2457] *See* PageNet reply in CC Docket No. 95-185 at 5.

[2458] *See, e.g.*, PageNet comments in CC Docket No. 95-185 at 25-29.

[2459] *See, e.g.*, U S West comments at 69; PacTel comments at 97; GTE comments at 18; Florida Commission comments at 39.

[2460] *See, e.g.*, U S West comments at 69; PacTel comments at 97; GTE comments at 18; BellSouth comments at 71.

[2461] Texas Public Utility Counsel comments at 49-50; *see also* Arch comments at 17-18; Florida Commission comments at 39.

[2462] U S West comments at 69. Similarly, CFA/CU argues that the availability of termination for new entrants is a monopoly enjoyed by the incumbent LEC as a legacy of its historic monopoly. CFA/CU comments at 52-53; *see also* MFS reply at 17.

[2463] Citizens Utilities comments at 29; *see also* BellSouth comments at 71.

[2464] *Id.*

[2465] USTA comments at 80; *see also* GST comments at 35-38; MFS comments at 76-77; Time Warner comments at 86-88; TCI comments at 27-28.

through their network design decisions.[2466]

1032. In addition, Sprint contends that section 251(b)(5) arguably applies to transport and termination of toll traffic as well as local traffic.[2467] Sprint contends, however, that in the context of section 252(d)(2), which establishes a pricing rule for reciprocal compensation where one of the carriers is an incumbent LEC, it appears that Congress intended to confine to local traffic the obligation of transport and termination.[2468] Several other commenters also maintain that toll traffic should remain subject to access charges and not section 251(b)(5) obligations, at least until access charge reform can be implemented.[2469] RTC argues that Congress made it clear that it did not intend the Act to change the access charge regime.[2470] Frontier, however, contends that Sprint's reliance on the wording of section 252(d)(2) as limiting the scope of section 251(b)(5) is simply misguided.[2471] Frontier argues that, at best, section 252(d)(2)'s silence regarding the pricing by an incumbent LEC simply meant that Congress did not intend to constrain the Commission decisions in the pricing of transport and termination by a non-incumbent LEC under section 252(d)(2).[2472] In sum, Frontier contends that the general principles of mutual and reciprocal compensation under section 251(b)(5) would apply to all traffic, while section 252(d)(2) applies to incumbent LEC pricing of mutual compensation involving any additional costs of transport and termination.[2473]

c. Discussion

(1) Distinction between "Transport and Termination" and Access

1033. We recognize that transport and termination of traffic, whether it originates locally or from a distant exchange, involves the same network functions. Ultimately, we believe that the rates that local carriers impose for the transport and termination of local traffic and for the transport and termination of long distance traffic should converge. We conclude, however, as a

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[2466] GST comments at 35-38.

[2467] Sprint comments at 76.

[2468] *Id.* at 76-77.

[2469] *See, e.g.*, Alabama Commission comments at 32-33; PacTel comments at 95-96, 98, reply at 48; MFS comments at 76.

[2470] RTC reply at 9.

[2471] Frontier reply at 19.

[2472] *Id.*

[2473] *Id.*

legal matter, that transport and termination of local traffic are different services than access service for long distance telecommunications. Transport and termination of local traffic for purposes of reciprocal compensation are governed by sections 251(b)(5) and 252(d)(2), while access charges for interstate long-distance traffic are governed by sections 201 and 202 of the Act. The Act preserves the legal distinctions between charges for transport and termination of local traffic and interstate and intrastate charges for terminating long-distance traffic.

1034. We conclude that section 251(b)(5) reciprocal compensation obligations should apply only to traffic that originates and terminates within a local area, as defined in the following paragraph. We disagree with Frontier's contention that section 251(b)(5) entitles an IXC to receive reciprocal compensation from a LEC when a long-distance call is passed from the LEC serving the caller to the IXC. Access charges were developed to address a situation in which three carriers -- typically, the originating LEC, the IXC, and the terminating LEC -- collaborate to complete a long-distance call. As a general matter, in the access charge regime, the long-distance caller pays long-distance charges to the IXC, and the IXC must pay both LECs for originating and terminating access service.[2474] By contrast, reciprocal compensation for transport and termination of calls is intended for a situation in which two carriers collaborate to complete a local call. In this case, the local caller pays charges to the originating carrier, and the originating carrier must compensate the terminating carrier for completing the call. This reading of the statute is confirmed by section 252(d)(2)(A)(i), which establishes the pricing standards for section 251(b)(5). Section 251(d)(2)(A)(i) provides for "recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier."[2475] We note that our conclusion that long distance traffic is not subject to the transport and termination provisions of section 251 does not in any way disrupt the ability of IXCs to terminate their interstate long-distance traffic on LEC networks. Pursuant to section 251(g), LECs must continue to offer tariffed interstate access services just as they did prior to enactment of the 1996 Act. We find that the reciprocal compensation provisions of section 251(b)(5) for transport and termination of traffic do not apply to the transport or termination of interstate or intrastate interexchange traffic.

1035. With the exception of traffic to or from a CMRS network, state commissions have the authority to determine what geographic areas should be considered "local areas" for the purpose of applying reciprocal compensation obligations under section 251(b)(5), consistent with the state commissions' historical practice of defining local service areas for wireline LECs. Traffic originating or terminating outside of the applicable local area would be subject to interstate and intrastate access charges. We expect the states to determine whether intrastate transport and termination of traffic between competing LECs, where a portion of their local

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[2474] In addition, both the caller and the party receiving the call pay a flat-rated interstate access charge -- the end-user common line charge -- to the respective incumbent LEC to whose network each of these parties is connected.

[2475] 47 U.S.C. § 252(d)(2)(A)(i).

service areas are not the same, should be governed by section 251(b)(5)'s reciprocal compensation obligations or whether intrastate access charges should apply to the portions of their local service areas that are different. This approach is consistent with a recently negotiated interconnection agreement between Ameritech and ICG that restricted reciprocal compensation arrangements to the local traffic area as defined by the state commission.[2676] Continental Cablevision, in an *ex parte* letter, states that many incumbent LECs offer optional expanded local area calling plans, in which customers may pay an additional flat rate charge for calls within a wider area than that deemed as local, but that terminating intrastate access charges typically apply to calls that originate from competing carriers in the same wider area.[2677] Continental Cablevision argues that local transport and termination rates should apply to these calls. We lack sufficient record information to address the issue of expanded local area calling plans; we expect that this issue will be considered, in the first instance, by state commissions. In addition, we expect the states to decide whether section 251(b)(5) reciprocal compensation provisions apply to the exchange of traffic between incumbent LECs that serve adjacent service areas.

1036. On the other hand, in light of this Commission's exclusive authority to define the authorized license areas of wireless carriers, we will define the local service area for calls to or from a CMRS network for the purposes of applying reciprocal compensation obligations under section 251(b)(5).[2678] Different types of wireless carriers have different FCC-authorized licensed territories, the largest of which is the "Major Trading Area" (MTA).[2679] Because wireless licensed territories are federally authorized, and vary in size, we conclude that the largest FCC-authorized wireless license territory (*i.e.*, MTA) serves as the most appropriate definition for local service area for CMRS traffic for purposes of reciprocal compensation under section 251(b)(5) as it avoids creating artificial distinctions between CMRS providers. Accordingly, traffic to or from a CMRS network that originates and terminates within the same MTA is subject to transport and termination rates under section 251(b)(5), rather than interstate and intrastate access charges.

1037. We conclude that section 251(b)(5) obligations apply to all LECs in the same state-defined local exchange service areas, including neighboring incumbent LECs that fit within this description. Contrary to the arguments of NYNEX and Pacific Telesis, neither the plain language of the Act nor its legislative history limits this subsection to the transport and termination of telecommunications traffic between new entrants and incumbent LECs. In addition, applying

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[2676] *See* letter from Albert H. Kramer, Dickstein, Shapiro, Morin & Oshinsky LLP to John Nakahata, Senior Legal Advisor to the Chairman, FCC, July 11, 1996.

[2677] Letter from Brenda L. Fox, Vice President, Federal Relations, Continental Cablevision, to Robert Pepper, Chief, Office of Plans and Policy, FCC, July 22, 1996, attached to Letter from Donna N. Lampert, Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C., to William F. Caton, Acting Secretary, FCC, July 22, 1996.

[2678] *See also infra*, Section XI.A.c.3.

[2679] *See* Rand McNally, Inc., *1992 Commercial Atlas & Marketing Guide* 38-39 (1992).

section 251(b)(5) obligations to neighboring incumbent LECs in the same local exchange area is consistent with our decision that all interconnection agreements, including agreements between neighboring LECs, must be submitted to state commissions for approval pursuant to section 252(e).[2480]

1038. Under section 252, neighboring states may establish different rate levels for transport and termination of traffic.[2481] In cases in which territory in multiple states is included in a single local service area, and a local call from one carrier to another crosses state lines, we conclude that the applicable rate for any particular call should be that established by the state in which the call terminates. This provides an administratively convenient rule, and termination of the call typically occurs in the same state where the terminating carrier's end office switch is located and where the cost of terminating the call is incurred.

(2) Distinction between "Transport" and "Termination"

1039. We conclude that transport and termination should be treated as two distinct functions. We define "transport," for purposes of section 251(b)(5), as the transmission of terminating traffic that is subject to section 251(b)(5) from the interconnection point between the two carriers to the terminating carrier's end office switch that directly serves the called party (or equivalent facility provided by a non-incumbent carrier). Many alternative arrangements exist for the provision of transport between the two networks. These arrangements include: dedicated circuits provided either by the incumbent LEC, the other local service provider, separately by each, or jointly by both; facilities provided by alternative carriers; unbundled network elements provided by incumbent LECs; or similar network functions currently offered by incumbent LECs on a tariffed basis. Charges for transport subject to section 251(b)(5) should reflect the forward-looking cost of the particular provisioning method.

1040. We define "termination," for purposes of section 251(b)(5), as the switching of traffic that is subject to section 251(b)(5) at the terminating carrier's end office switch (or equivalent facility) and delivery of that traffic from that switch to the called party's premises. In contrast to transport, for which some alternatives exist, alternatives for termination are not likely to exist in the near term. A carrier or provider typically has no other mechanism for delivering traffic to a called party served by another carrier except by having that called party's carrier terminate the call. In addition, forward-looking costs are calculated differently for the transport of traffic and the termination of traffic, as discussed above in the unbundled elements section.[2482]

[2480] *See supra*, Section III.D.

[2481] We discuss the methodology states should follow in establishing transport and termination rates *infra*, Section XI.A.3.c.(3).

[2482] *See infra*, Section VII.B.2.

As such, we conclude that we need to treat transport and termination as separate functions – each with its own cost. With respect to GST's contention that separate charges for transport and termination of traffic will allow incumbent LECs to "game" the system through network design decisions, we conclude in the interconnection section above that interconnecting carriers may interconnect at any technically feasible point.[2483] We find that this sufficiently limits LECs' ability to disadvantage interconnecting parties through their network design decisions.

(3) CMRS-Related Issues

1041. Section 251(b)(5) obligates LECs to establish reciprocal compensation arrangements for the transport and termination of telecommunications traffic. Although section 252(b)(5) does not explicitly state to whom the LEC's obligation runs, we find that LECs have a duty to establish reciprocal compensation arrangements with respect to local traffic originated by or terminating to any telecommunications carriers. CMRS providers are telecommunications carriers and, thus, LECs' reciprocal compensation obligations under section 251(b)(5) apply to all local traffic transmitted between LECs and CMRS providers.

1042. We conclude that, pursuant to section 251(b)(5), a LEC may not charge a CMRS provider or other carrier for terminating LEC-originated traffic. Section 251(b)(5) specifies that LECs and interconnecting carriers shall compensate one another for termination of traffic on a reciprocal basis. This section does not address charges payable to a carrier that originates traffic. We therefore conclude that section 251(b)(5) prohibits charges such as those some incumbent LECs currently impose on CMRS providers for LEC-originated traffic. As of the effective date of this order, a LEC must cease charging a CMRS provider or other carrier for terminating LEC-originated traffic and must provide that traffic to the CMRS provider or other carrier without charge.

1043. As noted above, CMRS providers' license areas are established under federal rules, and in many cases are larger than the local exchange service areas that state commissions have established for incumbent LECs' local service areas.[2484] We reiterate that traffic between an incumbent LEC and a CMRS network that originates and terminates within the same MTA (defined based on the parties' locations at the beginning of the call) is subject to transport and termination rates under section 251(b)(5), rather than interstate or intrastate access charges. Under our existing practice, most traffic between LECs and CMRS providers is not subject to interstate access charges unless it is carried by an IXC, with the exception of certain interstate interexchange service provided by CMRS carriers, such as some "roaming" traffic that transits

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[2483] *See supra*, Section IV.F..

[2484] *See* 47 C.F.R. §§ 22.911, 24.202; *see also* PCIA comments in CC Docket No. 95-185 at 21-22; Letter from Leonard J. Kennedy, on behalf of Comcast Cellular Communications, to William Caton, Acting Secretary, FCC, July 25, 1996.

incumbent LECs' switching facilities, which is subject to interstate access charges.[2485] Based on our authority under section 251(g) to preserve the current interstate access charge regime, we conclude that the new transport and termination rules should be applied to LECs and CMRS providers so that CMRS providers continue not to pay interstate access charges for traffic that currently is not subject to such charges, and are assessed such charges for traffic that is currently subject to interstate access charges.[2486]

1044. CMRS customers may travel from location to location during the course of a single call, which could make it difficult to determine the applicable transport and termination rate or access charge.[2487] We recognize that, using current technology, it may be difficult for CMRS providers to determine, in real time, which cell site a mobile customer is connected to, let alone the customer's specific geographic location.[2488] This could complicate the computation of traffic flows and the applicability of transport and termination rates, given that in certain cases, the geographic locations of the calling party and the called party determine whether a particular call should be compensated under transport and termination rates established by one state or another, or under interstate or intrastate access charges. We conclude, however, that it is not necessary for incumbent LECs and CMRS providers to be able to ascertain geographic locations when determining the rating for any particular call at the moment the call is connected. We conclude that parties may calculate overall compensation amounts by extrapolating from traffic studies and samples. For administrative convenience, the location of the initial cell site when a call begins shall be used as the determinant of the geographic location of the mobile customer. As an

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[2485] "[S]ome cellular carriers provide their customers with a service whereby a call to a subscriber's local cellular number will be routed to them over interstate facilities when the customer is "roaming" in a cellular system in another state. In this case, the cellular carrier is providing not local exchange service but interstate, interexchange service. In this and other situations where a cellular company is offering interstate, interexchange service, the local telephone company providing interconnection is providing exchange access to an interexchange carrier and may expect to be paid the appropriate access charge . . . . Therefore, to the extent that a cellular operator does provide interexchange service through switching facilities provided by a telephone company, its obligation to pay carrier's carrier [*i.e.*, access] charges is defined by § 69.5(b) of our rules." *The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services*, 59 RR 2d 1275, 1284-85 n.3 (1986). *See also Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, GN Docket No. 93-252, Second Report and Order, 9 FCC Rcd 1411, 1497-98 (1994) (concluding that there should be no distinction between incumbent LECs' interconnection arrangements with cellular carriers and those with other CMRS providers).

[2486] *See also, supra*, XI.A.2.c.(1).

[2487] In the *LEC-CMRS Interconnection NPRM*, we observed that a significant amount of LEC-CMRS traffic crosses state lines, because CMRS service areas often cross state lines and CMRS customers are mobile. *LEC CMRS Interconnection NPRM* at para. 112.

[2488] *Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, CC Docket No. 94-102, RM-8143, Report and Order and Further Notice of Proposed Rulemaking, FCC 96-264 at paras. 8-9 (adopted June 12, 1996, released July 26, 1996).

alternative. LECs and CMRS providers can use the point of interconnection between the two carriers at the beginning of the call to determine the location of the mobile caller or called party.

1045. As discussed above, pursuant to section 251(b)(5) of the Act, all local exchange carriers, including small incumbent LECs and small entities offering competitive local exchange services, have a duty to establish reciprocal compensation arrangements for the transport and termination of local exchange service. CMRS providers, including small entities, and LECs, including small incumbent LECs and small entity competitive LECs, will receive reciprocal compensation for terminating certain traffic that originates on the networks of other carriers, and will pay such compensation for certain traffic that they transmit and terminate to other carriers. We believe that these arrangements should benefit all carriers, including small incumbent LECs and small entities, because it will facilitate competitive entry into new markets while ensuring reasonable compensation for the additional costs incurred in terminating traffic that originates on other carriers' networks. We also recognize that, to implement transport and termination pursuant to section 251(b)(5), carriers, including small incumbent LECs and small entities, may be required to measure the exchange of traffic, but we believe that the cost of such measurement to these carriers is likely to be substantially outweighed by the benefits of these arrangements.[2489]

3. Pricing Methodology

a. Background

1046. In the NPRM, we sought comment on how to interpret section 252(d)(2) of the Act.[2490] Specifically, we asked if we should establish a generic pricing methodology or impose a ceiling to guide the states in setting the charge for the transport and termination of traffic. We also asked whether such a generic pricing methodology or ceiling should be established using the same principles we adopt for interconnection and unbundled elements.[2491] Additionally, we sought comment on the use of an interim and transitional pricing mechanism that would address concerns about unequal bargaining power in negotiations.[2492]

[2489] *See* Regulatory Flexibility Act, 5 U.S.C. §§ 601 et seq.

[2490] NPRM at para. 234.

[2491] NPRM at para. 234.

[2492] NPRM at para. 244.

b. Comments

1047. Time Warner argues that call termination is an essential element in completing calls and that this last "bottleneck" should be governed by a lower cost standard than elements that are based on a competitor's "make or buy decisions."[2493] MCI contends that the level of compensation for transport and termination should be determined by calculating the TSLRIC incurred by the incumbent in providing the network elements necessary to terminate the local calls originating on the networks of its competitors, and converting that cost to a per-minute rate.[2494] Cox asserts that section 252(d)(2) requires that competing carriers have mutual obligations to terminate traffic that originates on competitors' networks, and that this obligation requires that the rate for transport and termination be less than the rate charged for unbundled elements.[2495] Cox advocates the use of LRIC, as opposed to TSLRIC, methodology to set transport and termination rates because LRIC recognizes only the cost of capital expenditures to provide the additional terminations and transport required by a competitive local service provider, including maintenance and depreciation of those facilities, without any allocation of overhead.[2496]

1048. BellSouth argues that the recovery of transport and termination costs should include joint and common costs and that no LEC can charge rates for transport and termination in excess of access charges because potential customers would simply choose arrangements under the latter.[2497] The Western Alliance asserts that rates for the transport and termination of traffic must allow rural LECs to recover the incremental cost of local access, a reasonable apportionment of joint and common costs, and any lost contribution to basic, local service rates represented by the interconnecting carriers' service.[2498] The Western Alliance argues that recovery of lost contribution is especially important for smaller LECs because they are unlikely to have alternative sources from which to support basic service rates.[2499] USTA argues rates should be based on existing prices (*i.e.* access charges) because this would not require small and mid-sized incumbent

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[2493] Time Warner comments at 50. "Make or buy decision" is Time Warner's term for deciding between providing services through its own facilities or through resale and/or purchasing unbundled elements.

[2494] MCI comments at 48-49; *see also* NCTA comments at 47-50; Comcast comments at 22; Competition Policy Institute reply at 15.

[2495] Cox comments at 34; *see also* Sprint Spectrum/APC comments at 8-9.

[2496] Cox comments at 25-26; *see also* GST comments at 38-40; MFS comments at 80-81. We note above that TSLRIC is one instance of LRIC where the increment chosen is the provision of the entire service.

[2497] BellSouth comments at 70-72; *see also* MECA comments at 5; and Mass. Commission comments at 8-9.

[2498] Western Alliance comments at 5.

[2499] *Id.* at 7 n. 14.

LECs to conduct cost studies that could bog down the interconnection negotiation process.[2500] GTE claims that the "additional costs incurred" language undermines the contention that cost studies must assume the most efficient technology available because costs are incurred using actual network technology, not a theoretical network.[2501]

1049. The Illinois Commission asserts that the two different pricing standards in sections 252(d)(1)(A)(i) and 252(d)(2)(A)(ii) are not mutually exclusive and the text of the two provisions does not prohibit the states from using identical pricing standards for the two categories of service. The Illinois Commission notes that there is some substitutability between unbundled network elements and incumbent LEC transport and termination of a competitor's traffic. Consequently, the Illinois Commission contends that two widely disparate policies for the pricing of these services may have potentially distorting effects.[2502] The Illinois Commission further argues that section 252(d)(2)(B)(ii) does not prohibit rate regulation proceedings to establish transport and termination costs and does not bar a state from requiring carriers to maintain records regarding transport and termination costs, if authority exists independently of the 1996 Act.[2503] GST argues that section 252(d)(2)(B)(ii)'s prohibition against use of cost studies to set transport and termination rates suggests Congress intended for compensation prices to be set on the basis of economically relevant costs, not on the basis of artificial regulatory mechanisms, such as separations, revenue requirements, or a carrier's embedded investment.[2504]

1050. The Ohio Commission asserts that states should establish a price ceiling for transport and termination of local traffic on the basis of an imputation test. The Ohio Commission argues that the ceiling price for transport and termination of local traffic should be such that it allows the incumbent LEC to pass an imputation test for local traffic in the aggregate (*i.e.*, flat-rated, message, and measured local residence and business traffic) at the end user rate levels.[2505] Similarly, MFS suggests that the Commission adopt a rate equal to one half of the retail rate because, as a general rule, call origination and billing can be presumed to be equal to the cost of transport and termination.[2506] Jones Intercable contends that the Commission should

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[2500] USTA comments at 54-55.

[2501] GTE reply at 30; *see also* PacTel reply at 45-46.

[2502] Illinois Commission comments at 76-77; *see also* California Commission comments at 42; ACSI comments at 10-11; Ohio Commission comments at 70-71; Texas Public Utility Counsel comments at 1, 50; Lincoln Tel. comments at 20; Citizens Utilities comments at 32-33.

[2503] Illinois Commission comments at 78; *see also* California Commission comments at 43-44.

[2504] GST comments at 39.

[2505] Ohio Commission comments at 71-72, 78-79.

[2506] MFS comments at 87.

establish a presumption that all LECs can offer traffic termination at a rate that is no higher than the lowest rate that has been agreed to (or imposed through arbitration) for such traffic termination by *any* LEC. Jones Intercable adds that such a rule is immensely practical because it relieves competitors of the need to fight the same battle in all fifty states.[2507]

1051. The California Commission asserts that ceilings for transport and termination present problems because a ceiling based on, for example, switched access rates would have to take into account widely varying rates among states. The California Commission is also opposed to price floors for call termination because they may conflict with bill-and-keep arrangements.[2508] GST opposes the use of access charges to set reciprocal transport and termination rates because access charges are fundamentally based on rates of return.[2509] TCI argues that there has been sufficient evidence compiled in state proceedings for the Commission to determine the price ceiling based on existing TSLRIC studies and suggests a price ceiling of 0.4 cents per minute of use.[2510] The Illinois and Maryland commissions have adopted rates for the termination of traffic based on incremental cost studies. The Illinois Commission has adopted a rate equal to 0.5 cents ($0.005) per minute of use for termination from the end office switch. Maryland has adopted a rate equal to 0.3 cents ($0.003) per minute of use for termination from the end office switch. Both commissions adopted slightly higher rates for transport and termination via tandem switches equal to 0.5 cents ($0.005) in Maryland and 0.75 cents ($0.0075) in Illinois.[2511]

1052. Most commenters support the requirement that dedicated transport services be priced on a flat-rated basis.[2512] For example, the Ohio Commission asserts that all LECs should offer a reciprocal compensation structure that consists of both flat-rated elements and usage-sensitive elements, in order to satisfy the requirement that the rate structure reflect the way in which costs are incurred by the providing LEC.[2513] According to Lincoln Telephone, the connection between an incumbent LEC's central office and an interconnector's network should be

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[2507] Jones Intercable comments at 29-30.

[2508] California Commission comments at 43; *see also* Florida Commission comments at 40 (setting charges for the transport and termination of local exchange traffic should be left up to the states because of the unique geographical and demographic characteristics of each state).

[2509] GST comments at 39-40.

[2510] TCI comments at 40-43.

[2511] These cost studies, and others, are discussed in greater detail in *supra.*, Section VII.C.3.

[2512] *See, e.g.*, USTA comments at 80; Time Warner comments at 91-92; NEXTLINK comments at 34-35; Mass. Attorney General comments at 16-17, 22-23; CFA/CU comments at 51; Washington Commission comments at 3; Sprint comments at 79.

[2513] Ohio Commission comments at 68-69.

priced as a flat-rated unbundled network element.[2514] The Massachusetts Attorney General recommends that termination charges be flat-rated and capacity-based.[2515] This capacity-based, flat-rated reciprocal compensation charge would be based on port charges, measured at the peak busy hour of the month, to determine the relative traffic flow over the respective networks. The Massachusetts Attorney General further argues that, in a highly competitive market where services and prices would be continuously changing, rates charged by minutes of use will distort marketing and investment decisions away from the efficient path.[2516] Cox contends capacity-cost approaches should be used as the basic standard for setting transport and termination rates because costs are incurred in that manner.[2517] Additionally, Cox argues a capacity-cost approach addresses peak-load pricing problems because an interconnecting carrier is effectively reserving and paying for a slice of capacity on a full-time basis.[2518] Other carriers support a per-minute charge for transport and termination.[2519] In addition to a rate based on minutes of use, the Maryland Commission does not oppose flat-rated options for termination of traffic based on capacity costs measured at peak hours.[2520] BellSouth adds that usage-based charging is relatively more favorable to smaller competitors and facilities-based charging is relatively more favorable to larger competitors.[2521]

1053. Numerous new entrants and state commissions support the use of an interim pricing mechanism and support the use of bill and keep as such an interim measure.[2522] In the *LEC-CMRS Interconnection* proceeding, most CMRS providers argue in support of an interim pricing approach for transport and termination arrangements while long-term solutions are pursued.[2523]

[2514] Lincoln Tel. comments at 22.

[2515] Mass. Attorney General comments at 15-16.

[2516] Mass. Attorney General comments at 16-17; *see also* CFA/CU comments at 55-56; Washington Commission comments at 3.

[2517] Cox comments at Exhibit 3 (Bargaining Incentives and Interconnection), p. 7.

[2518] *Id.*

[2519] *See, e.g.*, MCI comments at 48-49; SBC comments at 50 n.91.

[2520] Maryland Commission comments at Attachment (Maryland Commission Order No. 72348), p. 33.

[2521] BellSouth comments at Attachment (Interconnection and Economic Efficiency), p. 11.

[2522] *See, e.g.*, GST comments at 34-35; AT&T comment at 69; Cox comments at 27-28, 38; Sprint comments at 87; Jones Intercable comments at 28-29; Citizens Utilities comments at 30; Telecommunication Resellers Ass'n comments at 54-55.

[2523] *See, e.g.*, AirTouch comments in CC Docket No. 95-185 at 38-39.

Cincinnati Bell asserts that the suggestion that an interim mechanism may be necessary to offset bargaining power of incumbent LECs incorrectly assumes that the incumbent LEC will always have greater bargaining power in the process of negotiations.[2524] Cincinnati Bell argues that, to the contrary, small and mid-size LECs will be at a disadvantage when they negotiate with large corporations.[2525] LECs generally argue that, under the 1996 Act, the Commission is precluded from creating an interim pricing regime, and point to section 251(d)(3), which preserves state regulations over the obligations of LECs in certain circumstances, to support their argument.[2526]

c. Discussion

(1) Statutory Standard

1054. We conclude that the pricing standards established by section 252(d)(1) for interconnection and unbundled elements, and by section 252(d)(2) for transport and termination of traffic, are sufficiently similar to permit the use of the same general methodologies for establishing rates under both statutory provisions. Section 252(d)(2) states that reciprocal compensation rates for transport and termination shall be based on "a reasonable approximation of the additional costs of terminating such calls."[2527] Moreover, there is some substitutability between the new entrant's use of unbundled network elements for transporting traffic and its use of transport under section 252(d)(2). Depending on the interconnection arrangements, carriers may transport traffic to the competing carriers' end offices or hand traffic off to competing carriers at meet points for termination on the competing carriers' networks. Transport of traffic for termination on a competing carrier's network is, therefore, largely indistinguishable from transport for termination of calls on a carrier's own network. Thus, we conclude that transport of traffic should be priced based on the same cost-based standard, whether it is transport using unbundled elements or transport of traffic that originated on a competing carrier's network. We, therefore, find that the "additional cost" standard permits the use of the forward-looking, economic cost-based pricing standard that we are establishing for interconnection and unbundled elements.[2528]

[2524] Cincinnati Bell comments at 25-26.

[2525] *Id.*

[2526] *See, e.g.*, BellSouth comments in CC Docket No. 95-185 at 32.

[2527] 47 U.S.C. § 252(d)(2)(A)(ii).

[2528] *See supra*, Section VII.B.

(2) Pricing Rule

1055. States have three options for establishing transport and termination rate levels. A state commission may conduct a thorough review of economic studies prepared using the TELRIC-based methodology outlined above in the section on the pricing of interconnection and unbundled elements.[2529] Alternatively, the state may adopt a default price pursuant to the default proxies outlined below. If the state adopts a default price, it must either commence review of a TELRIC-based economic cost study, request that this Commission review such a study, or subsequently modify the default price in accordance with any revised proxies we may adopt. As previously noted, we intend to commence a future rulemaking on developing proxies using a generic cost model, and to complete such proceeding in the first quarter of 1997. As a third alternative, in some circumstances states may order a "bill and keep" arrangement, as discussed below.

(3) Cost-Based Pricing Methodology

1056. Consistent with our conclusions about the pricing of interconnection and unbundled network elements, we conclude that states that elect to set rates through a cost study must use the forward-looking economic cost-based methodology, which is described in greater detail above, in establishing rates for reciprocal transport and termination when arbitrating interconnection arrangements.[2530] We find that section 252(d)(2)(B)(ii), which indicates that section 252(d)(2) shall not be construed to "authorize the Commission or any State to engage in any rate regulation proceeding to establish with particularity the additional costs of transporting or terminating calls,"[2531] does not preclude states or this Commission from reviewing forward-looking economic cost studies. First, we believe that Congress intended the term "rate regulation proceeding" in section 252(d)(2)(B)(ii) to mean the same thing as "a rate-of-return or other rate-based proceeding" in section 252(d)(1)(A)(i). In the section on the pricing of interconnection and unbundled elements above, we conclude that the statutory prohibition of the use of such proceedings is intended to foreclose the use of traditional rate case proceedings using rate-of-return regulation. Moreover, forward-looking economic cost studies typically involve "a reasonable approximation of the additional cost,"[2532] rather than determining such costs "with particularity," such as by measuring labor costs with detailed time and motion studies.

1057. We find that, once a call has been delivered to the incumbent LEC end office

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[2529] *Id.*

[2530] *See supra*, Section VII.B. for a complete discussion of forward-looking economic cost-based methodology.

[2531] 47 U.S.C. § 252(d)(2)(B)(ii).

[2532] 47 U.S.C. § 252(d)(2)(A)(i).

serving the called party, the "additional cost" to the LEC of terminating a call that originates on a competing carrier's network primarily consists of the traffic-sensitive component of local switching. The network elements involved with the termination of traffic include the end-office switch and local loop. The costs of local loops and line ports associated with local switches do not vary in proportion to the number of calls terminated over these facilities.[2533] We conclude that such non-traffic sensitive costs should not be considered "additional costs" when a LEC terminates a call that originated on the network of a competing carrier. For the purposes of setting rates under section 252(d)(2), only that portion of the forward-looking, economic cost of end-office switching that is recovered on a usage-sensitive basis constitutes an "additional cost" to be recovered through termination charges.

1058. Rates for termination established pursuant to a TELRIC-based methodology may recover a reasonable allocation of common costs. A rate equal to incremental costs may not compensate carriers fully for transporting and terminating traffic when common costs are present. We therefore reject the argument by some commenters that "additional costs" may not include a reasonable allocation of forward-looking common costs. We recognize that, as noted by Time Warner, call termination is an essential element in completing calls because competitors are required to use the incumbent LECs' existing networks to terminate calls to incumbent LEC customers.[2534] The 1996 Act envisions a seamless interconnection of competing networks, rather than the development of redundant, ubiquitous networks throughout the nation. In order to terminate traffic ubiquitously to other companies' local customers, all LECs are given the right to use termination services from those companies rather than construct facilities to everyone. While, on the originating end, carriers have different options to reach their revenue-paying customers -- including their own network facilities, purchasing access to unbundled elements of the incumbent LEC, or resale -- they have no realistic alternatives for terminating traffic destined for competing carriers' subscribers other than to use those carriers' networks. Thus, all carriers -- incumbent LECs as well as competing carriers -- have a greater incentive and opportunity to charge prices in excess of economically efficient levels on the terminating end. To ensure that rates for reciprocal compensation make possible efficient competitive entry, we conclude that termination rates should include an allocation of forward-looking common costs that is no greater proportionally than that allocated to unbundled local loops, which, as discussed above, should be relatively low.[2535] Additionally, we conclude that rates for the transport and termination of traffic shall not include an element that allows incumbent LECs to recover any lost contribution to basic, local service rates represented by the interconnecting carriers' service, because such an element would be

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[2533] The duty to terminate calls that originate on the network of a competitor does not directly affect the number of calls routed to a particular end user and any costs that result from inadequate loop capacity are, therefore, not considered "additional costs."

[2534] Time Warner comments at 50.

[2535] *See supra*, Section VII.C.2.b.(1).

inconsistent with the statutory requirement that rates for transport and termination be based on additional costs.[2536] In the section addressing prices for unbundled elements we conclude that the ECPR, which would allow incumbent LECs to recover such lost contributions, or collection of universal service costs through interconnection rates, leads to significant distortions in markets when existing retail prices are not cost-based.[2537]

1059. We also address the impact on small incumbent LECs. For example, the Western Alliance argues that it is especially important for small LECs to recover lost contributions and common costs through termination charges. We have considered the economic impact of our rules in this section on small incumbent LECs. For example, we conclude that termination rates for all LECs should include an allocation of forward-looking common costs, but find that the inclusion of an element for the recovery of lost contribution may lead to significant distortions in local exchange markets. We also note that certain small incumbent LECs are not subject to our rules under section 251(f)(1) of the 1996 Act, unless otherwise determined by a state commission, and certain other small incumbent LECs may seek relief from their state commissions from our rules under section 251(f)(2) of the 1996 Act.

(4) Default Proxies

1060. As with unbundled network elements, we recognize that it may not be feasible for some state commissions conducting or reviewing economic studies to establish transport and termination rates using our TELRIC-based pricing methodology within the time required for the arbitration process, particularly given some states' resource limitations. Thus, for the time being, we adopt a default price range of 0.2 cents ($0.002) to 0.4 cents ($0.004) per minute of use for calls handed off at the end-office switch. This default price range is based on the same proxies that apply to local switching as an unbundled network element. In establishing end-office termination rates, states may adopt a default termination price that is within our default price range or at either of the end points of the range. States should articulate the basis for selecting a particular price within this range. Thus, in arbitration proceedings, states must set the price for end office termination of traffic by: (1) using a forward-looking, economic cost study that complies with the forward-looking, economic-cost methodology set forth above; or (2) adopting a price less than or equal to 0.4 cents ($0.004) per minute, and greater than or equal to 0.2 cents ($0.002) per minute, pending the completion of such a forward-looking, economic cost study. We observe that the most credible studies in the record before us fall at the lower end of this range, and we encourage states to consider such evidence in their analysis. The adoption of a range of rates to serve as a default price range for interconnection agreements being arbitrated by the states provides carriers with a clearer understanding of the terms and conditions that will

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[2536] *See* 47 U.S.C. § 252(d)(2).

[2537] *See supra*, Section VII.B.2.b. for a discussion of the effect application of the ECPR would have on the market for local exchange service.

govern them if they fail to reach an agreement and helps to reduce the transaction costs of arbitration and litigation. We also find that states that have already adopted end-office termination rates based on an approach other than a full forward-looking cost study, either through arbitration or rulemaking proceedings, may keep such rates in effect, pending their review of a forward-looking cost study, as long as they do not exceed 0.5 cents ($0.005) per minute. As discussed below, a state may also order a "bill and keep" arrangement subject to certain limitations. Additionally, our adoption of a default price range temporarily relieves small and mid-sized carriers from the burden of conducting forward-looking economic cost studies.[2538]

1061. Similarly, in establishing transport rates under sections 251(b)(5) and 252(d)(2), state commissions should be guided by the price proxies that we are establishing for unbundled transport elements discussed above.[2539] States should explain the basis for selecting a particular default price subject to the applicable ceiling. Specifically, when interconnecting carriers hand off traffic at an incumbent LEC's tandem switch (or equivalent facilities of a carrier other than an incumbent LEC), the rates for the tandem switching and transmission from the tandem switch to end offices -- a portion of the "transport" component of transport and termination rates -- should be subject to the proxies that apply to the analogous unbundled network elements. Thus, for the time being, when states set rates for tandem switching under section 252(d)(2), they may set a default price at or below the default price ceiling that applies to the tandem switching unbundled element as an alternative to reviewing a forward-looking economic cost study using our TELRIC methodology.[2540] Similarly, when states set rates for transmission facilities between tandem switches and end offices, they may establish rates equal to the default prices we are adopting for such transmission, as discussed above in the section on unbundled elements.[2541]

1062. Finally, in establishing the rates for transmission facilities that are dedicated to the transmission of traffic between two networks, state commissions should be guided by the default price level we are adopting for the unbundled element of dedicated transport.[2542] For such dedicated transport, we can envision several scenarios involving a local carrier that provides transmission facilities (the "providing carrier") and another local carrier with which it interconnects (the "interconnecting carrier"). The amount an interconnecting carrier pays for dedicated transport is to be proportional to its relative use of the dedicated facility. For example, if the providing carrier provides one-way trunks that the interconnecting carrier uses exclusively for sending terminating traffic to the providing carrier, then the interconnecting carrier is to pay the

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[2538] *See* Regulatory Flexibility Act, 5 U.S.C. §§ 601 et seq.

[2539] *See supra*, Section VII.C.2.b.(3).

[2540] *Id.*

[2541] *Id.*

[2542] *Id.*

providing carrier a rate that recovers the full forward-looking economic cost of those trunks. The interconnecting carrier, however, should not be required to pay the providing carrier for one-way trunks in the opposite direction, which the providing carrier owns and uses to send its own traffic to the interconnecting carrier. Under an alternative scenario, if the providing carrier provides two-way trunks between its network and the interconnecting carrier's network, then the interconnecting carrier should not have to pay the providing carrier a rate that recovers the full cost of those trunks. These two-way trunks are used by the providing carrier to send terminating traffic to the interconnecting carrier, as well as by the interconnecting carrier to send terminating traffic to the providing carrier. Rather, the interconnecting carrier shall pay the providing carrier a rate that reflects only the proportion of the trunk capacity that the interconnecting carrier uses to send terminating traffic to the providing carrier. This proportion may be measured either based on the total flow of traffic over the trunks, or based on the flow of traffic during peak periods.[2543] Carriers operating under arrangements which do not comport with the principles we have set forth above, shall be entitled to convert such arrangements so that each carrier is only paying for the transport of traffic it originates, as of the effective date of this order.

(5) Rate Structure

1063. Nearly all commenters agree that flat rates, rather than usage-sensitive rates, should apply to the purchase of dedicated facilities. As discussed in the NPRM, economic efficiency may generally be maximized when non-traffic sensitive services, such as the use of dedicated facilities for the transport of traffic, are priced on a flat-rated basis.[2544] We, therefore, require all interconnecting parties to be offered the option of purchasing dedicated facilities, for the transport of traffic, on a flat-rated basis. As discussed by Lincoln Telephone, the connection between an incumbent LEC's end or tandem office and an interconnecting LEC's network is likely to be a dedicated facility. We recognize that the facility itself can be provided in a number of different ways -- by use of two service providers, by the other carrier, or jointly in a meet-point arrangement. We conclude first that, no matter what the specific arrangements, these costs should be recovered in a cost-causative manner and that usage-based charges should be limited to situations where costs are usage sensitive. In cases going to arbitration and in reviewing BOC statements of terms and conditions, the carrier actually providing the facility should presumptively be entitled to a rate that is set based on the forward-looking economic cost of providing the portion of the facility that is used for terminating traffic that originates on the network of a competing carrier. We recognize that negotiated agreements may incorporate flat-rated charges when it is efficient to do so and find that the presence of the arbitration default rule is likely to lead parties to negotiate efficient rate structures.

1064. We recognize that the costs of transporting and terminating traffic during peak and

[2543] *See infra*, Section XI.A.3.c.(5).

[2544] NPRM at para. 150.

off-peak hours may not be the same. As suggested by the Massachusetts Attorney General, rates that are the same during peak and off-peak hours may not reflect the cost of using the network and could lead to inefficient use of the network. The differences in the cost of transporting and terminating traffic during peak and off-peak hours, however, are likely to vary depending on the network, and the amount and type of traffic terminated at a particular switch. For example, peak periods may vary within a local service area depending upon whether the switch is located in a business or residential area. As a result, there may be administrative difficulties in establishing peak-load pricing schemes that may outweigh the benefits of such schemes. The negotiating parties, however, are likely to be in a position to more accurately determine how traffic patterns will adjust to peak-load pricing schemes and we encourage parties to address such pricing schemes in the negotiation process. For similar reasons, we neither require nor forbid states from adopting rates that reflect peak and off-peak costs. We hope some states will evaluate the benefits and costs of pricing schemes that consist of different rates for peak and off-peak traffic. We do require, however, that peak-load pricing schemes, adopted through the arbitration process, comply with our default price level if not based on a forward-looking cost study (*e.g.*, the average rate, weighted by the projected relative minutes of use during peak and off-peak periods, should fall within our default price range of 0.2 to 0.4 cents or the level determined by an incremental cost study).

(6) Interim Transport and Termination Rate Levels

1065. We are concerned that some new entrants that do not already have interconnection arrangements with incumbent LECs may face delays in initiating service solely because of the need to negotiate transport and termination arrangements with the incumbent LEC. In particular, a new entrant that has already constructed facilities may have a relatively weak bargaining position because it may be forced to choose either to accept transport and termination rates not in accord with these rules or to delay its commencement of service until the conclusion of the arbitration and state approval process. To promote the Act's goal of rapid competition in the local exchange, we order incumbent LECs upon request from new entrants to provide transport and termination of traffic, on an interim basis, pending resolution of negotiation and arbitration regarding transport and termination prices, and approval by the state commission. A carrier may take advantage of this interim arrangement only after it has requested negotiation with the incumbent LEC. The interim arrangement shall cease to be in effect when one of the following occurs: (1) an agreement has been negotiated and approved; (2) an agreement has been arbitrated and approved; or (3) the period for requesting arbitration has passed with no such request. We also conclude that interim prices for transport and termination shall be symmetrical. Because the purpose of this interim termination requirement is to permit parties without existing interconnection agreements to enter the market expeditiously, this requirement shall not apply with respect to requesting carriers that have existing interconnection arrangements that provide for termination of local traffic by the incumbent LEC. The ability to interconnect with an incumbent LEC prior to the completion of a forward-looking, economic cost study, based on an interim presumptive price ceiling, allows carriers, including small entrants, to enter into local exchange

service expeditiously.[2545]

1066. In states that have already conducted or reviewed forward-looking economic cost studies and promulgated transport and termination rates based on such studies, an incumbent LEC receiving a request for interim transport and termination shall use these state-determined rates as interim transport and termination rates. In states that have not conducted or reviewed a forward-looking economic cost study, but have set rates for transport and termination of traffic consistent with the default price ranges and ceilings discussed above, an incumbent LEC shall use these state-determined rates as interim rates.[2546] In states that have neither set rates consistent with the default price ceilings and ranges nor reviewed or conducted forward-looking economic cost studies, we must establish an interim default price in order to facilitate rapid competition in the local exchange market. In those states, an incumbent LEC shall set interim rates at the default ceilings for end-office switching (0.4 cents per minute of use), tandem switching (0.15 cents per minute of use), and transport described above.[2547] Using the ceiling as a default interim price, pending a state commission's completion of a forward-looking economic cost analysis, should ensure that both the incumbent LEC and the competing provider recovers no less than their full transport and termination costs. We note, however, that the most credible evidence in the record suggests that the actual forward-looking economic cost of end-office switching is closer to 0.2 cents ($0.002) per minute of use than the ceiling of 0.4 cents ($0.004) per minute of use.[2548] States must adopt "true-up" mechanisms to ensure that no carrier is disadvantaged by an interim rate that differs from the final rate established pursuant to arbitration.

1067. We conclude that section 251, in conjunction with our broad rulemaking authority under section 4(i), provides us with authority to create interim pricing rules to facilitate market entry. Because section 251(d)(1) gives the FCC authority "to establish regulations to implement the requirements of this section," we find that section 251(d)(1) gives the Commission authority to establish interim regulations that address the "just and reasonable" rates for the "reciprocal compensation" requirement of section 251(b)(5), subject to the preservation requirements of section 251(d)(3). Courts have upheld our adoption of interim compensation arrangements pursuant to our authority under section 4(i) of the 1934 Communications Act on numerous occasions in the past.[2549] In particular, we have authority, under section 4(i), to set interim rates

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[2545] *See* Regulatory Flexibility Act, 5 U.S.C. §§ 601 et seq.

[2546] *See supra*, Section XI.A.3.c.(4).

[2547] *Id.*

[2548] *See supra*, Section XI.A.3.c.(4).

[2549] *See New England Tel. and Tel. Co. v. FCC*, 826 F.2d 1101 (D.C. Cir 1987); *North American Telecommunications Association v. FCC*, 772 F.2d 1092 (7th Cir. 1085); *Lincoln Tel. and Tel. Co. v. FCC*, 659 F.2d (D.C. Cir. 1989).

subject to a later "true-up" when final rates are established.[2550] We therefore conclude that the default prices discussed above need not in all instances await the conclusion of the negotiation, arbitration, and state approval process set forth in section 252, but must nevertheless be in accordance with the requirements of section 251(d)(3) preserving state access regulations. We also observe that we proposed a similar interim transport and termination arrangement, albeit with different rate levels, in our NPRM in the *LEC-CMRS Interconnection* proceeding.[2551]

1068. We have considered the economic impact of our rules in this section on small incumbent LECs. For example, Cincinnati Bell asserts that interim mechanisms are not required because large corporations are not disadvantaged by unequal bargaining power in negotiations with small and mid-size incumbent LECs. We do not adopt Cincinnati Bell's position because some new entrants, regardless of their size, that do not already have interconnection arrangements with incumbent LECs may face delays in initiating service solely because of the need to negotiate transport and termination arrangements with the incumbent LEC. We believe that the adoption of interim rates, subject to a "true-up," advances the pro-competitive goals of the statute. We also note that certain small incumbent LECs are not subject to our rules under section 251(f)(1) of the 1996 Act, unless otherwise determined by a state commission, and certain other small incumbent LECs may seek relief from their state commissions from our rules under section 251(f)(2) of the 1996 Act.

4. Symmetry

a. Background

1069. Symmetrical compensation arrangements are those in which the rate paid by an incumbent LEC to another telecommunications carrier for transport and termination of traffic originated by the incumbent LEC is the same as the rate the incumbent LEC charges to transport and terminate traffic originated by the other telecommunications carrier. Incumbent LECs are not likely to purchase interconnection or unbundled elements from competitive LECs, except for termination of traffic, and possibly transport.[2552] In the NPRM, we sought comment on whether

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[2550] "[T]he Commission's establishment of an interim billing and collection arrangement was both a helpful and necessary step for the Commission to take in implementing its 'immediate' interconnection order." *Lincoln Telephone & Telegraph Co. v. FCC*, 659 F.2d 1092, 1107 (D.C.Cir.1981) (upholding Commission decision requiring an incumbent LEC to interconnect with MCI immediately, in order not to delay interconnection, at interim rates subject to later adjustment); *see also FTC Communications v. FCC*, 750 F.2d 226 (2d Cir.1984) (affirming Commission's authority under Section 4(i) to set interim rates for interconnection between the domestic record carrier, Western Union, and international record carriers, subject to an accounting order, pending the conclusion of a rulemaking to set permanent rates replacing expired, contract-based rates).

[2551] *LEC-CMRS Interconnection NPRM* at para. 60.

[2552] NPRM at para. 235.

rate symmetry requirements are consistent with the statutory requirement that rates set by states for transport and termination of traffic be based on "costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier," and "a reasonable approximation of the additional costs of terminating such calls."[2553]

1070. In addition, we noted in the NPRM that the Illinois, Maryland, and New York commissions have established different rates for termination of traffic on an incumbent LEC's network, depending upon whether the traffic is handed off at the incumbent LEC's end office or tandem switch.[2554] We also observed that California and Michigan have established one rate that applies to transport and termination of all competing local exchange carrier traffic on incumbent LEC networks, regardless of whether the traffic is handed off at the incumbent LEC's end office or tandem switch, although this rate does not currently apply to CMRS.[2555] We, therefore, address whether rates for transport and termination should be symmetrical and consist of only a single rate regardless of where the call is handed off, or if rates should be priced on an element-by-element basis.

1071. In the *LEC-CMRS Interconnection NPRM*, we sought comment on whether incumbent LECs were utilizing their greater bargaining power to negotiate with wireless carriers interconnection agreements that did not reflect principles of mutual compensation. We sought comment on whether we should institute some procedure or mechanism in addition to our section 208 enforcement process to ensure that incumbent LECs comply with our existing rules requiring mutual compensation.[2556]

b. Comments

1072. *Local Competition NPRM.* Incumbent LECs argue that a symmetrical reciprocal compensation requirement does not comport with the Act.[2557] GTE contends that the symmetry rule violates the requirement of section 252(d)(2) that rates be based on a reasonable estimate of the additional costs of transport and termination.[2558] In addition, Lincoln Telephone argues that rates for the transport and termination of traffic should not be symmetrical because small and

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[2553] 47 U.S.C. § 252(d)(2).

[2554] NPRM at para. 239.

[2555] *Id.*

[2556] *LEC-CMRS Interconnection NPRM*, para. 81.

[2557] *See, e.g.*, BellSouth comments at 72-73; SBC comments at 51-52; GTE reply at 29.

[2558] GTE reply at 29.

mid-sized companies can incur higher costs transporting and terminating traffic than larger carriers.[2559] TDS argues that a symmetrical pricing standard fails to fulfill the basic statutory directive that each carrier recover its costs.[2560] BellSouth contends that, because the costs of an incumbent LEC and new entrant are likely to be quite different, the Commission does not have the authority to contravene the mutual and reciprocal recovery language of section 252(d)(2) and require symmetry.[2561] Furthermore, MECA, which represents Michigan exchange carriers, asserts that competing LECs should be required to compensate each other for terminating traffic at a cost-based rate for each carrier.[2562] MECA argues that compensation rates cannot be uniform because each carrier has its own unique cost structure.[2563] RTC also asserts that proposals such as symmetry do not consider the costs involved in the use of another's carriers network.[2564]

1073. On the other hand, state commissions, as well as several other commenters, support symmetrical reciprocal compensation mechanisms.[2565] Several commenters contend that symmetrical rates are mutual and reciprocal, and therefore only symmetrical rates can satisfy the statutory standards required under section 252(d)(2).[2566] MFS notes that Congress required that compensation rates be "mutual and reciprocal" and based on a "reasonable approximation of additional costs," and expressly prohibited any requirement of actual cost studies.[2567] According to MFS "these interrelated provisions indicate Congress's intention that optimal economic costs, rather than actual or historical costs, should be used in setting these rates."[2568] MFS also argues that, while actual costs may vary from one carrier to the next, the optimal economic cost of performing the transport and termination function is the same for all carriers operating within the

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[2559] Lincoln Tel. reply at 11-12.

[2560] TDS comments at 23.

[2561] BellSouth comments at 72-73.

[2562] MECA comments at 67.

[2563] *Id.*; *see also* Lincoln Tel. reply at 11.

[2564] RTC comments at 23.

[2565] *See, e.g.*, Alabama Commission comments at 32; AT&T comments at 69; Louisiana Commission comments at 7-8; Mass. Commission comments at 13; MCI comments at 50.

[2566] MFS comments at 82-83; GST comments at 40-42; *see also* Texas Public Utility Counsel comments at 52-54 (arguing that symmetrical rates are consistent with the Act as long as rates are based on TSLRIC).

[2567] MFS comments at 82.

[2568] *Id.*

same geographic area.[2569] Therefore, it asserts that *"[o]nly* symmetrical rates are 'mutual and reciprocal,' and only such rates are consistent with the provisions of Sec. 252(d)(2)."[2570]

1074. Several potential new entrants believe that requiring symmetrical reciprocal compensation is needed to ensure efficient competition.[2571] MCI argues that the reciprocal compensation will be of much greater importance to competing carriers than to incumbent LECs because initially calls terminating on other carriers' networks will account for a far greater share of entrants' traffic than is the case for incumbent LECs, which will still be terminating most of their local traffic on their own networks.[2572] Therefore, MCI asserts that the compensation rate charged for transport and termination will comprise a significant portion of the competing carrier's overall cost of providing service.[2573] MCI argues that incumbent LECs have every reason to attempt to use their superior bargaining position in negotiations to obtain termination rates that are as high as possible, and asserts that a symmetrical compensation rate will reduce the incentive of incumbent LECs to inflate their termination rates.[2574] In addition, MFS asserts that asymmetrical rates burden new entrants because incumbent LECs have greater bargaining power and access to information.[2575] The Alabama Commission contends that equal rates eliminate incumbent LECs' ability to exploit the system.[2576]

1075. Some prospective local entrants contend that requiring symmetrical reciprocal compensation arrangements will lead to economically efficient outcomes.[2577] MFS contends that setting symmetrical rates based on the cost of optimal technology gives all carriers an incentive to use the most efficient network design in order to reduce costs.[2578] Further, GST argues that the long-term efficient cost of transporting and terminating traffic should be identical for all

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[2569] *Id.*; *see also* Texas Public Utility Counsel comments at 52-54 (arguing that symmetrical rates based on TSLRIC should not vary much across companies).

[2570] MFS comments at 82 (emphasis in original); *see also* WinStar comments at 24-26; GST comments at 40-42.

[2571] *See, e.g.*, MCI comments at 50-51; MFS comments at 82-84.

[2572] MCI comments at 49-50.

[2573] *Id.*

[2574] *Id.*

[2575] MFS comments at 83.

[2576] Alabama Commission comments at 32.

[2577] *See, e.g.*, MFS comments at 83-84; WinStar comments at 26.

[2578] MFS comments at 84.

providers, based upon their adoption of the most efficient technology, even if their short-term costs based upon today's technology are different.[2579] WinStar argues that asymmetrical cost-based compensation would penalize new entrants for deploying state-of-the-art technology. According to WinStar, such a system would require new entrants to absorb the costs of the incumbent LECs' less efficient networks by paying higher termination rates, while entrants would be required to pass cost savings from their more efficient networks to the less efficient incumbent LECs by charging lower terminations rates.[2580] WinStar asserts that incumbent LECs have no incentive to increase the efficiency of their own operations as long as they remain free to recover the costs of terminating traffic through higher termination rates than those of their competitors.[2581]

1076. Many state commissions and potential new entrants contend that symmetrical rates should be based on the incumbent LEC's costs. AT&T argues that such an approach provides carriers with the proper incentives to minimize costs and has the added benefit of being administratively manageable, given that incumbent LECs will already be performing TSLRIC studies.[2582] In addition, the Massachusetts Commission notes that entrants may not have the expertise or ability to calculate costs for specific services, and supports use of the incumbent LECs' costs to calculate reciprocal compensation rates. The Alabama Commission asserts, however, that reciprocal compensation rates should be set equal to the transport and termination rates charged by entrants.[2583] Noting that some new entrants may have higher costs than incumbent LECs, several commenters argue that, while reciprocal compensation generally should be symmetrical based on incumbent LECs' costs, new entrants should be able to prove their costs are higher than the incumbent LECs' rates.[2584] Lincoln Telephone, on the other hand, opposes a symmetry requirement because it "achieves expediency at the expense of economic efficiency, thereby eliminating some of the benefits of competition under the Act."[2585]

1077. Several commenters, including many states, contend that this issue should be left to the states or parties to decide.[2586] The California Commission suggests that symmetry should be

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[2579] GST comments at 35-38.

[2580] WinStar comments at 26.

[2581] *Id.*

[2582] AT&T comments at 69; *see also* Texas Public Utility Counsel comments at 52-54.

[2583] Alabama Commission comments at 32.

[2584] *See, e.g.*, Mass. Commission comments at 13; Sprint comments at 83.

[2585] Lincoln Tel. comments at 22.

[2586] *See, e.g.*, Ohio Commission comments at 73-75; Illinois Commission comments at 79-80; Pennsylvania Commission comments at 40; Ohio Consumers' Counsel reply at 24.

encouraged by the Commission but not mandated.[2587] NYNEX claims that, although the statute does not require symmetrical rates, parties may agree to such a scheme in a negotiated agreement.[2588]

1078. Certain commenters argue that any symmetry requirement should only apply to separate rate elements. The Ohio Commission supports symmetrical rates on a rate element-by-rate element basis (*e.g.*, local switching rate element, local transport rate element).[2589] For example, the Ohio Commission would not endorse symmetrical rates for transport and termination where a new entrant requests interconnection with an incumbent LEC's tandem office, and the new entrant does not have tandem capabilities.[2590] In that case, terminating a call on the new entrant's network typically would involve only the use of local switching and local transport between the interconnection point and the LEC's switch. In contrast, terminating a call on the incumbent LEC's network often is likely to involve the use of the incumbent LEC's tandem switch in addition to the local switch and the transport between the two switching offices.[2591] Bell Atlantic argues that the reciprocal compensation rate for calls delivered to an access tandem for which the terminating carrier will incur the cost of tandem switching and transport should be allowed to be higher than rates for calls delivered to an end office, which do not incur those additional costs.[2592]

1079. MFS opposes a two-tier termination rate structure under which one rate applies for traffic routed through an incumbent LEC's tandem switch, and a lower rate applies to traffic directly trunked to an incumbent LEC's end office. MFS asserts that these rate structures are inherently non-reciprocal because non-incumbent LECs typically do not operate separate tandem and end-office hierarchies.[2593] Time Warner argues that transport and termination based on incumbent LECs' historical choices of network architecture penalizes new LECs that deploy different architectures, even when that architecture is more efficient.[2594] TCI argues that higher charges for routing calls through tandem switches rather than directly through the incumbent LEC's end offices will discourage carriers from routing traffic through tandem switches, even

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[2587] California Commission comments at 44.

[2588] NYNEX reply at 43-44.

[2589] Ohio Commission comments at 73-75

[2590] *Id.* at 73-74.

[2591] *Id.*

[2592] Bell Atlantic comments at 43.

[2593] MFS comments at 77-78; *see also* NCTA reply at 14-15.

[2594] Time Warner comments at 87-88; *see also* Continental comments at 13-14; Winstar comments at 26.

when it is efficient to do so.[2595]

1080. *LEC-CMRS Interconnection NPRM.* Many CMRS providers contend that they are unable to negotiate interconnection arrangements based on mutual or reciprocal compensation because of incumbent LEC bargaining power.[2596] In its reply comments, Omnipoint asserts that many interconnection agreements across the CMRS industry reflect a general incumbent LEC unwillingness to provide reciprocal compensation.[2597] SBC argues, however, that CMRS providers have significant bargaining power and numerous options for interconnection.[2598] Ameritech states that it continues to fulfill the principles of mutual compensation in all of its CMRS compensation arrangements.[2599]

1081. Although the incumbent LECs generally contend that good faith negotiations are working well,[2600] most CMRS providers comment that the negotiation process works poorly.[2601] According to AT&T, the problem of achieving mutual compensation is further compounded because incumbent LECs not only charge rates that bear no relationship to their costs but also refuse to compensate CMRS providers for termination of landline-originated calls.[2602] In many instances, incumbent LECs even charge CMRS providers for terminating incumbent LEC-originated calls.[2603] GTE, however, states that it does not charge CMRS providers for land-to-

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[2595] TCI comments at 28.

[2596] *See, e.g.*, Nextel comments in CC Docket No. 95-185 at 5; Tracer reply in CC Docket No. 95-185 at 8; Vanguard comments in CC Docket No. 95-185 at 6; *see also* CTIA comments in CC Docket No. 95-185 at 8.

[2597] Omnipoint reply in CC Docket No. 95-185 at 3-7; *see also* RCC comments in CC Docket No. 95-185 at 5; 360 Degrees comments in CC Docket No. 95-185 at 3; Western Wireless comments in CC Docket No. 95-185 at 13.

[2598] SBC comments in CC Docket No. 95-185 at 13.

[2599] Ameritech comments in CC Docket No. 95-185 at 4.

[2600] *See, e.g.*, GTE comments in CC Docket No. 95-185 at 18; Ameritech comments in CC Docket No. 95-185 at 4.

[2601] *See, e.g.*, APC/Sprint Joint comments in CC Docket No. 95-185 at 11; PCIA reply in CC Docket No. 95-185 at 6-8; *see also* Cox comments in CC Docket No. 95-185 at 12-16; AT&T reply in CC Docket No. 95-185 at 4-8.

[2602] AT&T comments in CC Docket No. 95-185 at 8; *see also* Western Wireless comments in CC Docket No. 95-185 at 13; New Par comments in CC Docket No. 95-185 at 5.

[2603] *See, e.g.*, Arch comments in CC Docket No. 95-185 at 3; Centennial comments in CC Docket No. 95-185 at 9; Century comments in CC Docket No. 95-185 at 4; CMT comments in CC Docket No. 95-185 at 4; Nextel comments in CC Docket No. 95-185 at 5.

mobile traffic.[2604] California has rejected the principle of mutual compensation for interconnection, reasoning that such a policy would lead to a calling-party-pays system, which in turn could lead to an increase in the cost of basic telephone service.[2605] CMRS providers report that they receive mutual compensation from only a handful of the incumbent LECs with which they interconnect.[2606]

1082. CMRS providers generally agree that many interconnection arrangements result in unjust, unreasonable and discriminatory interconnection rates, terms and conditions.[2607] According to Cox, the average incremental cost of call termination, expressed on a per minute basis is .20 cents, but the average charge for cellular interconnection is currently 3 cents per minute.[2608] Similarly, Comcast states that the aggregate charge it pays Bell Atlantic for call termination is 2.5 cents per minute, or 12.5 times the average incremental cost of 0.2 cents.[2609] In contrast, the incumbent LECs assert that incumbent LEC interconnection rates have provided for reasonable charges.[2610] A few incumbent LECs also point to the lack of interconnection rate complaints filed in their respective regions as evidence of reasonable rates.[2611] Cox responds that "the fact that few complaints have been filed does not lead to the conclusion that existing agreements are reasonable, let alone that they promote competition."[2612] U S West contends that, until the local rate subsidy issue is addressed, reform in CMRS interconnection charges will not come to fruition.[2613]

[2604] GTE comments in CC Docket No. 95-185 at 19-20.

[2605] California Commission comments in CC Docket No. 95-185 at 6.

[2606] *See, e.g.*, Bell Atlantic/NYNEX Mobile comments in CC Docket No. 95-185 at 4-5.

[2607] *See, e.g.*, Comcast comments in CC Docket No. 95-185 at 4; Vanguard comments in CC Docket No. 95-185 at 7.

[2608] Cox comments in CC Docket No. 95-185 at 13.

[2609] Comcast comments in CC Docket No. 95-185 at 5-6.

[2610] *See, e.g.*, Pacific Bell reply in CC Docket No. 95-185 at 16-27; U S West comments in Docket 95-185 at 6-8.

[2611] *See, e.g.*, Bell Atlantic comments in CC Docket No. 95-185 at 9-11; NYNEX comments in CC Docket No. 95-185 at 13-15, 22-23; Ameritech comments in CC Docket No. 95-185 at 4; USTA comments in CC Docket No. 95-185 at 7.

[2612] Cox reply in CC Docket No. 95-185 at 6; *see also* New Par reply in CC Docket No. 95-185 at 7; PageNet reply CC Docket No. 95-185 at 5-7.

[2613] US West reply in CC Docket No. 95-185 at 5. US West alleges that access and local interconnection must be priced above cost to provide a subsidy to local residential services that remain priced below cost.

1083. The incumbent LECs further assert that, aside from anecdotal commentary, CMRS providers submit no evidence that their market entry or growth has been impeded by state or incumbent LEC action with respect to interconnection.[2614] The incumbent LECs argue that CMRS is developing rapidly under existing compensation arrangements and therefore current interconnection policies apparently do not pose a barrier to CMRS competition.[2615] U S West contends that CMRS providers have benefitted from negotiations that have resulted in declining interconnection charges as well as added flexibility with the introduction of calling-party-pays and wide area calling options.[2616] Many CMRS providers contend, however, that the industry may have grown faster had it not been impeded by unreasonable interconnection rates.[2617] Some incumbent LECs also point out that interconnection charges only represent a small percentage of a CMRS provider's total operating costs.[2618] But according to Airtouch, interconnection charges represent a growing proportion of CMRS costs.[2619]

1084. According to most paging companies, incumbent LEC abuses are especially acute for narrowband CMRS providers.[2620] Because virtually 100 percent of paging calls are originated on incumbent LEC networks and terminated on CMRS networks, incumbent LEC abuses, it is argued, present a formidable barrier to entry in the CMRS marketplace.[2621] Most paging carriers allege that incumbent LECs charge narrowband CMRS providers for terminating LEC-originated calls on the paging network but do not compensate narrowband CMRS providers for terminating incumbent LEC originated traffic.[2622] Many narrowband CMRS providers also allege discrimination because the charges assessed to paging companies for connection to the landline network are different from the charges assessed on other CMRS providers, and that many of these

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[2614] *See, e.g.*, NYNEX reply in CC Docket No. 95-185 at 4; Pacific Bell reply in CC Docket No. 95-185 at 13-16.

[2615] *See, e.g.*, USTA reply in CC Docket No. 95-185 at 2-5.

[2616] US West comments in CC Docket No. 95-185 at 7-12.

[2617] *See, e.g.*, Vanguard reply in CC Docket No. 95-185 at 9; PageNet reply in CC Docket No. 95-185 at 7.

[2618] US West CC Docket No. 95-185 comments at 16; USTA reply in CC Docket No. 95-185 at 4-5. SBC estimates that interconnection charges represent 5.5 to 7 percent of a CMRS provider's total operating costs. SBC reply in CC Docket No. 95-185 at 18.

[2619] *See, e.g.*, Airtouch reply in CC Docket No. 95-185 at 10-13.

[2620] *See, e.g.*, Airtouch comments in CC Docket No. 95-185 at 59.

[2621] *See* Celpage comment in CC Docket No. 95-185 at 6.

[2622] *See e.g.*, Arch comments in CC Docket No. 95-185 at 6; Celpage comments in CC Docket No. 95-185 at 6.

interconnection charges are not substantiated with adequate cost data.[2623]

c. Discussion

(1) Symmetry In General

1085. Regardless of whether the incumbent LEC's transport and termination prices are set using a TELRIC-based economic cost study or a default proxy, we conclude that it is reasonable to adopt the incumbent LEC's transport and termination prices as a presumptive proxy for other telecommunications carriers' additional costs of transport and termination. Both the incumbent LEC and the interconnecting carriers usually will be providing service in the same geographic area, so the forward-looking economic costs should be similar in most cases. We also conclude that using the incumbent LEC's forward-looking costs for transport and termination of traffic as a proxy for the costs incurred by interconnecting carriers satisfies the requirement of section 252(d)(2) that costs be determined "on the basis of a reasonable approximation of the additional costs of terminating such calls." Using the incumbent LEC's cost studies as proxies for reciprocal compensation is consistent with section 252(d)(2)(B)(ii), which prohibits "establishing with particularity the additional costs of transporting or terminating calls."[2624] If both parties are incumbent LECs (*e.g.*, an independent LEC and an adjacent BOC), we conclude that the larger LEC's forward-looking costs should be used to establish the symmetrical rate for transport and termination. We conclude that larger LECs are generally in a better position to conduct a forward-looking economic cost study than smaller carriers.

1086. We conclude that imposing symmetrical rates based on the incumbent LEC's additional forward-looking costs will not substantially reduce carriers' incentives to minimize those costs. A symmetric compensation rule gives the competing carriers correct incentives to minimize its own costs of termination because its termination revenues do not vary directly with changes in its own costs. Moreover, symmetrical rates based on the incumbent LEC's costs should not seriously affect incumbent LECs' incentives to control costs. We expect that incumbent LECs will transport and terminate much more traffic that originates on their own networks than traffic that originates on competing carriers' networks. Even if, under the additional cost standard, incumbent LECs were required to reflect any improvements in operating efficiency, and consequent cost reductions, in reduced termination rates, the cost savings realized by the incumbent LEC are likely to be much greater than its reduction in net termination revenues, because the majority of traffic transported and terminated is likely to be its own. Even if a pass-through of incumbent LEC's cost reductions were instantaneous and complete, the number of minutes of use on which an incumbent LEC's net termination revenues is assessed is much smaller than its overall number of minutes of switching and transport. Moreover, if a

[2623] *See, e.g.*, Arch comments in CC Docket No. 95-185 at 23-25.

[2624] 47 U.S.C. §252(d)(2)(B)(ii).

portion of the reduction in costs is specific to exchange traffic, under symmetrical rates, the LEC's revenues from terminating traffic originating from another local carrier are based on the net difference in traffic, which is likely to be much smaller than the total traffic it terminates.[2625] For example, in the case where traffic is balanced, net termination charges are zero, a figure that is unaffected by changes in the incumbent LEC's costs, and the incumbent LEC is provided with correct incentives to minimize termination costs.

1087. We also find that symmetrical rates may reduce an incumbent LEC's ability to use its bargaining strength to negotiate excessively high termination charges that competitors would pay the incumbent LEC and excessively low termination rates that the incumbent LEC would pay interconnecting carriers. As discussed by commenters in the *LEC-CMRS Interconnection* proceeding, LECs have used their unequal bargaining position to impose asymmetrical rates for CMRS providers and, in some instances, have charged CMRS providers origination as well as termination charges.[2626] On the other hand, symmetrical rates largely eliminate such advantages because they require incumbent LECs, as well as competing carriers, to pay the same rate for reciprocal compensation.

1088. Symmetrical compensation rates are also administratively easier to derive and manage than asymmetrical rates based on the costs of each of the respective carriers. In addition, we believe that using the incumbent LEC's cost studies to establish the presumptive symmetrical rates will establish reasonable opportunities for local competition, including opportunities for small telecommunications companies entering the local exchange market.[2627] We have considered the economic impact of our rules in this section on small incumbent LECs. For example, RTC argues that symmetrical rates do not consider the costs involved in the use of another carrier's network. We find, however, that incumbent LECs' costs, including small incumbent LECs' costs, serve as reasonable proxies for other carriers' costs of transport and termination for the purpose of reciprocal compensation. We also note that certain small incumbent LECs are not subject to our rules under section 251(f)(1) of the 1996 Act, unless otherwise determined by a state

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[2625] Consider a situation approximating traditional LEC-CMRS interconnection, in which traffic flows are substantially unbalanced: let us suppose, of 1,000,000 minutes of use, 750,000 are CMRS-to-LEC and 250,000 LEC-to-CMRS. Thus, under symmetric compensation at 0.3 cents per minute, the LEC receives 0.3 cents times 500,000, or $1,500.00. If it reduced its per-minute cost, for some reason only on terminating CMRS-to-LEC traffic, to 0.2 cents per minute, it would save 0.1 cent times 750,000, or $750.00, in reduced costs, whereas its terminating revenues would fall by only 0.1 cent times 500,000, or $500.00. Thus, it would still have substantial incentive to make the cost reduction in question. In situations closer to traffic balance, the incentive is even more favorable. And, of course, the LEC probably also reduces its cost of switching on many millions of other minutes that do not involve other networks at the same time.

[2626] *See, e.g.*, Century Comments in CC Docket No. 95-184 at 4; Western Wireless Comments in CC Docket No. 95-185 at 14.

[2627] *See* Regulatory Flexibility Act, 5 U.S.C. §§ 601 et seq.

commission, and certain other small incumbent LECs may seek relief from their state commissions from our rules under section 251(f)(2) of the 1996 Act. In addition, symmetry will avoid the need for small businesses to conduct forward-looking economic cost studies in order for the states to arbitrate reciprocal compensation disputes.[2628]

1089. Given the advantages of symmetrical rates, we direct states to establish presumptive symmetrical rates based on the incumbent LEC's costs for transport and termination of traffic when arbitrating disputes under section 252(d)(2) and in reviewing BOC statements of generally available terms and conditions. If a competing local service provider believes that its cost will be greater than that of the incumbent LEC for transport and termination, then it must submit a forward-looking economic cost study to rebut this presumptive symmetrical rate. In that case, we direct state commissions, when arbitrating interconnection arrangements, to depart from symmetrical rates only if they find that the costs of efficiently configured and operated systems are not symmetrical and justify a different compensation rate. In doing so, however, state commissions must give full and fair effect to the economic costing methodology we set forth in this order, and create a factual record, including the cost study, sufficient for purposes of review after notice and opportunity for the affected parties to participate. In the absence of such a cost study justifying a departure from the presumption of symmetrical compensation, reciprocal compensation for the transport and termination of traffic shall be based on the incumbent local exchange carrier's cost studies.

1090. We find that the "additional costs" incurred by a LEC when transporting and terminating a call that originated on a competing carrier's network are likely to vary depending on whether tandem switching is involved. We, therefore, conclude that states may establish transport and termination rates in the arbitration process that vary according to whether the traffic is routed through a tandem switch or directly to the end-office switch. In such event, states shall also consider whether new technologies (*e.g.*, fiber ring or wireless networks) perform functions similar to those performed by an incumbent LEC's tandem switch and thus, whether some or all calls terminating on the new entrant's network should be priced the same as the sum of transport and termination via the incumbent LEC's tandem switch. Where the interconnecting carrier's switch serves a geographic area comparable to that served by the incumbent LEC's tandem switch, the appropriate proxy for the interconnecting carrier's additional costs is the LEC tandem interconnection rate.

1091. We disagree with TCI's claim that higher charges for routing calls through tandem switches rather than directly through incumbent LECs' end offices will materially discourage carriers from routing traffic through tandem switches, even when it is efficient to do so. New entrants will only be encouraged to interconnect at end-office switches, rather than tandem switches, when the decrease in incumbent LEC transport charges justifies the extra costs incurred by the new entrant to route traffic directly through the incumbent LEC's end-office switches.

[2628] *See* Regulatory Flexibility Act, 5 U.S.C. §§ 601 et seq.

Carriers will interconnect in a way that minimizes their costs of interconnection, including the use of cost-based LEC network elements. In addition, the flexibility given to states may allow carriers, including small entities, with different network architectures to establish rates for terminating calls originating on other carriers' networks that are asymmetrical, if they can show that the costs of efficiently configured and operated systems are not symmetrical and justify different compensation rates, instead of being based on competitors' network architectures.[2629]

1092. We believe, with respect to interconnection between LECs and paging providers, that there should be an exception to our rule that states must establish presumptive symmetrical rates based on the incumbent LEC's costs for transport and termination of traffic. While paging providers, as telecommunications carriers, are entitled to mutual compensation for the transport and termination of local traffic, and should not be required to pay charges for traffic that originates on other carriers' networks, we believe that incumbent LECs' forward-looking costs may not be reasonable proxies for the costs of paging providers. Paging is typically a significantly different service than wireline or wireless voice service and uses different types and amounts of equipment and facilities. PageNet's own network, for example, is based on a regional hub and spoke network that transmits paging calls from radio transmitters to provide regional or national coverage.[2630] This configuration is distinctly different from either LEC wireline networks, with their hierarchy of switches and transmission facilities, or cellular carriers, with their multiple cells and sophisticated systems for handing off calls as a vehicle moves across cell boundaries. In addition, most calls terminated by paging companies are brief (averaging 15 seconds) in duration and contain no voice message, but only an alpha-numeric message of a few characters.[2631] Using incumbent LEC's costs for termination of traffic as a proxy for paging providers' costs, when the LECs' costs are likely higher than paging providers' cost, might create uneconomic incentives for paging providers to generate traffic simply in order to receive termination compensation. Thus, using LEC costs for termination of voice calls thus may not be a reasonable proxy for paging costs as the types of switching and transport that paging carriers perform are different from those of LECs and other voice carriers.

1093. Given the lack of information in the record concerning paging providers' costs to terminate local traffic, we have decided to initiate a further proceeding to try to determine what an appropriate proxy for paging costs would be and, if necessary, to set a specific paging default proxy. In the interim, however, in the event that LECs and paging companies cannot negotiate agreed-upon rates, we direct states, when arbitrating disputes under section 252(d)(2), to establish rates for the termination of traffic by paging providers based on the forward-looking economic

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[2629] *See* Regulatory Flexibility Act, 5 U.S.C. §§ 601 et seq.

[2630] PageNet comments in CC Docket No. 95-185 at 34.

[2631] Letter from Carl W. Northrop, Paul, Hastings, Janofsy & Walker, on behalf of Arch Communications to Michele Farquhar, Chief, WTB, July 11, 1996.

costs of such termination to the paging provider. The paging provider seeking termination fees must prove to the state commission the costs of terminating local calls. Given the lack of information in the record concerning paging providers' costs, we further conclude that the default price for termination of traffic from the end office that we adopt in this proceeding in Section XI.A.3., *supra*, does not apply to termination of traffic by paging providers. This default price is based on estimates in the record of the costs to LECs of termination from the end office or end-office switching. There are no such estimates with respect to paging in the record, and as discussed above, we find that estimates of LEC costs may not reflect paging providers' costs.

(2) Existing Non-Reciprocal Agreements Between Incumbent LECs and CMRS Providers

1094. Section 20.11 of our rules, which predates enactment of the 1996 Act, requires that interconnection agreements between incumbent LECs and CMRS providers comply with principles of mutual compensation, and that each carrier pay reasonable compensation for transport and termination of the other carrier's calls.[2632] Based on the extensive record in the *LEC-CMRS Interconnection* proceeding, as well as that in this proceeding, we conclude that, in many cases, incumbent LECs appear to have imposed arrangements that provide little or no compensation for calls terminated on wireless networks, and in some cases imposed charges for traffic originated on CMRS providers' networks, both in violation of section 20.11 of our rules.[2633] Accordingly, we conclude that CMRS providers that are party to pre-existing agreements with incumbent LECs that provide for non-mutual compensation have the option to renegotiate these agreements with no termination liabilities or other contract penalties. Pending the successful completion of negotiations or arbitration, symmetrical reciprocal compensation provisions shall apply, with the transport and termination rate that the incumbent LEC charges the CMRS provider from the pre-existing agreement applying to both carriers, as of the effective date of the rules we adopt pursuant to this order.

1095. In addition, we conclude that this opportunity for CMRS providers currently operating under arrangements with non-mutual transport and termination rates to renegotiate such arrangements advances the mutual compensation regime contemplated under section 251(b)(5) of

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[2632] 47 C.F.R. § 20.11.

[2633] *See, e.g.*, Centennial comments in Docket 95-185 at 8-9 (states that it does not receive compensation for terminating LEC-originated traffic in any of its 28 cellular markets, and is charged by the LEC to terminate LEC-originated calls in many of those markets); Century Cellunet comments in Docket 95-185 (states that it does not receive compensation from LECs to terminate landline originating calls, and that in some states, it must pay the LEC to terminate landline originating calls; further states that it is charged an average rate of $0.025 per minute for local interconnection); Point Communications comments in Docket 95-185 at 1 (Point has never received compensation for terminating landline originated calls); and Vanguard Cellular comments in Docket 95-185 at 7--8; 11 (notes that of the 95 LECs with which it interconnects, only one LEC in one community pays compensation for termination of LEC-originated calls).

the 1996 Act.[2634] We find that extending the opportunity to establish symmetrical reciprocal compensation for the transport and termination of traffic addresses inequalities in bargaining power that incumbent LECs may used to disadvantage interconnecting wireless carriers. At the same time, our rule will place wireless carriers with non-mutual, existing agreements on the same footing as other new entrants, who will be able to negotiate more equitable interconnection agreements because of the rules we put in place with this Report and Order. We find that we have ample authority under section 4(i) of the 1934 Act as well as section 251 of the 1996 Act. to order this remedy. Courts have held that "the Commission has the power to prescribe a change in contract rates when it finds them to be unlawful . . . and to modify other provisions of private contracts when necessary to serve the public interest."[2635] The opportunity that we are affording to CMRS providers in this context is consistent with similar "fresh look" requirements that we have adopted in the past.[2636]

5. Bill and Keep

a. Background

1096. *Local Competition NPRM.* In the NPRM, we defined bill-and-keep arrangements as those in which neither of two interconnecting networks charges the other network for terminating traffic that originated on the other network.[2637] Instead, each network recovers from its own end users the cost of both originating traffic delivered to the other network and terminating traffic received from the other network. A bill-and-keep approach for termination of traffic does not, however, preclude a positive flat-rated charge for transport of traffic between carriers' networks.

[2634] We use the term "reciprocal compensation" and "mutual compensation" synonymously to mean that compensation flows in both directions between interconnecting networks. *See LEC-CMRS Interconnection NPRM* at para. 27 n.31.

[2635] *Western Union Tel. Co. v. FCC*, 815 F.2d 1495, 1501 (D.C. Cir. 1987). The Commission has adopted similar "fresh look" requirements in the past.

[2636] *See, e.g., Expanded Interconnection with Local Telephone Company Facilities*, CC Docket Nos. 91-141 and 92-222, Report and Order and Notice of Proposed Rulemaking, 7 FCC Rcd 7369, 7463-7465 (1992), *recon.*, 8 FCC Rcd 7341, 7342-7359 (1993) (fresh look to enable customers to take advantage of new competitive opportunities under special access expanded interconnection), *vacated on other grounds and remanded for further proceedings sub nom. Bell Atlantic Tel. Cos. v. FCC*, 24 F.3d 1441 (1994); *Competition in the Interstate Interexchange Marketplace*, CC Docket No. 90-132, Memorandum Opinion and Order on Reconsideration, 7 FCC Rcd 2677, 2681-82 (1992) ("fresh look" in context of 800 bundling with interexchange offerings); *Amendment of the Commission's Rules Relative to Allocation of the 849-851/894-896 MHz Bands*, GEN Docket No. 88-96, Memorandum Opinion and Order on Reconsideration, 6 FCC Rcd 4582, 4583-84 (1991) ("fresh look" requirements imposed in context of air-ground radiotelephone service as condition of grant of Title III license).

[2637] NPRM at para. 239.

1097. We sought comment on what guidance we should give state commissions regarding the use of bill-and-keep arrangements in arbitrated interconnection arrangements.[2638] We sought comment on whether section 252(d)(2)(B)(ii) specifically authorizes states to impose bill-and-keep arrangements in the arbitration process, at least when certain conditions are met.[2639] We also sought comment on whether we should interpret the statute as placing any limits on the circumstances in which states may adopt bill-and-keep arrangements.[2640] We also asked for comment on the meaning of the statutory description of bill-and-keep arrangements as "arrangements that waive mutual recovery."[2641] In addition, we sought comment on whether there are any circumstances in which the statute requires states to establish bill-and-keep arrangements.[2642]

1098. *LEC-CMRS Interconnection NPRM.* In the *LEC-CMRS Interconnection NPRM*, we proposed bill and keep as an interim arrangement.[2643] We noted there that proponents have argued that bill-and-keep would be economically efficient if either of two conditions are met: (1) traffic flows between competing LECs are balanced; or (2) the per-unit cost of interconnection is *de minimis*. We, therefore, address whether interim bill-and-keep arrangements for LEC-CMRS traffic should be imposed.

b. Comments

1099. *Local Competition NPRM.* Numerous new entrants and state commissions contend that bill-and-keep arrangements are expressly authorized by the statute.[2644] Non-incumbent LECs argue that section 252(d)(2) makes clear that bill-and-keep satisfies the reciprocal compensation duties of section 251(b)(5). Therefore, pursuant to the Commission's broad authority to adopt implementing regulations via section 251(d)(1), and consistent with the interconnection pricing standards, they argue that the Commission has the authority to require a bill-and-keep reciprocal

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[2638] NPRM at para. 243.

[2639] *Id.*

[2640] *Id.*

[2641] *Id.* (*citing* 47 U.S.C. § 252(d)(2)(B)(i)).

[2642] *Id.*

[2643] *See LEC-CMRS Interconnection NPRM* at paras. 60-62.

[2644] *See, e.g.*, Continental comments at 11; GST comments at 34-35; California Commission comments at 45-46; Time Warner comments at 93, reply at 34-37; Omnipoint comments at 15; Hyperion comments at 20-21; WinStar reply at 12.

compensation mechanism.[2645] Continental and NCTA assert, contrary to some incumbent LEC arguments, that section 252(b)(2)(B)(i) does not limit bill-and-keep to situations in which incumbent LECs waive their right to some other form of compensation, but instead clarifies that regulators are not precluded from imposing or approving such waivers.[2646] Numerous state commissions contend that reciprocal compensation issues should be left to the states to decide, and that states have the authority to impose bill-and-keep arrangements.[2647] Many of these commenters further argue that, while states have the authority to require bill-and-keep arrangements, the Commission does not have the authority to mandate these arrangements.[2648]

1100. Incumbent LECs as well as certain other commenters contend that mandatory bill-and-keep requirements conflict with the 1996 Act.[2649] Numerous incumbent LECs also argue that bill-and-keep arrangements fail the "reasonable approximation of the additional costs" test of section 252(d)(2) because they would effectively price termination at zero.[2650] For example, RTC argues that bill and keep fails to adequately deal with each carrier's costs and should not be considered, even as an interim proposal.[2651] Cincinnati Bell contends that the statute merely authorizes bill-and-keep arrangements in voluntary negotiations and only parties to the negotiation can properly assess if such an arrangement would be appropriate.[2652] In response to Cincinnati Bell's argument, potential new entrants counter that the only reasonable interpretation of section 252(d)(2) is that regulators may impose bill and keep over the objection of an incumbent LEC.[2653] They assert that this is the only logical interpretation because section 252(d)(2) only applies to

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[2645] *See, e.g.*, Time Warner comments at 93-94; ACSI comments at 21-26. *But see* Ohio Consumers' Counsel reply at 24 (contending that Time Warner's argument is circular).

[2646] Continental comments at 11 n.15; NCTA comments at 55; *cf.* Cox reply at 19.

[2647] *See, e.g.*, Louisiana Commission comments at 20; Illinois Commission comments at 80; District of Columbia Commission comments at 37-38; Florida Commission comments at 40; *see also* Ohio Consumers' Counsel reply at 24.

[2648] *See, e.g.*, Illinois Commission comments at 80; District of Columbia Commission comments at 38.

[2649] *See, e.g.*, Ameritech comments at 78-79; PacTel comments at 95; SBC comments at 51-52; GTE comments at 56-58; BellSouth comments at 73-74; Cincinnati Bell comments at 38-39; Frontier comments at 32; Washington Independent Tel. Ass'n comments at 4; TDS comments at 24; ALTS comments at 45.

[2650] *See, e.g.*, NYNEX comments at 88-90; Ameritech Comments at 78-79; Bell Atlantic comments at 41-42; PacTel comments at 95; USTA comments at 82-84; U S West comments at 70-71.

[2651] RTC comments at 23.

[2652] Cincinnati Bell comments at 38-39.

[2653] *See, e.g.*, Jones Intercable comments at 27; NCTA reply at 15; ALTS reply at 31 n.37; Comcast reply at 12-14.

arbitration cases. If parties reach an agreement to use bill-and-keep arrangements, this section would not apply.[2654]

1101. Proponents of bill-and-keep arrangements contend that these arrangements minimize the administrative costs associated with metering and billing that would be incurred under other compensation methods.[2655] In addition, because there currently may be no mechanism readily available to new entrants for measuring terminating traffic, states and new entrants argue that the cost of measurement and billing under a reciprocal compensation agreement is not known.[2656] TCG asserts that bill-and-keep arrangements would reduce small carriers burdens by eliminating billing and monitoring requirements and the potential for carrier disputes.[2657] MCI asserts that termination measurement and billing costs would represent a substantial portion of termination costs.[2658] It notes that in the state of Washington, US West estimated that measurement and billing costs would more than double its reported TSLRIC cost of switching for local terminations.[2659] Other benefits of a bill-and-keep arrangement presented by commenters include: (1) elimination of incentives to "game" the LEC-to-LEC relationship by soliciting (or avoiding) customers with high incoming or outgoing usage;[2660] (2) architectural and technological neutrality;[2661] (3) the reduction of economic barriers to entry because it does not require additional capital investment that other arrangements would necessitate;[2662] and (4) economic efficiency.[2663] USTA, however, asserts that alternative local service providers will have no economic incentives

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[2654] *Id.*

[2655] *See, e.g.*, California commission at 45; DOJ comments at 34-35; Teleport comments at 77; Jones Intercable comments at 28-29; Mass. Attorney General comments at 19. *But see* Bell Atlantic reply at Exhibit 2, p.8 (Richard Epstein, a witness for Bell Atlantic, argues that bill-and-keep may lead to habitual overconsumption by the party terminating less traffic that will be significantly more costly than administrative cost savings).

[2656] *See, e.g.*, Colorado Commission comments at 59; AT&T comments at 69; Sprint comments at 86-87; ACSI comments at 22-23.

[2657] TCG comments at 80.

[2658] MCI comments at 48.

[2659] *Id.*; *see also* Teleport comments at 77.

[2660] *See, e.g.*, Jones Intercable comments at 27-28; GST comments at 34-35; MCI comments at 53.

[2661] *See* Mass. Attorney General comments at 19.

[2662] *See, e.g.*, Telecommunications Resellers Ass'n comments at 54.

[2663] *See, e.g.*, Jones Intercable comments at 28; ACSI comments at 21-26; Competitive Policy Institute reply at 15-17.

to use the lower cost facilities or service under bill-and-keep arrangements.[2664]

1102. Potential new entrants observe that bill-and-keep arrangements have traditionally been used by neighboring incumbent LECs for exchanging traffic. Thus, they argue, bill-and-keep arrangements represent a fair mechanism for the exchange of traffic between new entrants and incumbent LECs.[2665] In response to this argument, MECA counters that compensation arrangements should not be patterned after EAS interconnections between incumbent LECs because those EAS arrangements were not designed for the competitive environment.[2666]

1103. Numerous commenters address the issue of the likely balance of traffic between a new entrant and an incumbent LEC. New entrants argue that in most cases traffic between incumbent LECs and competing LECs will be relatively balanced over time[2667] and that additional costs to terminate traffic on already over-built incumbent LEC networks are close to zero.[2668] In addition, the Consumer Federation of America contends that once barriers to competition (*e.g.*, number portability) are removed there is no reason to believe that there will be substantial incentives to seek heavy outgoing-only customers.[2669] While acknowledging that bill-and-keep arrangements may be problematic if traffic levels exchanged are significantly different, other new entrants argue that critics have failed to produce any evidence of materially uneven traffic loadings.[2670] MECA, however, argues that a bill-and-keep reciprocal compensation mechanism is flawed because it is premised on the assumption that terminating traffic will be equal in both directions for competing LECs.[2671] MECA argues that this assumption is incorrect because new entrants will engage in niche marketing to get a toehold in a new service area, and therefore the size of each carrier's customer base will be different and the total number of originating minutes

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[2664] USTA comments at Attachment (Affidavit of Jerry A. Hausman), p. 9-10; *see also* BellSouth comments at Attachment (Interconnection and Economic Efficiency), p. 8-10; Bell Atlantic reply at Attachment (Declaration of Richard A. Epstein) p. 8 (adopting bill and keep would invite new entrants, that are able to tailor their networks, to keep traffic perpetually out of balance, as, for example, by actively courting companies, such as telephone solicitors, that generate a huge volume of outgoing calls).

[2665] *See, e.g.*, Sprint/APC comments at 11-12; TCI comments at 27; Continental comments at 10.

[2666] MECA comments at 69.

[2667] Time Warner comments at 97-98; *see also* TCI comments at 35-37.

[2668] Time Warner comments at 98-99; *see also* Teleport comments at 81-83.

[2669] CFA/CU comments at 55.

[2670] *See, e.g.*, ACSI comments at 24; GST comments at 34-35.

[2671] MECA comments at 68-69.

will differ.[2672]

1104. Numerous new entrants and state commissions recommend that bill-and-keep arrangements be implemented on an interim basis[2673] and note that reciprocal compensation arrangements will not be practical until mechanisms are developed to measure the relevant traffic volumes.[2674] Ameritech, however, argues that parties advocating mandating bill-and-keep arrangements on an interim basis do not take into account that the period during which the new carriers first enter a local market will be the time during which traffic is most unbalanced between the new entrants and the incumbent LEC.[2675] BellSouth argues that characterizing bill and keep as an interim arrangement does not remedy the problems associated with bill and keep.[2676]

1105. Some commenters opposed to bill-and-keep arrangements also argue that mandating these arrangements violates the takings clause of the Fifth Amendment.[2677] Numerous incumbent LECs argue that mandating bill-and-keep arrangements requires a LEC to transport and terminate traffic of another LEC, constituting a physical intrusion into the LEC's property.[2678] BellSouth further asserts that bill and keep would lead to no compensation for use of incumbent LEC property and will therefore constitute an uncompensated taking in violation of the Constitution.[2679] AT&T responds that there is no basis for the argument that bill and keep would be a taking.[2680] AT&T asserts that these claims are speculative and rest on an erroneous premise that bill-and-

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[2672] MECA comments at 68-69; *but see* GST comments at 34-35 (using compensation systems other than bill-and-keep would encourage new entrants to focus entry strategies on niches that exploit compensation levels).

[2673] *See, e.g.*, Alabama Commission comments at 32; GST comments at 34-35; AT&T comment at 69; Cox comments at 27-28, 38-39; Sprint comments at 87; Jones Intercable comments at 28-29; Mass. Attorney General comments at 14, 21; Telecommunication Resellers Ass'n comments at 54-55.

[2674] *See, e.g.*, AT&T comments at 69; Colorado Commission at 59.

[2675] Ameritech reply at 36.

[2676] BellSouth reply at 40.

[2677] *See, e.g.*, Bell Atlantic comments at 41-42; Cincinnati Bell comments at 39 n.71; USTA comments at 84; U S West comments at 70-71; GTE comments at 57-58; BellSouth comments at 74-75.

[2678] *See, e.g.*, BellSouth comments at 74-75; Bell Atlantic comments at 41.

[2679] BellSouth comments at 74-75.

[2680] AT&T reply at 36; *see also* ALTS reply at 31; Cox reply at 21-22; Comcast reply at 14; Teleport reply at 20-22.

keep would provide no (or inadequate) compensation.[2681] AT&T argues that, as Congress recognizes, bill and keep allows each carrier in-kind compensation in the form of access to the other carrier's network.[2682] Similarly, Ohio Consumers' Counsel argues that a bill-and-keep mechanism makes each company whole through its own rate design and structure. As such, Ohio Consumers' Counsel argues that allegations that bill and keep means that a competing carrier gets to use the incumbent LEC's network for free cannot withstand scrutiny.[2683] NCTA asserts that bill and keep is not "physical occupation" of the incumbent LEC property, and furthermore does not authorize an invasion of incumbent LEC property, any more than it authorizes incumbent LECs to invade a new entrant's property.[2684] In response to the confiscation argument, NCTA contends that rate regulation does not violate the takings clause unless it is so "unjust as to destroy the value of the property for all purposes for which it was acquired."[2685]

1106. Some wireless commenters argue that bill-and-keep arrangements are not appropriate for incumbent LEC-narrowband CMRS or incumbent LEC-paging reciprocal compensation.[2686] ProNet argues that, because paging carriers' incremental termination costs are above zero and there is no evidence that paging demand is inelastic, imposing bill and keep would likely result in serious resource misallocation.[2687] In addition, PageNet argues that, with respect to paging, the cost of termination is not small and in fact comprises a significant portion of the total revenue requirement for paging services.[2688] With respect to rural incumbent LECs, Bay Spring argues that states should be prohibited from adopting bill-and-keep arrangements to the extent that they force rural incumbent LECs to terminate other carriers' calls on their rural networks without compensation.[2689]

[2681] *Id.*

[2682] AT&T reply at 36; *see also* Washington Commission comments at 3, 38; Teleport comments at 68.

[2683] Ohio Consumers' Counsel comments at 44.

[2684] NCTA reply at 16; *see also* Cox reply at 21-22.

[2685] *Id.* at 17 (*citing Duquesne Light Co. v. Barasch*, 109 S.Ct. 609, 615 (1989), and *Covington & Lexington Turnpike Road Co. v. Sandford*, 164 U.S. 578, 579 (1896)).

[2686] *See, e.g.*, ProNet comments at 11; PageNet comments at 11.

[2687] ProNet comment at 11-12.

[2688] PageNet comments at 11.

[2689] Bay Springs, et. al comments at 17; *see also* GVNW comments at 41; Bay Springs et. al reply at 11-12 (incremental termination costs are higher for small LECs because the smaller size of their networks reduce economies of scale).

1107. *LEC-CMRS Interconnection NPRM.* CMRS providers, with the exception of paging providers, generally support the Commission's proposal to adopt an interim bill-and-keep compensation mechanism.[2690] Some supporters of an interim bill-and-keep compensation model argue that it should be adopted on a permanent basis,[2691] and others argue that it should be extended to transport charges.[2692] PageNet and other paging providers oppose application of a bill-and-keep compensation mechanism to the paging industry because traffic flows are entirely one-way.[2693] Sprint supports application of an interim bill-and-keep model solely for incumbent LEC-PCS interconnection.[2694]

1108. Most CMRS providers contend that bill and keep is an appropriate interim compensation mechanism because the incremental cost of incumbent LEC-CMRS interconnection is so low that there is little difference between a cost-based and zero rate.[2695] Cox and other commenters cite the Brock study's conclusions that the national average incremental cost of incumbent LEC-CMRS interconnection is 0.2 cents per minute and that the off-peak cost is close to zero as support for adoption of an interim bill-and-keep model.[2696] Cox contends that none of the incumbent LECs has submitted evidence that the average incremental cost of call termination is anything other than 0.2 cents per minute.[2697] In addition, APC notes that it has relatively balanced traffic flows with incumbent LECs[2698] and a number of CMRS providers assert that incumbent LEC-cellular traffic flows will become more balanced in the future.[2699] AT&T states

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[2690] *See, e.g.*, AirTouch comments in CC Docket No. 95-185 at 20; CTIA comments in CC Docket No. 95-185 at 7; Comcast comments in CC Docket No. 95-185 at 9.

[2691] *See, e.g.*, New Par comments in CC Docket No. 95-185 at 10; NC 4 Cellular comments in CC Docket No. 95-185 at 1.

[2692] *See, e.g.*, MCI comments in CC Docket No. 95-185 at 5; Nextel comments in CC Docket No. 95-185 at 9; Omnipoint comments in Docket No. 95-185 at 8.

[2693] PageNet comments in CC Docket No. 95-185 at 23; *see also, e.g.*, Allied comments in CC Docket No. 95-185 at 8; Arch comments in CC Docket No. 95-185 at 11.

[2694] Sprint comments in CC Docket No. 95-185 at 7.

[2695] *See, e.g.*, Cox comments in CC Docket No. 95-185 at 29-30.

[2696] Cox comments in CC Docket No. 95-185 at 23; *see also* New Par comments in CC Docket No. 95-185 at 12.

[2697] Cox reply in CC Docket No. 95-185 at 41-42; *see also* Comcast reply in CC Docket No. 95-185 at 17-22.

[2698] APC comments in CC Docket No. 95-185 at 9.

[2699] *See, e.g.*, PCIA comments in CC Docket No. 95-185 at 8; Time Warner comments in CC Docket No. 95-185 at 21.

that any traffic imbalances are offset by the higher cost to CMRS providers of terminating incumbent LEC-originated calls.[2700] Similarly, CTIA asserts that the relevant inquiry is whether the costs each carrier incurs to terminate traffic are balanced, not whether total traffic is balanced.[2701] Some commenters argue that bill and keep is necessary to curb incumbent LEC market power and to remedy incumbent LECs' failure to provide mutual compensation.[2702]

1109. Incumbent LEC commenters, however, generally oppose the Commission's proposal to adopt an interim bill-and-keep compensation mechanism.[2703] A number of incumbent LECs contend that neither of the two conditions that justify a bill-and-keep compensation mechanism -- balanced traffic flows or interconnection costs near zero -- are present in the context of incumbent LEC-CMRS interconnection.[2704] SBC states that bill-and-keep is inappropriate where 80 percent of traffic is CMRS-to-incumbent LEC.[2705] USTA asserts that CMRS interconnection causes incumbent LECs to incur costs for which they should be compensated, and estimates that those costs are 1.3 cents ($0.013) per minute.[2706] Other incumbent LECs contend that the Brock study underestimates the costs of incumbent LEC-CMRS interconnection, but provide no cost estimates of their own.[2707] In addition, many opponents of bill-and-keep contend that it will create market distortions and encourage arbitrage.[2708] Some incumbent LEC commenters assert that incumbent LECs will be unable to recover from ratepayers the lost revenues from LEC-CMRS interconnection charges,[2709] and that bill and keep

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[2700] AT&T comments in CC Docket No. 95-185 at 10.

[2701] CTIA reply in CC Docket No. 95-185 at 12-14.

[2702] *See, e.g.*, CTIA comments in CC Docket No. 95-185 at 9; Telecommunications Resellers Ass'n comments in CC Docket No. 95-185 at 8.

[2703] *See, e.g.*, Bell Atlantic comments in CC Docket No. 95-185 at 6; BellSouth comments in CC Docket No. 95-185 at 20; NTCA comments in CC Docket No. 95-185 at 8. *But see* Teleport comments in CC Docket No. 95-185 at 2.

[2704] *See, e.g.*, Ameritech comments in CC Docket No. 95-185 at 8-9, Cincinnati Bell comments in CC Docket No. 95-185 at 4-5.

[2705] SBC comments in CC Docket No. 95-185 at 12.

[2706] USTA comments in CC Docket No. 95-185 at 24, Attachment (Bill and Keep: A Bad Solution to a Non-Problem), p. 8.

[2707] *See, e.g.*, BellSouth comments in CC Docket No. 95-185 at 24.

[2708] *See, e.g.*, Pacific Bell comments in CC Docket No. 95-185 at 11, 60.

[2709] *See, e.g.*, BellSouth comments in CC Docket No. 95-185 at 28; NYNEX comments in CC Docket No. 95-185 at 34; U S West comments in CC Docket No. 95-185 at 25.

is an unlawful taking.[2710] U S West disputes the Commission's contention that bill-and-keep is administratively efficient because, it argues, carriers will still have to develop billing and accounting systems.[2711]

1110. Several commenters propose alternatives to the Commission's proposed bill-and-keep interim compensation mechanism. For example, Frontier suggests that the Commission adopt a benchmark compensation scheme similar to that offered by Ameritech in Illinois, which sets a rate of .5 cents ($0.005) per minute for end office termination and .75 cents ($0.0075) per minute for tandem termination.[2712] CMS recommends that bill and keep apply for a two year voluntary period, after which a mandatory negotiation period under bill and keep would be imposed if the parties fail to reach agreement.[2713] RCC proposes that bill and keep be used only until a "carrier access billing system" can be implemented.[2714]

c. Discussion

1111. As an additional option for reciprocal compensation arrangements for termination services, we conclude that state commissions may impose bill-and-keep arrangements if neither carrier has rebutted the presumption of symmetrical rates and if the volume of terminating traffic that originates on one network and terminates on another network is approximately equal to the volume of terminating traffic flowing in the opposite direction, and is expected to remain so, as defined below. We disagree with commenters who contend that the Commission and states do not have the authority to mandate bill-and-keep arrangements under any circumstances. Section 252(d)(2)(B)(i) provides that the definition of what may be considered "just and reasonable" terms and conditions for reciprocal compensation "shall not be construed to preclude arrangements that afford mutual recovery (such as bill-and-keep arrangements)."[2715] We conclude that section 252(d)(2) would be superfluous if bill-and-keep arrangements were limited to negotiated agreements, because none of the standards in section 252(d) apply to voluntarily-negotiated agreements. Therefore, it is clear that bill-and-keep arrangements may be imposed in the context of the arbitration process for termination of traffic, at least in some circumstances.

[2710] *See, e.g.*, Bell Atlantic comments in CC Docket No. 95-185 at 8; BellSouth comments in CC Docket No. 95-185 at 20; Pacific Bell comments in CC Docket No. 95-185 at 79; U S West comments in CC Docket No. 95-185 at 49.

[2711] U S West comments in CC Docket No. 95-185 at 39-40.

[2712] Frontier comments in CC Docket No. 95-185 at 9.

[2713] CMS comments in CC Docket No. 95-185 at 17.

[2714] RCC comments in CC Docket No. 95-185 at 8-9.

[2715] 47 U.S.C. § 252(d)(2)(B)(i).

1112. Section 252(d)(2)(A)(i) provides that to be just and reasonable, reciprocal compensation must "provide for the mutual and reciprocal recovery by each carrier of costs associated with transport and termination."[2716] In general, we find that carriers incur costs in terminating traffic that are not *de minimis*, and consequently, bill-and-keep arrangements that lack any provisions for compensation do not provide for recovery of costs. In addition, as long as the cost of terminating traffic is positive, bill-and-keep arrangements are not economically efficient because they distort carriers' incentives, encouraging them to overuse competing carriers' termination facilities by seeking customers that primarily originate traffic. On the other hand, when states impose symmetrical rates for the termination of traffic,[2717] payments from one carrier to the other can be expected to be offset by payments in the opposite direction when traffic from one network to the other is approximately balanced with the traffic flowing in the opposite direction. In such circumstances, bill-and-keep arrangements may minimize administrative burdens and transaction costs. We find that, in certain circumstances, the advantages of bill-and-keep arrangements outweigh the disadvantages, but no party has convincingly explained why, in such circumstances, parties themselves would not agree to bill-and-keep arrangements. We are mindful, however, that negotiations may fail for a variety of reasons. We conclude, therefore, that states may impose bill-and-keep arrangements if traffic is roughly balanced in the two directions and neither carrier has rebutted the presumption of symmetrical rates.

1113. We further conclude that states may adopt specific thresholds for determining when traffic is roughly balanced. If state commissions impose bill-and-keep arrangements, those arrangements must either include provisions that impose compensation obligations if traffic becomes significantly out of balance or permit any party to request that the state commission impose such compensation obligations based on a showing that the traffic flows are inconsistent with the threshold adopted by the state.[2718] States may, however, also apply a general presumption that traffic between carriers is balanced and is likely to remain so. In that case, a party asserting imbalanced traffic arrangements must prove to the state commission that such imbalance exists. Under such a presumption, bill-and-keep arrangements would be justified unless a carrier seeking to rebut this presumption satisfies its burden of proof. We also find that states that have adopted bill-and-keep arrangements prior to the date that this order becomes effective, either in arbitration or rulemaking proceedings, may retain such arrangements, unless a party proves to the state commission that traffic is not roughly balanced. In that case, the state commission is to determine the termination rates based either on the forward-looking economic cost-based methodology or consistent with the default proxies in this order. Finally, we observe

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[2716] 47 U.S.C. § 252(d)(2)(A)(i).

[2717] *See infra*, Section XI.A.4.c. for a discussion of symmetrical rates.

[2718] For example, the Michigan Commission adopted a five percent threshold for the difference between the traffic flows in the two directions. Michigan Commission comments at Attachment 1 (Michigan Public Service Commission Case No. U-10647), p.29.

that carriers have an incentive to agree to bill-and-keep arrangements if it is economically efficient to do so, and that nothing in the Act prevents parties from agreeing to bill-and-keep arrangements even if a state declines to mandate such arrangements. For example, we note that Time Warner/BellSouth interconnection agreement provides for a bill-and-keep arrangement based on a "roughly balanced traffic" concept.[2719]

1114. In determining whether traffic is balanced, we find that precise traffic measurement is not necessary. It is sufficient to use approximations based on samples and studies comparable to reports on percentages of interstate use often used for access charge billing. Such an approach is likely to reduce implementation costs and complexities. Alternatively, state commissions may require that traffic flowing in the two directions be measured as accurately as possible during some defined period of time, which may commence no later than six months after an interconnection arrangement goes into effect. All affected carriers are required to cooperate with the state commission in implementing this measurement. A state commission that adopts a traffic flow measurement approach may adopt a "true-up" mechanism to ensure that no carrier is disadvantaged by an interim rate that differs from the rate established once such a measurement is undertaken. Finally, state commissions may require that local traffic and access traffic be carried on separate trunk groups if they deem such measures to be necessary to ensure accurate measurement and billing.

1115. We have considered the economic impact of our rules in this section on small incumbent LECs. For example, RTC argues that bill-and-keep arrangements fail to adequately deal with each carrier's costs.[2720] In addition to basing reciprocal compensation on the incumbent LECs costs, we believe that by allowing carriers to rebut a presumption of balanced traffic volumes, the concern that bill-and-keep arrangements fail to adequately deal with each carrier's costs are addressed. We also note that certain small incumbent LECs are not subject to our rules under section 251(f)(1) of the 1996 Act, unless otherwise determined by a state commission, and certain other small incumbent LECs may seek relief from their state commissions from our rules under section 251(f)(2) of the 1996 Act.

1116. We disagree with commenters that argue that mandating bill-and-keep arrangements

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[2719] Letter from W.W. Jordan, Executive Director, BellSouth, to William F. Caton, Acting Secretary, FCC, July 11, 1996. Per the agreement, no party shall owe compensation to the other unless the net minutes of use for terminating local traffic results in a dollar amount in excess of the amount designated for each month during the calculation period as follows: (1) during the first six month period of operation, no charges shall accrue, or compensation paid for the termination of local traffic, however, parties shall exchange billing information and usage data during this initial period for the purpose of reviewing for accuracy only; (2) during the second six months, $40,000 per month/billing period; (3) during the third six months, $30,000 per month/billing period; (4) during the fourth six months, $20,000 per month/billing period; and (5) during any extension of this agreement pursuant to Article II, paragraph 2.03, $0 per month/billing period.

[2720] RTC comments at 23.

in these circumstances violates the taking clause of Fifth Amendment. We reject BellSouth's argument that mandating bill-and-keep mechanisms would constitute a physical intrusion of LEC property. As NCTA observes, bill-and-keep arrangements are not a "physical occupation" of incumbent LEC property and thus *per se* takings cases[2721] are irrelevant. We also reject arguments that the bill-and-keep arrangements we adopt here would not adequately compensate incumbent LECs for transport and termination. As Congress recognized, bill-and-keep arrangements allow each carrier compensation "in-kind" in the form of access to the other carrier's network.[2722] Therefore, the type of bill-and-keep arrangements that we have permitted states to adopt are not unconstitutionally confiscatory.

1117. Commenters in the *LEC-CMRS Interconnection NPRM* assert that the estimated per minute cost of LEC termination ranges from 0.2 to 1.3 cents, and most of the estimates are clustered near the lower end of this range.[2723] These estimates are based primarily on interconnection at a LEC end office,[2724] while most interconnections occur at tandem offices where LECs' costs of call completion are higher than terminations routed directly through the end office switch.[2725] Moreover, the record contains no estimates of the cost of CMRS termination. That cost is generally considered to be greater than the cost of LEC termination;[2726] but only one oral, *ex parte* estimate of CMRS cost has been offered: 2.25 to 4.0 cents per minute.[2727] Further, there is no showing that the transaction costs of measuring traffic flows and making net payments would be so high that a bill-and-keep regime would be more efficient. Moreover, no party has demonstrated that aggregate cost flows between interconnecting LECs and CMRS providers are in balance.

[2721] *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982); *Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886, 2893 (1992).

[2722] Joint Explanatory Statement at 120.

[2723] For the .2 cents per minute estimate, see letter from Robert F. Roche, CTIA, to William F. Caton, Acting Secretary, Federal Communications Commission, filed in CC Docket No. 94-54, Gerald W. Brock, *The Economics of Interconnection: Incremental Cost of Local Usage* (April 1995). For the 1.3 cents per minute estimate, *see* USTA Comments, CC Docket No. 95-185, submission of Jeffrey H. Rohlfs, Harry M. Shooshan III, and Calvin S. Monson, at 9-10.

[2724] *See supra*, Section VII.C.2.b.(2), for a complete discussion of cost estimates for terminations at both the end office and tandem office switches.

[2725] U S West comments in CC Docket No. 95-185 Attachment A (In Response to Dr. Gerald Brock by Professor Robert G. Harris), p. 11-14.

[2726] *See, e.g.*, AT&T comments in CC Docket No. 95-185 at Attachment (Declaration of Bruce M. Owen), p. 5-6.

[2727] Steven R. Brenner and Bridger M. Mitchell, CTIA *ex parte* briefing, CC Docket No. 95-185, Mar. 21, 1996.

1118. In light of the overall transport and termination policy we are adopting, we do not adopt the interim bill and keep arrangement tentatively proposed in the LEC-CMRS Interconnection NPRM. Notwithstanding our conclusions about bill and keep above, under which states may rule on bill and keep for particular pairs of firms based on the circumstances prevailing between them, we conclude that we are correct in not adopting bill and keep as a single, nationwide policy that would govern all LEC-CMRS transport and termination of traffic. Thus, we reject our tentative conclusion in the LEC-CMRS Interconnection NPRM. We expect, however, that when it is economically efficient to do so, parties will adopt bill and keep arrangements in the negotiation process. Also, as described above, a state commission may impose bill-and-keep arrangements with respect to CMRS-LEC traffic when it finds that traffic is roughly balanced and is expected to remain so.

B. ACCESS TO RIGHTS OF WAY

1. Overview

1119. Section 251(b)(4) imposes upon each LEC the "duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224."[2728] The access provisions of section 224, as amended by the 1996 Act, differ from the requirements of section 251(b)(4) with respect to both the entities required to grant access and the entities that may demand access. Section 224(f)(1) imposes upon all utilities,[2729] including LECs, the duty to "provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it."[2730] For purposes of section 224, the term "telecommunications carrier" excludes any incumbent LEC as that term is defined in section 251(h).[2731]

1120. In the NPRM, we sought comment on various aspects of this access requirement, as well as on section 224(f)(2) which creates the following limited exception to the obligations of section 224(f)(1):

> Notwithstanding paragraph (1), a utility providing electric service may deny a cable

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[2728] 47 U.S.C. § 251(b)(4).

[2729] A "utility" is "any person who is a local exchange carrier or an electric, gas, water, steam, or other public utility, and who owns or controls poles, ducts, conduits, or rights-of-ways used, in whole or in part, for wire communications," but does not include any railroad, any cooperative, or any federally or state-owned entities. 47 U.S.C. § 224(a)(1).

[2730] 47 U.S.C. § 224(f)(1). *See* 47 U.S.C. § 153(44) (definition of "telecommunications carrier").

[2731] 47 U.S.C. § 224(a)(5).

television system or any telecommunications carrier access to its poles, ducts, conduits, or rights-of-way, on a non-discriminatory basis where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes.[2732]

1121. Additionally, we sought comment on section 224(h), which provides:

Whenever the owner of a pole, duct, conduit, or right-of-way intends to modify or alter such pole, duct, conduit, or right-of-way, the owner shall provide written notification of such action to any entity that has obtained an attachment to such conduit or right-of-way so that such entity may have a reasonable opportunity to add to or modify its existing attachment. Any entity that adds to or modifies its existing attachment after receiving such notification shall bear a proportionate share of the costs incurred by the owner in making such pole, duct, conduit, or right-of-way accessible.[2733]

1122. In this Order, we establish rules implementing these provisions. Based on the comments received and the plain language of the statute, and in furtherance of our original mandate to institute an expeditious procedure for determining just and reasonable pole attachment rates with a minimum of administrative costs and consistent with fair and efficient regulation,[2734] we adopt herein a program for nondiscriminatory access to poles, ducts, conduits and rights-of-way. This Order includes several specific rules as well as a number of more general guidelines that are designed to give parties flexibility to reach agreements on access to utility-controlled poles, ducts, conduits, and rights-of-way, without the need for regulatory intervention. We provide for expedited dispute resolution when good faith negotiations fail, and we establish requirements concerning modifications to pole attachments and the allocation of the cost of such modifications. We also explain the division of responsibility between federal and state regulation envisioned by the 1996 Act.

2. Section 224(f): Non-discriminatory access

a. Background

1123. Pursuant to section 224(f)(1), a utility must grant telecommunications carriers and cable operators nondiscriminatory access to all poles, ducts, conduits, and rights-of-way owned or

[2732] 47 U.S.C. § 224(f)(2).

[2733] 47 U.S.C. § 224(h).

[2734] S. Rep. No. 580, 95th Cong., 1st Sess. 19 (1977).

controlled by the utility.[2735] This directive seeks to ensure that no party can use its control of the enumerated facilities and property to impede, inadvertently or otherwise, the installation and maintenance of telecommunications and cable equipment by those seeking to compete in those fields. Section 224(f)(1) appears to mandate access every time a telecommunications carrier or cable operator seeks access to the utility facilities or property identified in that section, with a limited exception allowing electric utilities to deny access "where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes."[2736] While Congress recognized the legitimate interests of utilities in protecting and promoting the safety and reliability of their core services, on balance we believe section 224(f) reflects Congress' determination that utilities generally must accommodate requests for access by telecommunications carriers and cable operators.

b. Comments

1124. The comments relating to nondiscriminatory access describe in substantial detail a wide variety of largely technical issues and concerns. We will review the finer points raised by commenters in subsequent discussion sections devoted to particular issues. Here, we discuss the comments to the extent they provide an overview of access issues and we summarize the positions of the parties generally.

1125. NEES states that, historically, providers of electric and telephone services have installed and maintained transmission and distribution lines overhead and underground.[2737] According to NEES, the methods by which utilities install and maintain facilities vary depending upon a number of factors, including the type of utility service provided, the specific type of equipment being used, and various local conditions and regulations. Utilities state that their facilities often occupy public rights-of-way with other utilities or are constructed on private property pursuant to easements granted by the property owners.[2738] Utilities often are empowered to take property by eminent domain in order to install facilities and provide service.[2739] Because

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[2735] As noted, a utility's obligations under section 224(f)(1), however, do not extend to incumbent LECs which are excluded from the definition of "telecommunications carriers" under section 224(a)(5). *See infra*, Section E(3)(c) for a discussion of the incorporation of this provision into section 251(b)(4).

[2736] 47 U.S.C. § 224(f)(2).

[2737] Facilities used to transport electricity generally can be divided into transmission facilities and distribution facilities. Transmission facilities deliver bulk power at high voltages across long distances for the ultimate use of a large number of customers. Distribution facilities deliver electricity at lower voltages to individual subscribers within a community. Electric transmission and distribution lines can be installed either on overhead poles and towers, or within underground ducts and conduit. NEES comments at 3.

[2738] PECO comments at 2-3; NEES comments at 4.

[2739] PECO comments at 2-3; Duquesne comments at 14-15.

of economic factors and space considerations, new entrants in the utility fields, as well as providers of cable television and other services, generally must "piggyback" on the poles and conduits of the incumbent utilities in order to provide service.[2740]

1126. The relationship between the general access requirement of section 224(f)(1) and the limited exception contained in section 224(f)(2) reflects long-standing, and sometimes contentious, relationships between utilities and various service providers seeking access to those facilities.[2741] Historically, access to utility poles, conduits, and other facilities has been governed by private pole attachment agreements entered into between the parties in accordance with a patchwork of federal, state, and local regulations and industry standards.[2742] Commenters extensively debate the extent to which our rules implementing section 224(f)(1) and (f)(2) should incorporate various aspects of these standards and requirements. Many utilities claim that existing regulations and standards, including those imposed unilaterally by individual utility companies, should continue to be observed.

1127. Generally, utilities argue that the nondiscrimination obligations set forth in the Act should not be triggered when a utility's facility has not previously been used by cable or telecommunications service providers.[2743] Requiring access accommodation, it is argued, may constitute a taking under the Fifth Amendment takings clause because the right to exclude others from the facility is an inherent attribute of property ownership that would be compromised by mandated access provisions.[2744] Alternatively, some parties suggest that, if access is allowed, utilities should have substantial discretion to set the terms and conditions of such access depending on the nature of the service involved because different technologies present varying levels of risk.[2745] Utilities contend that a wide variety of issues arise in the pole attachment context and that national rules governing questions of access would fail to accommodate the range of concerns that could justify a denial of access.[2746] For this reason, they request that the Commission eschew national rules in favor of individual case adjudication when a cable operator

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[2740] *See* Cole comments at 1-3 & n. 1-5.

[2741] *See* Cole comments at 1-7; GST comments at 4.

[2742] American Electric comments at 26; Delmarva reply at 7.

[2743] UTC comments at 6-7.

[2744] American Electric Power comments at 7-10. We discuss these comments in more detail in a separate section devoted to constitutional issues. *See infra*, Section C.

[2745] ConEd comments at 12.

[2746] Carolina Power & Light comments at 4; Virginia Electric comments at 13; American Electric comments at 32-38.

or telecommunications carrier is denied access to a utility's pole or other facility.[2747] Electric utilities, in their comments, request that distinctions be made between facilities used for electric power and those used for other services, including telecommunications services.

1128. On the issue of capacity constraints, utilities strongly favor explicit provisions that would allow utilities to reserve capacity sufficient to meet future needs.[2748] They suggest space reservations are critical to enable utilities to meet expansion plans and ensure the fulfillment of existing obligations. For example, reserve space may be needed for the emergency replacement of failed components.[2749] Although capacity can sometimes be expanded, utilities argue for authority to deny access when providing access would require the expansion of existing capacity.[2750] If Congress intended utilities to expand existing capacity to accommodate new service providers, they argue, it would have granted utilities the power of eminent domain for this purpose.[2751]

1129. Utility commenters present various approaches to determining the amount of reserved capacity that should be recognized under the Commission's rules. Some oppose precise quantifiable reservations, advocating instead a case-by-case adjudication of the allowed reservation with deference to a utility's prior practices.[2752] At least one commenter, however, supports quantifiable limits as a safe harbor for access denials and suggests that a utility be permitted to reserve of 25% of remaining pole space.[2753]

1130. As for safety and reliability factors upon which access can be denied, utilities urge the Commission to resist the adoption of specific rules because the circumstances affecting safety and reliability are too diverse for precise regulatory packaging. One commenter suggests that the method of delivering electricity varies among utilities and a single set of safety rules would not account for these varying delivery methods.[2754] Although utilities have indicated that some broad

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[2747] Duquesne Light comments at 3-4; Public Service Company of New Mexico comments at 5-7; NEES comments at 15.

[2748] PECO comments at 7-8; Duquesne comments at 17; NU System Companies comments at 4-5; American Electric comments at 23-24.

[2749] NU System Companies comments at 5;

[2750] American Electric comments at 21; Kansas City Power & Light comments at 3.

[2751] New Mexico Public Service comments at 15.

[2752] Duquesne comments at 17; NU System Companies comments at 5.

[2753] ConEd comments at 10.

[2754] Duquesne comments at 21.

national safety standards, such as the National Electric Safety Code ("NESC"),[2755] may be useful to guide parties regarding access generally, they argue stricter standards beyond such accepted codes would not be workable. Instead, utilities propose case-by-case adjudication of disputes because the range of applicable circumstances will frustrate attempts at regulatory specificity.[2756]

1131. To some degree, the comments of LECs reflect concerns similar to those expressed by electric utilities. With respect to the definition of nondiscrimination, however, the Commission received a diverse range of opinion from LEC commenters. Some LECs argue that nondiscrimination does not require parity with the access terms that a facility owner provides to itself because the statute does not explicitly require such parity,[2757] or because requiring parity would work an unconstitutional taking by relegating a facility owner to non-owning status.[2758] Other LECs argue that nondiscrimination obligates facility owners to provide access similar to what the owner provides to itself for similar uses.[2759] Another commenter suggests that the requirement of nondiscrimination prohibits discrimination against entities competing against the facility owner's affiliate, but does not necessarily require parity as long as the facility owner does not impose unreasonable impediments on the use of the facility by unaffiliated entities.[2760]

1132. Generally, LECs oppose detailed rules regarding nondiscrimination and access, arguing in favor of flexibility to accommodate individual circumstances,[2761] and to promote private industry negotiation.[2762] LEC commenters cite a variety of situations that, in their view, present circumstances that cannot be regulated beyond the articulation of broad guidelines or principles. They argue against the imposition of standards for determining sufficient capacity because utilities need flexibility to make good faith judgments about future service demands.[2763] One LEC commenter, however, advocates capacity reservations based on a five-year business

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[2755] 1993 National Electric Safety Code, Institute of Electrical and Electronics Engineers, Inc. (1992).

[2756] PECO comments at 6; NEES comments at 14.

[2757] Ameritech comments at 34; PacTel comments at 19-20.

[2758] GTE comments at 23-24.

[2759] Bell Atlantic comments at 13; NYNEX comments at 14.

[2760] PacTel comments at 19-21.

[2761] PacTel comments at 18.

[2762] SBC comments at 15-16; GTE comments at 22-23; Rural Tel. Coalition at 10.

[2763] USTA comments at 10; Ameritech comments at 37; BellSouth comments at 14-15; PacTel comments at 20.

forecast.[2764]

1133. Similarly, LECs oppose specific standards governing access denials due to safety and engineering concerns. LECs argue that municipal rules have governed this area for years, obviating the need for federal guidelines.[2765] In their view, established safety codes exist and additional standards imposed at the federal level may conflict with these accepted standards.[2766] A wide variety of concerns could affect the safety and reliability of a network and attachments to poles within a network, according to commenters, including wind resistance, local height regulations, working space requirements between attachments, national safety codes and federal and state occupational safety rules.[2767] Although the precise language of section 224(f)(2) allows electric utilities to deny access for safety, reliability, and engineering concerns, LECs contend they confront the same concerns and need the same authority to deny access when safety or network reliability is jeopardized.[2768]

1134. IXCs argue that nondiscrimination requires an incumbent LEC to provide access on the same terms and conditions that apply to the incumbent LEC or its affiliate.[2769] One IXC suggests that all users of poles and rights-of-way should pay the same rate regardless of the service provided. Under this view, uniform pricing would promote incipient competition.[2770] IXCs contend, however, that access obligations are not reciprocal or symmetrical under section 224. Rather, they contend regulatory asymmetry is required under section 251(b)(4) because that section incorporates section 224 which specifically exempts incumbent LECs from the class of entities entitled to access.[2771]

1135. On capacity questions, IXCs argue strongly for limits on the amount of capacity utilities can reserve for future use. Essentially, they contend the reservation of space, if allowed at all, must be circumscribed by precise standards. For example, a reservation might be allowed

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[2764] SBC comments at 18-19.

[2765] Ameritech comments at 38; GTE comments at 25-26; BellSouth comments at 16-17.

[2766] GTE comments at 25-26; Bell Atlantic comments at 14.

[2767] BellSouth comments at 16-17.

[2768] Bell Atlantic comments at 14; Ameritech comments at 38; NYNEX comments at 14.

[2769] MCI comments at 21; Sprint comments at 16.

[2770] Sprint comments at 17-18.

[2771] *See* 47 U.S.C. § 224(a)(5); AT&T reply at 24. One LEC argues, however, that section 251 obligations apply to all LECs, including IXCs if they become LECs within the meaning of the Act. PacTel reply at 23.

for use within a one-year forecast period.[2772] IXCs also contend that claims of insufficient capacity must be scrutinized carefully and that LECs, to the extent they deny access due to capacity constraints, must carry the burden of proving access requests from competitors cannot be accommodated.[2773]

1136. As for safety and reliability concerns, AT&T argues for specific standards to define circumstances under which access can be denied. Whether or not quantifiable standards are adopted, AT&T suggests that the burden of proof should be on utilities to prove they meet applicable standards because utilities or other facility owners, rather than the parties requesting attachments, would have access to information needed to evaluate a particular claim.[2774] Moreover, AT&T argues, under the literal terms of section 224(f)(2), only electric utilities, not incumbent LECs, have explicit authority to justify access denials based on safety, reliability or engineering concerns.[2775]

1137. CAPS favor a literal construction of nondiscrimination, arguing that a loose definition of the term could entice incumbent LECs and utilities to obstruct competition.[2776] Despite recognition that, for the most part, incumbent LECs have been cooperative in allowing access to poles, they contend that on several occasions, LECs and utilities have obstructed such access.[2777] With respect to capacity sufficiency, CAPS agree with LECs that available capacity is a fact-dependent issue, but encourage the Commission to establish standards that would ensure access when existing facilities can be configured to accommodate new telecommunications entrants.[2778] In addition, they support placing the burden of proof to justify denials of access on LECs and utilities subject to an audit of LEC outside plant records.[2779] Similarly, with respect to safety and reliability issues, CAPS advocate the adoption of standards requiring quantifiable threats to safety or reliability before access can be denied.[2780] They, along with the Telecommunications Resellers Association, also favor imposing proof burdens on LECs and

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[2772] AT&T comments at 16.

[2773] MCI comments at 23; AT&T comments at 17; Sprint comments at 16-17.

[2774] AT&T comments at 17-18.

[2775] AT&T reply at 11.

[2776] American Communications Services comments at 6.

[2777] American Communications Services comments at 6; GST Telecom comments at 4.

[2778] MFS comments at 10; American Communications Services comments at 7.

[2779] American Communications Services comments at 7; MFS comments at 11.

[2780] MFS comments at 11; GST Telecom comments at 5.

utilities in such cases.[2781] In addition, CAPS support limits on survey or engineering fees that utilities may charge before proceeding with a competitor's attachment or other facility installation.[2782]

1138. Cable operators emphasize that access to poles, conduits and other facilities of LECs and utilities is critical to their ability to compete in the provision of telecommunications services as facilities-based competitors.[2783] Generally, cable operators support a definition of nondiscrimination that ensures that utilities cannot provide access to their facilities that is inferior to that provided to themselves or their affiliates.[2784] Moreover, small cable operators expressed support for the adoption of detailed national rules which they contend will strengthen their ability to negotiate acceptable pole attachment terms.[2785]

1139. With respect to capacity concerns, cable operators urge the Commission to construe narrowly the conditions under which access can be denied based on claims of insufficient capacity. Because access is critical to facilities-based competition, they argue, the Commission should adopt capacity standards that presume the availability of access as long as the new competitor can overcome whatever obstacles stand in the way of making the pole or facility capable of additional attachments.[2786] To underscore the importance of access to facilities-based competition, NCTA notes that Congress explicitly incorporated access to poles, conduits and rights-of-way in both section 251(b)(4) and section 271(c)(2) of the 1996 Act, recognizing that accessibility to such facilities is critical to finding genuine competition in the provision of local exchange service.[2787]

1140. Similarly, with regard to access denials based on claims of safety, reliability or engineering concerns, cable operators support using the NESC as the benchmark for resolving disputes over such issues. To the degree factors or standards other than those set forth in the NESC are relied upon to justify access, cable operators support a presumption that such denials are unreasonable and support the imposition of proof burdens on any LEC or utility making such

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[2781] MFS comments at 11; GST Telecom comments at 5; Telecommunications Resellers Assn. comments at 13.

[2782] MFS comments at 11; GST Telecom comments at 6.

[2783] NCTA comments at 3-4.

[2784] Cole comments at 18.

[2785] Small Cable Business Association Comments at 21.

[2786] Summit comments at 1; Cole comments at 17.

[2787] NCTA comments at 12.

claims.[2788]

1141. In their comments, state commissions emphasize their experience in dealing with pole attachment issues. One state commission indicates that its procedures for handling disputes concerning access to poles, conduits, and rights-of-way are sufficient and that any changes in procedures are unnecessary at this time.[2789] Moreover, state Commissions emphasize that the statute itself recognizes the prominent role of state and local regulation in the area of pole attachments, citing the preservation of state preemption of federal rules when a state has regulated in this area.[2790]

1142. With respect to the definition of nondiscrimination, state commissions urge us to ensure that incumbent LECs provide access to poles and other facilities on terms that do not discriminate unreasonably between similarly situated carriers.[2791] The Ohio Consumers' Counsel agrees, suggesting that nondiscrimination requires that LECs provide competitors access on the same terms it provides to itself or its affiliates.[2792] As for the various reasons that may be asserted to justify denial of access, the Ohio Commission and Ohio Consumers' Counsel argue that a heavy burden should be placed on the LEC or utility denying access to demonstrate whenever capacity constraints, safety issues or reliability concerns are claimed for the access denial.[2793]

c. Discussion

(1) Generally

1143. We conclude that the reasonableness of particular conditions of access imposed by a utility should be resolved on a case-specific basis. We discuss below the forum for such resolutions.[2794] The record makes clear that there are simply too many variables to permit any other approach with respect to access to the millions of utility poles and untold miles of conduit

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[2788] NCTA comments at 12; Cole comments at 18.

[2789] Illinois Commission comments at 72.

[2790] District of Columbia Commission comments at 9.

[2791] Illinois Commission comments at 73-74; Texas Commission comments at 3; California Commission comments at 5.

[2792] Ohio Consumers' Counsel comments at 5-6.

[2793] Ohio Commission comments at 11-12; Ohio Consumers' Counsel comments at 5-6.

[2794] *See infra*, Section E.

in the nation.[2795] The broader access mandated by the Act, in conjunction with the reasonableness variables mentioned here, will likely increase the number of disputes over access. In turn, this may cause small incumbent LECs and small entities to incur the need for additional resources to evaluate, process, and resolve such disputes, as well as to make poles and conduits physically accessible.[2796] We will not enumerate a comprehensive regime of specific rules, but instead establish a few rules supplemented by certain guidelines and presumptions that we believe will facilitate the negotiation and mutual performance of fair, pro-competitive access agreements. We will monitor the effect of this approach and propose more specific rules at a later date if reasonably necessary to facilitate access and the development of competition in telecommunications and cable services. We believe that the rules, guidelines and presumptions established herein strike the appropriate balance between the need for uniformity, on the one hand, and the need for flexibility, on the other, which should minimize the regulatory burdens and economic impact for both small entities and small incumbent LECs.[2797]

1144. We also address the impact on small incumbent LECs. For example, the Rural Telephone Coalition opposes adoption of sweeping national rules because local circumstances will be relevant to disputes over access to poles or rights-of-way.[2798] We have considered the economic impact of our rules in this section on small incumbent LECs. For example, we have adopted a flexible regulatory approach to pole attachment disputes that ensures consideration of local conditions and circumstances.

1145. Our determination not to prescribe numerous specific rules is supported by acknowledgements in the relevant national industry codes that no single set of rules can take into account all of the issues that can arise in the context of a single installation or attachment. The NESC, one of the national codes that virtually all commenters regard as containing reasonable attachment requirements, contains thousands of rules and dozens of tables and figures, all designed to ensure "the practical safeguarding of persons during the installation, operation, or maintenance of electric supply and communication lines and associated equipment."[2799]

1146. For example, with respect to overhead wires, the NESC contains 64 pages of rules dictating minimum "clearances," i.e., the minimum separations between a particular wire, cable,

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[2795] Delmarva comments at 6.

[2796] *See* Regulatory Flexibility Act, 5 U.S.C. §§ 601 et seq.

[2797] *See* Regulatory Flexibility Act, 5 U.S.C. §§ 601 et seq.

[2798] RTC comments at 14.

[2799] NESC § 010.

or other piece of equipment and other wires, cables, equipment, structures, and property.[2800] A short list of only a few of the variables in that discussion includes: the type of wire or equipment in question; the type of current being transmitted; the nature of the structure supporting the wires; the proximity and nature of other equipment and structures; the temperature of the conducting element; and the use of the land below the wires. These separation requirements dictate the required distances between various wires and other transmission and distribution equipment, as well distances between such equipment and other objects that are not a part of the transmission and distribution network. Prescribed separations between wires will vary between the point at which wires are attached to a pole and at mid-points between poles, with the latter separations dictated by the predicted amount of sag that the wires will experience. The amount of sag will itself depend upon additional variables. Changing just one variable can radically alter the separation requirements.[2801] Other rules dictate: electrical loading requirements that vary depending upon wind and ice conditions and the predicted sag of the lines being installed; structural strength requirements that vary depending upon the amount and type of installations and the nature of the supporting structure; and line insulation requirements. A wholly separate and equally extensive array of rules apply to underground lines.

1147. Despite this specificity, the introduction to the NESC states that the code "is not intended as a design specification or an instruction manual."[2802] Indeed, utilities typically impose requirements more stringent than those prescribed by NESC and other industry codes.[2803] In some cases stricter requirements and restrictions are dictated by federal, state, or local law.[2804] Potentially applicable federal regulations include rules promulgated by the Federal Energy Regulatory Commission ("FERC") and by the Occupational Safety and Health Administration ("OSHA").[2805] Various restrictions can apply at the state level as well.[2806] Some local requirements governing zoning, aesthetics, or road clearances impose more stringent or more

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[2800] NESC § 23.

[2801] For example, depending upon other conditions there are at least 16 potentially applicable clearance requirements relating specifically to wires passing over or near swimming pools. Separate sets of clearance requirements apply to wires in the vicinity of rail cars, and for wires attached near bridges.

[2802] NESC § 010.

[2803] NU comments at 4-5; BellSouth comments at 16-17; Virginia Electric comments at 10-12; Carolina comments at 4; NEES comments at 11.

[2804] NEES comments at 6, 11; PECO comments at 2; Duquesne comments at 11-12; Virginia comments at 11-12

[2805] Texas Commission comments at 4; NEES comments at 11; American Electric comments at 25. *See* 29 C.F.R. §§ 1910.268, 1910.269.

[2806] NEES comments at 6 (*citing* Massachusetts statute prohibiting electric utilities from permitting attachments to their transmission facilities); Duquesne comments at 11-12 (describing similar restriction under Wisconsin law).

specific requirements than those of the national industry codes or of federal or state law.[2807]

1148. In addition to operating under federal, state, and local requirements, a utility normally will have its own operating standards that dictate conditions of access.[2808] Utilities have developed their own individual standards and incorporated them into pole attachment agreements because industry-wide standards and applicable legal requirements are too general to take into account all of the variables that can arise.[2809] A utility's individual standards cover not simply its policy with respect to attachments, but all aspects of its business. Standards vary between companies and across different regions of the country based on the experiences of each utility and on local conditions.[2810] As Duquesne notes, the provision of electricity is the result of varied engineering factors that continue to evolve.[2811] Because there is no fixed manner in which to provide electricity, there is no way to develop an exhaustive list of specific safety and reliability standards.[2812] In addition, increasing competition in the provision of electricity is forcing electric utilities to engineer their systems more precisely, in a way that is tailored to meet the specific needs of the electric company and its customers.[2813] As a result, each utility has developed its own internal operating standards to suit its individual needs and experiences.[2814]

1149. The record contains numerous factors that may vary from region to region, necessitating different operating procedures particularly with respect to attachments. Extreme temperatures, ice and snow accumulation, wind, and other weather conditions all affect a utility's safety and engineering practices.[2815] In some instances, machinery used by local industries requires higher than normal clearances. Particular utility work methods and equipment may require specific separations between attachments and may restrict the height of the poles that a

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[2807] American Electric comments at 36; Delmarva comments at 10-11; Ameritech comments at 38; PECO comments at 2.; Duquesne comments at 11-13; ConEd comments at 11.

[2808] American comments at 26, 36; NEES comments at 11.

[2809] Virginia Power comments at 13; NEES comment at 11; NU comments at 4-5.

[2810] ConEd comments at 5; Duquesne comments at 7; NEES comments at 11.

[2811] Duquesne comments at 21.

[2812] *Id.*; UTC reply at 20.

[2813] Duquesne comments at 21.

[2814] ConEd reply at 2.

[2815] NEES comments at 11; Carolina comments at 4; American Electric comments at 31.

utility will use.[2816] The installation and maintenance of underground facilities raise distinct safety and reliability concerns.[2817] It is important that such variables be taken into account when drafting pole attachment agreements and considering an individual attachment request. The number of variables makes it impossible to identify and account for them all for purposes of prescribing uniform standards and requirements.[2818] Universally accepted codes such as the NESC do not attempt to prescribe specific requirements applicable to each attachment request and neither shall we.

1150. We are sensitive to concerns of cable operators and telecommunications carriers regarding utility-imposed restrictions that could be used unreasonably to prevent access.[2819] We note in particular that a utility that itself is engaged in video programming or telecommunications services has the ability and the incentive to use its control over distribution facilities to its own competitive advantage. A number of utilities have obtained, or are seeking, the right and ability to provide telecommunications or video programming services.[2820] We agree, however, with Duquesne that the best safeguard is not the adoption of a comprehensive set of substantive engineering standards, but the establishment of procedures that will require utilities to justify any conditions they place on access.[2821] These procedures are outlined in section E below. In the next two sections, we set forth rules of general applicability and broader guidelines relating to specific issues that are intended to govern access negotiations between the parties.

(2) Specific Rules

1151. We establish five rules of general applicability. First, in evaluating a request for access, a utility may continue to rely on such codes as the NESC to prescribe standards with respect to capacity, safety, reliability, and general engineering principles. We have no reason to question the reasonableness of the virtually unanimous judgment of the commenters, many of whom have otherwise diverse and conflicting interests, in this regard.[2822] Utilities may incorporate such standards into their pole attachment agreements in accordance with section

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[2816] American Electric comments at 20; NEES comments at 11; Carolina comments at 4.

[2817] ConEd comments at 7; Kansas City comments at 3-4; UTC reply at 20.

[2818] American Electric comments at 18-20, 36; Delmarva reply at 7-8.

[2819] Cole comments 3-7.

[2820] Cole reply at 3-7.

[2821] Duquesne comments at 21.

[2822] Cole comments at 22; American Electric comments at 22; NCTA reply at 6-7; UTC reply at 15-16; Virginia Power reply at 6; Ohio Edison reply at 23-24.

224(f)(2). Other industry codes also will be presumed reasonable if shown to be widely-accepted objective guides for the installation and maintenance of electrical and communications facilities.

1152. Second, federal requirements, such as those imposed by FERC and OSHA, will continue to apply to utilities to the extent such requirements affect requests for attachments to utility facilities under section 224(f)(1). We see no reason to supplant or modify applicable federal regulations promulgated by FERC, OSHA, or other federal agencies acting in accordance with their lawful authority.

1153. Third, we will consider state and local requirements affecting pole attachments. We note that section 224(c)(1) provides:

> Nothing in this section shall be construed to apply to, or to give the Commission jurisdiction with respect to rates, terms and conditions, or access to poles, ducts, conduits, and rights-of-way as provided in subsection (f), for pole attachments in any case where such matters are regulated by the State.[2823]

1154. In a separate section we discuss the authority of a state to preempt federal regulation of pole attachments.[2824] For present purposes, we conclude that state and local requirements affecting attachments are entitled to deference even if the state has not sought to preempt federal regulations under section 224(c).[2825] The 1996 Act increased significantly the Commission's role with respect to attachments by creating federal access rights and obligations, which for decades had been the subject of state and local regulation. Such regulations often relate to matters of local concern that are within the knowledge of local authorities and are not addressed by standard codes such the NESC.[2826] We do not believe that regulations of this sort necessarily conflict with the scheme established in this Order. More specifically, we see nothing in the statute or in the record that compels us to preempt such local regulations as a matter of course. Regulated entities and other interested parties are familiar with existing state and local requirements and have adopted operating procedures and practices in reliance on those requirements. We believe it would be unduly disruptive to invalidate summarily all such local requirements. We thus agree with commenters who suggest that such state and local requirements should be presumed reasonable.[2827] Thus, even where a state has not asserted preemptive authority in accordance with section 224(c), state and local requirements affecting pole

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[2823] 47 U.S.C. § 224(c)(1).

[2824] *See infra*, Section E.

[2825] New Mexico comments at 12; Ohio comments at 11.

[2826] *See supra*, Section B.2.

[2827] PECO comments at 2; Kansas City comments at 2-3; NEES reply at 13.

attachments remain applicable, unless a complainant can show a direct conflict with federal policy. Where a local requirement directly conflicts with a rule or guideline we adopt herein, our rules will prevail. We note that a standard prescribed by the NESC is not a specific Commission rule, and therefore a state requirement that is more restrictive than the corresponding NESC standard may still apply.

1155. It is important to note that the discretion of state and local authorities to regulate in the area of pole attachments is tempered by section 253, which invalidates all state or local legal requirements that "prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."[2828] This restriction does not prohibit a state from imposing "on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers."[2829] In addition, section 253 specifically recognizes the authority of state and local governments to manage public rights-of-way and to require fair and reasonable compensation for the use of such rights-of-way.[2830]

1156. Fourth, where access is mandated, the rates, terms, and conditions of access must be uniformly applied to all telecommunications carriers and cable operators that have or seek access.[2831] Except as specifically provided herein, the utility must charge all parties an attachment rate that does not exceed the maximum amount permitted by the formula we have devised for such use, and that we will revise from time to time as necessary.[2832] Other terms and conditions also must be applied on a nondiscriminatory basis.[2833]

1157. Fifth, except as specifically noted below, a utility may not favor itself over other parties with respect to the provision of telecommunications or video programming services.[2834] We interpret the statutory requirement of nondiscriminatory access as compelling this result, particularly when read in the context of other provisions of the statute. This element of

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[2828] 47 U.S.C. § 253(a).

[2829] 47 U.S.C. § 253(b); section 254 sets forth specific provisions related to universal service.

[2830] 47 U.S.C. § 253(c). *See* Ameritech reply at 10.

[2831] 47 U.S.C. § 224(f)(1). As noted above, incumbent LECs are excluded from the definition of "telecommunications carrier" for purposes of section 224. 47 U.S.C. § 224(a)(5).

[2832] *See* 47 C.F.R. § 1.1404.

[2833] *See supra*, Sections IV.G. and V.G. for a discussion of the meaning of "nondiscriminatory."

[2834] 47 U.S.C. § 224(f)(1); *see* Ohio Consumers' Counsel comments at 5; California comments at 5; MCI comments at 21; Sprint comments at 16; ACSI comments at 6-7.

nondiscrimination is evident in section 224(g), which requires a utility to impute to itself or to its affiliate the pole attachment rate such entity would be charged were it a non-affiliated entity.[2835] Further, we believe it unlikely that Congress intended to allow an incumbent LEC to favor itself over its competitors with respect to attachments to the incumbent LEC's facilities, given that section 224(a)(5) has just the opposite effect in that it operates to preclude the incumbent LEC from obtaining access to the facilities of other LECs. A utility will be able to discriminate in favor of itself with respect to the provision of telecommunications or cable services only as expressly provided herein.

1158. Aside from the conditions described above, we will not adopt specific rules to determine when access may be denied because of capacity, safety, reliability, or engineering concerns. In addition, we reject the contention of some utilities that they are the primary arbiters of such concerns, or that their determinations should be presumed reasonable.[2836] We recognize that the public welfare depends upon safe and reliable provision of utility services, yet we also note that the 1996 Act reinforces the vital role of telecommunications and cable services. As noted above, section 224(f)(1) in particular reflects Congress' intention that utilities must be prepared to accommodate requests for attachments by telecommunications carriers and cable operators.

(3) Guidelines Governing Certain Issues

1159. In addition to the rules articulated above, we will establish guidelines concerning particular issues that have been raised in this proceeding. These guidelines are intended to provide general ground rules upon which we expect the parties to be able to implement pro-competitive attachment polices and procedures through arms-length negotiations, rather than having to rely on multiple adjudications by the Commission in response to complaints or by other forums. We do not discuss herein every issue raised in the comments. Rather, we discuss only major issues that we believe will arise often. Issues not discussed herein may be important in a particular case, but are not susceptible to any general observation or presumption.

1160. We note that a utility's obligation to permit access under section 224(f) does not depend upon the execution of a formal written attachment agreement with the party seeking access. We understand that such agreements are the norm and encourage their continued use, subject to the requirements of section 224. Complaint or arbitration procedures will, of course, be available when parties are unable to negotiate agreements.[2837]

[2835] 47 U.S.C. § 224(g).

[2836] American Electric comments at 14, 21; NEES comments at 14; ConEd comments at 11; Delmarva reply at 8

[2837] *See infra*, Section E.

(a) Capacity Expansions

1161. When a utility cannot accommodate a request for access because the facility in question has no available space, it often must modify the facility to increase its capacity.[2838] In some cases, a request for access can be accommodated by rearranging existing facilities to make room for a new attachment.[2839] Another method of maximizing useable capacity is to permit "overlashing," by which a new cable is wrapped around an existing wire, rather than being strung separately.[2840] A utility pole filled to capacity often can be replaced with a taller pole.[2841] New underground installations can be accommodated by the installation of new duct, including subducts that divide a standard duct into four separate, smaller ducts.[2842] Cable companies and others contend that there is rarely a lack of capacity given the availability of taller poles and additional conduits.[2843] These commenters suggest that utilities should rarely be permitted to deny access on the basis of a lack of capacity, particularly since under section 224(h) the party or parties seeking to increase capacity will be responsible for all associated costs.[2844] Utilities argue that neither the statute nor its legislative history requires facility owners to expand or alter their facilities to accommodate entities seeking to lease space.[2845] These commenters argue that, if Congress intended such a result, the statute would have imposed the requirement explicitly.[2846]

1162. A utility is able to take the steps necessary to expand capacity if its own needs require such expansion. The principle of nondiscrimination established by section 224(f)(1) requires that it do likewise for telecommunications carriers and cable operators.[2847] In addition, we note that section 224(f)(1) mandates access not only to physical utility facilities (*i.e.*, poles,

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[2838] Cole comments at 9; ConEd comments at 10; MFS comments at 10; NCTA reply at 5-6.

[2839] GST Telecom comments at 5.

[2840] MFS comments at 10; GST Telecom comments at 5.

[2841] Cole comments at 14-15.

[2842] GST Telecom comments at 5; Cole comments at 17.

[2843] Cole comments at 15.

[2844] NCTA comments at 12; Summit comments at 1; MCI comments at 23.

[2845] American Electric reply at 19; ConEd reply at 5; U S West reply at 7; GTE reply at 26; Virginia Power reply at 5.

[2846] SBC reply at 21.

[2847] AT&T reply at 14-15; MFS reply at 22. We note that this standard differs from the one we adopt for collocation of equipment on incumbent LEC premises under section 251(c)(6). *See supra*, Section VI.

ducts, and conduit), but also to the rights-of-way held by the utility. The lack of capacity on a particular facility does not necessarily mean there is no capacity in the underlying right-of-way that the utility controls. For these reasons, we agree with commenters who argue that a lack of capacity on a particular facility does not automatically entitle a utility to deny a request for access. Since the modification costs will be borne only by the parties directly benefitting from the modification,[2848] neither the utility nor its ratepayers will be harmed, despite the assertions of utilities to the contrary.[2849]

1163. In some cases, however, increasing capacity involves more than rearranging existing attachments or installing a new pole or duct. For example, the record suggests that utility poles of 35 and 40 feet in height are relatively standard, but that taller poles may not always be readily available.[2850] The transportation, installation, and maintenance of taller poles can entail different and more costly practices.[2851] Many utilities have trucks and other service equipment designed to maintain poles of up to 45 feet, but no higher.[2852] Installing a 50 foot pole may require the utility to invest in new and costly service equipment.[2853] Expansion of underground conduit space entails a very complicated procedure, given the heightened safety and reliability concerns associated with such facilities.[2854] Local regulators may seek to restrict the frequency of underground excavations. We find it inadvisable to attempt to craft a specific rule that prescribes the circumstances in which, on the one hand, a utility must replace or expand an existing facility in response to a request for access and, on the other hand, it is reasonable for the utility to deny the request due to the difficulties involved in honoring the request. We interpret sections 224(f)(1) and (f)(2) to require utilities to take all reasonable steps to accommodate requests for access in these situations. Before denying access based on a lack of capacity, a utility must explore potential accommodations in good faith with the party seeking access.

1164. We will not require telecommunications providers or cable operators seeking access to exhaust any possibility of leasing capacity from other providers, such as through a resale

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[2848] *See infra*, Section 2(b).

[2849] *See, e.g.*, Ohio Ed reply at 19.

[2850] NEES comments at 8; Cole comments at 15.

[2851] Carolina comments at 3-4; American Electric comments at 23.

[2852] NEES comments at 8-9.

[2853] UTC reply at 17.

[2854] American Electric comments at 20, 31; ConEd comments at 7; Kansas City comments at 3-4; UTC comments at 18. Some commenters assert that expanding conduit capacity is impractical. Delmarva reply at 7.

agreement, before requesting a modification to expand capacity.[2855] As indicated elsewhere in this Order, resale will play an important role in the development of competition in telecommunications. However, as we also have noted, there are benefits to facilities-based competition as well. We do not wish to discourage unduly the latter form of competition solely because the former might better suit the preferences of incumbent utilities with respect to pole attachments.

(b) Reservation of space by utility

1165. Utilities routinely reserve space on their facilities to meet future needs.[2856] Local economic growth and property development may require an electric utility to install additional lines or transformers that use previously available space on the pole.[2857] A utility may install an underground duct in which it can later install additional distribution lines, if necessitated by a subsequent increase in demand or by damage to the original lines.[2858] Reserving space allows the utility to respond quickly and efficiently to changed circumstances. This practice, however, also can result in a utility denying access to a telecommunications carrier or a cable operator even though there is unused capacity on the pole or duct.

1166. This issue is of particular concern because section 224(h) imposes the cost of modifying attachments on those parties that benefit from the modification.[2859] If, for example, a cable operator seeks to make an attachment on a facility that has no available capacity, the operator would bear the full cost of modifying the facility to create new capacity, such as by replacing an existing pole with a taller pole. Other parties with attachments would not share in the cost, unless they expanded their own use of the facilities at the same time. If the electric utility decides to change a pole for its own benefit, and no other parties derive a benefit from the modification, then the electric company would bear the full cost of the new pole.

1167. Some commenters contend that utilities will reserve space on a pole and then claim there is no capacity available, as a way of forcing cable operators and telecommunications carriers to pay for new utility facilities. These commenters contend that we should restrict or eliminate

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[2855] *See* PNM comments at 20; Carolina comments at 5; American Electric reply at 14.

[2856] American Electric comments at 43; UTC reply at 22.

[2857] Virginia Power comments at 8; American comments at 23; Connecticut Light comments at 5.

[2858] Ohio Edison comments at 16-17; ConEd comments at 9.; Delmarva reply at 5.

[2859] *See infra*, Section (C)(3).

the authority of utilities to reserve space.[2860] Utilities respond that it is unfair to force a utility to accommodate full occupation of its facility by third parties and then to saddle the utility with the cost of modifying the facility when the utility's own needs change and require a costly increase in capacity.[2861]

1168. The near-universal public demand for their core utility services, while imposing certain obligations, arguably entitles utilities to certain prerogatives vis-a-vis other parties, including the right to reserve capacity to meet anticipated future demand for those utility services.[2862] Recognition of such a right, however, could conflict with the nondiscrimination requirement of section 224(f)(1) which prohibits a utility from favoring itself or its affiliates with respect to the provision of telecommunications and video services.[2863] In addition, allowing space to go unused when a cable operator or telecommunications carrier could make use of it is directly contrary to the goals of Congress.

1169. Balancing these concerns leads us to the following conclusions. We will permit an electric utility to reserve space if such reservation is consistent with a bona fide development plan that reasonably and specifically projects a need for that space in the provision of its core utility service. The electric utility must permit use of its reserved space by cable operators and telecommunication carriers until such time as the utility has an actual need for that space. At that time, the utility may recover the reserved space for its own use. The utility shall give the displaced cable operator or telecommunications carrier the opportunity to pay for the cost of any modifications needed to expand capacity and to continue to maintain its attachment.[2864] An electric utility may not reserve or recover reserved space to provide telecommunications or video programming service and then force a previous attaching party to incur the cost of modifying the facility to increase capacity, even if the reservation of space were pursuant to a reasonable development plan. The record does not contain sufficient data for us to establish a presumptively reasonable amount of pole or conduit space subject that an electric utility may reserve. If parties cannot agree, disputes will be resolved on a case-by-case approach based on the reasonableness of the utility's forecast of its future needs and any additional information that is relevant under the circumstances.

[2860] MCI comments at 23; ACSI comments at 6-8; MFS comments at 7; Time Warner comments at 14; AT&T reply at 14-15.

[2861] AEP comments at 42-43; Duquesne comments at 17; PECO comments at 7; Delmarva comments at 14.

[2862] PNM comments at 8-9; American Electric comments at 13; ConEd reply at 4-5.

[2863] Ohio Consumers Counsel comments at 5-6; Delmarva comments at 8.

[2864] This standard differs from the one we anopt for allocation of collocation space under section 251(c)(4). *See supra*, Section VI

1170. With respect to a utility providing telecommunications or video services, we believe the statute requires a different result. Section 224(f)(1) requires nondiscriminatory treatment of all providers of such services and does not contain an exception for the benefit of such a provider on account of its ownership or control of the facility or right-of-way. Congress seemed to perceive such ownership and control as a threat to the development of competition in these areas, thus leading to the enactment of the provision in question. Allowing the pole or conduit owner to favor itself or its affiliate with respect to the provision of telecommunications or video services would nullify, to a great extent, the nondiscrimination that Congress required. Permitting an incumbent LEC, for example, to reserve space for local exchange service, to the detriment of a would-be entrant into the local exchange business, would favor the future needs of the incumbent LEC over the current needs of the new LEC. Section 224(f)(1) prohibits such discrimination among telecommunications carriers. As indicated above, this prohibition does not apply when an electric utility asserts a future need for capacity for electric service, to the detriment of a telecommunications carrier's needs, since the statute does not require nondiscriminatory treatment of all utilities; rather, it requires nondiscriminatory treatment of all telecommunications and video providers.

(c) Definition of "Utility"

1171. The access obligations of section 224(f) apply to any "utility," which is defined as:

> any person who is a local exchange carrier or an electric, gas, water, steam, or other public utility, and who owns or controls poles, ducts, conduits, or other rights-of-way used, in whole or in part, for any wire communications. Such term does not include any railroad, any person who is cooperatively organized, or any person owned by the Federal Government or any State.[2865]

1172. Arguably a provider of utility service does not fall within this definition if it has refused to permit any wired communications use of its facilities and rights-of-way since, in that case, its facilities and rights-of-way are not "used, in whole or in part, for wire communications." Under this construction, an electric utility would have no obligation to grant access under section 224(f) until the utility voluntarily has granted access to one communications provider or has used its facilities for wire communications.[2866] Only after its facilities were being used for wire communications would the utility have to grant access to all telecommunications carriers and cable operators on a nondiscriminatory basis.

1173. We conclude that this construction of the statute is mandated by its plain language

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[2865] 47 U.S.C. § 224(a)(1).

[2866] NU Systems comments at 2-3; UTC comments at 6-7.

and is indeed nondiscriminatory, since denial of access to all discriminates against none. We see no statutory basis, however, for the argument made by some utilities that they should be permitted to devote a portion of their poles, ducts, conduits, and rights-of-way to wire communications without subjecting all such property to the access obligations of section 224(f)(1).[2867] Those obligations apply to any "utility," which section 224(a)(1) defines to include an entity that controls "poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications."[2868] The use of the phrase "in whole or in part" demonstrates that Congress did not intend for a utility to be able to restrict access to the exact path used by the utility for wire communications. We further conclude that use of any utility pole, duct, conduit, or right-of-way for wire communications triggers access to all poles, ducts, conduits, and rights-of-way owned or controlled by the utility, including those not currently used for wire communications.

1174. We reject the contention that, because an electric utility's internal communications do not pose a competitive threat to third party cable operators or telecommunications carriers, such internal communications are not "wire communications" and do not trigger access obligations.[2869] Although internal communications are used solely to promote the efficient distribution of electricity, the definition of "wire communication" is broad and clearly encompasses an electric utility's internal communications.[2870]

(d) Application of Section 224(f)(2) to Non-Electric Utilities

1175. While all utilities are subject to the access obligations of section 224(f)(1), the provisions of section 224(f)(2), permitting a utility to deny access due to a lack of capacity or for reasons of safety, reliability, and generally applicable engineering purposes, apply only to "a utility providing electric service . . . ."[2871] Based on this statutory language, some commenters suggest that LECs and other utilities that do not provide electric service must grant requests for access, regardless of any concerns relating to safety, reliability, and general engineering principles.[2872] If there is a lack of capacity, a LEC must create more capacity, according to these

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[2867] *See* American Electric comments at 12, n. 7.

[2868] 47 U.S.C. § 224(a)(1).

[2869] *See* UTC comments at 7; Delmarva reply at 5.

[2870] *See* 47 U.S.C. 3(51) ("The term 'wire communication' . . . means the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection . . .").

[2871] 47 U.S.C. § 224(f)(2).

[2872] *See, e.g.*, AT&T comments at 16-17.

commenters.[2873]

1176. While the express language of sections 224(f)(1) and (f)(2) suggests that only utilities providing electric service can take into consideration concerns relating to safety and reliability, we are reluctant to ignore these concerns simply because the pole owner is not an electric utility. Even parties seeking broad access rights under section 224 recognize that, in some circumstances, a LEC will have legitimate safety or engineering concerns that may need to be accommodated.[2874] We believe that Congress could not have intended for a telecommunications carrier to ignore safety concerns when making pole attachment decisions. Rather than reach this dangerous result which would require us to ignore the dictates of sections 1[2875] and 4(o)[2876] of the Communications Act, we conclude that any utility may take into account issues of capacity, safety, reliability and engineering when considering attachment requests, provided the assessment of such factors is done in a nondiscriminatory manner.

1177. Nevertheless, we believe that section 224(f)(2) reflected Congress' acknowledgment that issues involving capacity, safety, reliability and engineering raise heightened concerns when electricity is involved, because electricity is inherently more dangerous than telecommunications services. Accordingly, although we determine that it is proper for non-electric utilities to raise these matters, they will be scrutinized very carefully, particularly when the parties concerned have a competitive relationship.

(e) Third-Party Property Owners

1178. Section 224(f)(1) mandates that the utility grant access to any pole, duct, conduit, or right-of-way that is "owned or controlled by it." Some utilities and LECs argue that certain private easement agreements, when interpreted under the applicable state property laws, deprive the utilities of the ownership or control that triggers their obligation to accommodate a request for access.[2877] Moreover, they contend, access to public rights-of-way may be restricted by state law

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[2873] *Id.* at 16-17.

[2874] AT&T reply at 17, n. 40

[2875] 47 U.S.C. § 151 (establishing the Commission for the purpose of promoting a "rapid, efficient Nation-wide, and world-wide wire and radio and communication service with adequate facilities . . . [and] promoting safety of life and property . . .").

[2876] 47 U.S.C. § 154 (o) (promoting the "safety of life and property" with respect to the use of radio and wire communications).

[2877] UTC comments at 7-8, GVNW comments at 9; U S West reply at 6; BellSouth reply at 9; *see* BOMA reply at 3.

or local ordinances.[2878] Opposing commenters contend that the addition of cable television or telecommunications facilities is compatible with electric service and therefore does not violate easements that have been granted for the provision of electric service.[2879] These commenters also assert that the statute does not draw specific distinctions between private and public easements.[2880] Further, some cable operators contend that utility easements are accessible to cable operators pursuant to section 621(a)(2) of the Communications Act as long as the easements are physically compatible with such use, regardless of the terms of a written easement agreement.[2881] Another commenter suggests utilities are best positioned to determine when access requests would affect a private easement, foreclosing the need to determine whether a private owner would consent to the requested attachment.[2882] As for local ordinances restricting access to public rights-of-way, one commenter suggests that such restrictions would violate section 253(a) of the Act, which blocks state or local rules that prohibit competition.[2883]

1179. The scope of a utility's ownership or control of an easement or right-of-way is a matter of state law.[2884] We cannot structure general access requirements where the resolution of conflicting claims as to a utility's control or ownership depends upon variables that cannot now be ascertained. We reiterate that the access obligations of section 224(f) apply when, as a matter of state law, the utility owns or controls the right-of-way to the extent necessary to permit such access.

1180. Section 621(a)(2) states that a cable franchise shall be construed as authorizing the construction of cable facilities in public rights-of-way and "through easements . . . which have been dedicated for compatible uses . . . ."[2885] The scope of a cable operator's access to easements under this provision has been the subject of a number of court opinions.[2886] To the extent section

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[2878] Rural Tel. reply at 4.

[2879] Cole comments at 16-17.

[2880] MFS reply at 16.

[2881] Cole comments at 17; *see* 47 U.S.C. § 541(a)(2).

[2882] AT&T reply at 18.

[2883] Sprint reply at 18.

[2884] *See* S. Rep. No. 580, 95th Cong., 1st Sess. 16 (1977).

[2885] 47 U.S.C. § 541(a)(2).

[2886] *TCI of North Dakota, Inc. v. Schriock Holding Co.*, 11 F.3d 812 (8th Cir. 1993); *Media General Cable of Fairfax, Inc. v. Sequoyah Condominium Council of Co-Owners*, 991 F.2d 1169 (4th Cir. 1993); *Cable Holdings of Georgia, Inc. v. McNeil Real Estate Fund VI, Ltd.*, 953 F.2d 600 (11th Cir.), *cert. den'd*, 506 U.S. 862 (1992); *Cable*

621(a)(2) has been construed to permit access to easements, a cable operator must be permitted to attach to utility poles, ducts, and conduits within such easements in accordance with section 224(f).

1181. Finally, we disagree with those utilities that contend that they should not be forced to exercise their powers of eminent domain to establish new rights-of-way for the benefit of third parties.[2887] We believe a utility should be expected to exercise its eminent domain authority to expand an existing right-of-way over private property in order to accommodate a request for access, just as it would be required to modify its poles or conduits to permit attachments. Congress seems to have contemplated an exercise of eminent domain authority in such cases when it made provisions for an owner of a right-of-way that "intends to modify or alter such right-of-way . . . ."[2888]

(f) Other Matters

1182. Utilities stress the importance of ensuring that only qualified workers be permitted in the proximity of utility facilities. Some utilities seek to limit access to their facilities to the utility's own specially trained employees or contractors, particularly with respect to underground conduits.[2889] According to these commenters, parties seeking to make attachments to utility facilities should be required to pay for the use of the utility's workers if the utility concludes that only its workers are fit for the job. While we agree that utilities should be able to require that only properly trained persons work in the proximity of the utilities' lines, we will not require parties seeking to make attachments to use the individual employees or contractors hired or pre-designated by the utility. A utility may require that individuals who will work in the proximity of electric lines have the same qualifications, in terms of training, as the utility's own workers, but the party seeking access will be able to use any individual workers who meet these criteria. Allowing a utility to dictate that only specific employees or contractors be used would impede the access that Congress sought to bestow on telecommunications providers and cable operators and would inevitably lead to disputes over rates to be paid to the workers.

1183. Some electric utilities argue that high voltage transmission facilities should not be accessible by telecommunications carriers or cable operators under section 224(f)(1).[2890] These commenters contend that transmission facilities, which are used for high voltage transmissions

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Investments, Inc. v. Woolley, 867 F.2d 151 (3d Cir. 1989).

[2887] *But see* UTC comments at 15, Ohio Edison comments at 14-15.

[2888] 47 U.S.C. § 224(h).

[2889] Kansas City at 3-4.

[2890] NEES comments at 15-16, PECO comments at 4.

over great distances, are far more delicate and dangerous than local distribution facilities. Permitting attachments to transmission facilities, they argue, poses a greater risk to the safety and reliability of the electric distribution system than is the case with distribution lines. They further state that transmission facilities generally are not located where cable operators and telecommunications carriers need to install facilities. ConEd suggests that transmission towers do not even fall within the scope of the statute.[2891]

1184. Section 224(f)(1) mandates access to "any pole, duct, conduit, or right-of-way," owned or controlled by the utility. The utilities do not suggest that transmission facilities do not use poles or rights-of-way, for which the statute does mandate the right of access. The utilities' arguments for excepting transmission facilities from access requirements are based on safety and reliability concerns. We believe that the breadth of the language contained in section 224(f)(1) precludes us from making a blanket determination that Congress did not intend to include transmission facilities. As with any facility to which access is sought, however, section 224(f)(2) permits the electric utility to impose conditions on access to transmission facilities, if necessary for reasons of safety and reliability. To the extent safety and reliability concerns are greater at a transmission facility, the statute permits a utility to impose stricter conditions on any grant of access or, in appropriate circumstances, to deny access if legitimate safety or reliability concerns cannot be reasonably accommodated.[2892]

1185. We note that some commenters favor a broad interpretation of "pole, duct, conduit, or right-of-way" because that approach would minimize the risk that a "pathway" vital to competition could be shut off to new competitors.[2893] Others argue for a narrow construction of this statutory phrase, contending that Congress addressed access to other LEC facilities elsewhere in the 1996 Act.[2894] We recognize that an overly broad interpretation of this phrase could impact the owners and mangers of small buildings, as well as small incumbent LECs, by requiring additional resources to effectively control and monitor such rights-of-way located on their properties.[2895] We do not believe that section 224(f)(1) mandates that a utility make space available on the roof of its corporate offices for the installation of a telecommunications carrier's transmission tower,[2896] although access of this nature might be mandated pursuant to a request for

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[2891] ConEd comments at 6.

[2892] 47 U.S.C. § 224(f)(2).

[2893] AT&T comments at 14.

[2894] Ameritech reply at 8; NYNEX reply at 8; PacTel reply at 22.

[2895] *See* Regulatory Flexibility Act, 5 U.S.C. §§ 601 et seq.

[2896] *See* Winstar comments at 3.

interconnection or for access to unbundled elements under section 251(c)(6).[2897] The intent of Congress in section 224(f) was to permit cable operators and telecommunications carriers to "piggyback" along distribution networks owned or controlled by utilities, as opposed to granting access to every piece of equipment or real property owned or controlled by the utility.[2898]

1186. The statute does not describe the specific type of telecommunications or cable equipment that may be attached when access to utility facilities is mandated.[2899] We do not believe that establishing an exhaustive list of such equipment is advisable or even possible. We presume that the size, weight, and other characteristics of attaching equipment have an impact on the utility's assessment of the factors determined by the statute to be pertinent -- capacity, safety, reliability, and engineering principles. The question of access should be decided based on those factors.

3. Constitutional Takings

a. Background

1187. The access provisions of section 224(f) restrict the right of a utility to exclude third parties from its property and therefore may raise Fifth Amendment issues.[2900] While we have no jurisdiction to determine the constitutionality of a federal statute, constitutional concerns are relevant for purposes of construing a statute.[2901] For that reason, we here consider the constitutional issues raised in the comments.

b. Comments

1188. A number of utilities suggest that we must construe section 224(f) as permitting them to make the ultimate decision as to whether to grant access to their facilities and rights-of-way, on the grounds that a statute compelling them to grant access would be an unconstitutional

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[2897] *See supra*, Section VI.B.

[2898] Ohio Edison reply at 12.

[2899] "The term 'pole attachment' means any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility." 47 U.S.C. § 224(a)(4).

[2900] *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

[2901] *Bell Atlantic Telephone Cos. v. FCC*, 24 F.3d 1441, 1445 (D.C. Cir. 1994).

taking of their private property under the Fifth Amendment.[2902] AEP notes that in *FCC v. Florida Power Corp.* the Supreme Court upheld the 1978 Pole Attachments Act, in part because nothing in that statute compelled utilities "to enter into, renew, or refrain from terminating pole attachment agreements."[2903] By contrast, the Supreme Court held that a state law requiring a landlord to permit a cable operator to install and maintain cable facilities over the landlord's apartment building constituted a taking of private property.[2904] On the basis of these cases, AEP contends: "To pass constitutional muster, the access required under section 224(f)(1) must be voluntary."[2905] Likewise, Puget argues: "If the Commission interprets the act's access requirement broadly as mandating access to the facility owner's property to all who desire it, the Takings Clause would be violated."[2906]

1189. Other utilities argue that the Fifth Amendment is implicated by the access requirements of section 224(f)(1), but stop short of contending that mandating access under the statue renders it unconstitutional. U S West believes that any discussion of access under section 224(f)(1) "would be incomplete without explicit recognition of the fact that such mandatory occupation . . . constitutes the taking of private property. As such, both the Commission and respective state regulatory agencies must ensure that LECs receive just compensation for their taken property."[2907] Virginia Power believes that any mandatory access requirement would result in a taking of private property, and notes "the potential constitutional issue . . . ."[2908] UTC states that forced access "raises serious questions, regarding at least, the taking of property without just compensation."[2909] Finally, GTE suggests that mandatory access under section 224(f)(1) may be unconstitutional as a taking of private property without just compensation, when considered in conjunction with the method by which pole attachment rates will be determined under section 224(e)(2).[2910]

[2902] AEP comments at 7-10; Virginia Electric comments at 4; GTE comments at 23; Puget comments at 3; UTC comments at 4.

[2903] 480 U.S. 245, 251 n. 6 (1987).

[2904] *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

[2905] AEP comments at 7.

[2906] Puget comments at 3.

[2907] U S West comments at 16.

[2908] Virginia Power comments at 4.

[2909] UTC comments at 5.

[2910] GTE comments at 23 & n. 24.

1190. Other commenters contend that there are no relevant constitutional issues to be confronted. Cole argues that requiring a utility to connect its facilities with those of other parties is simply a condition of providing utility service.[2911] With respect to LECs, for instance, Cole states: "Part of the obligation of being a regulated telecommunications common carrier is to provide services deemed to be necessary by regulators whether the regulated common carrier 'wants' to provide them or not."[2912] Cole contends that mandatory access to poles and other facilities "has no impact on the applicable constitutional standard."[2913] "As long as the rates for pole space and services are not confiscatory," Cole asserts,"there simply is no taking."[2914] In the alternative, Cole argues that "even if the access provision of section 224(f)(1) does constitute a taking, any argument that the compensation provided by the statute is not compensatory must be decided in a specific case, and not in this generic rulemaking."[2915]

c. Discussion

1191. Section 224(f)(1) mandates that a utility grant access to a requesting telecommunications provider or cable system operator, subject to certain conditions that we discuss elsewhere in this Order. That provision is not reasonably susceptible of a reading that gives the pole owner the choice of whether to grant telecommunications carriers or cable television systems access. Even if such mandatory access results in a taking, we cannot agree that it necessarily raises a constitutional issue. The Fifth Amendment permits takings as long the property owner receives just compensation for the property taken.[2916]

1192. As for the amount of compensation provided under the statute, GTE suggests that mandatory access will result in an unconstitutional taking when considered in conjunction with the methodology for pole attachment rates set forth in section 224(e)(2). We, of course, have no power to declare any provision of the Communications Act unconstitutional.[2917] In any event, we cannot agree. Congress has provided for compensation to pole owners, in the event that they cannot resolve a dispute with telecommunications carriers regarding the charges for use of the

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[2911] Cole comments at 28.

[2912] *Id.* at 7.

[2913] *Id.* at 29.

[2914] *Id.* at 31 [*citing FPC v. Hope Natural Gas*, 320 U.S. 591, 602 (1944)].

[2915] *Id.* at 31 [*citing WBEN v. United States*, 396 F.2d 601, 618 (2d Cir.), *cert. denied*, 393 U.S. 914 (1968)].

[2916] *Id.*

[2917] *See GTE California v. FCC*, 39 F.3d 940, 946 (9th Cir. 1994) (*citing Johnson v. Robison*, 415 U.S. 361, 368 (1974)).

[illegible] poles, that would allow them to recover the cost of providing usable space to each entity and two-thirds of the cost of the unusable space apportioned among such users. The Commission soon will initiate a separate rulemaking proceeding that will give greater content to this statutory standard. GTE and others may present their just compensation arguments with respect to the ratemaking standards the Commission adopts in that proceeding. GTE has not shown here, however, how the statutory standard contained in section 224(e) necessarily would deny pole owners just compensation.

4. Modifications

a. Background

1193. In the NPRM we sought comment on section 224(h) which provides:

> Whenever the owner of a pole, duct, conduit, or right-of-way intends to modify or alter such pole, duct, conduit, or right-of-way, the owner shall provide written notification of such action to any entity that has obtained an attachment to such conduit or right-of-way so that such entity may have a reasonable opportunity to add to or modify its existing attachment. Any entity that adds to or modifies its existing attachment after receiving such notification shall bear a proportionate share of the costs incurred by the owner in making such pole, duct, conduit, or right-of-way accessible.[2918]

1194. The NPRM requested comments addressing the manner and timing of the notice that must be provided to ensure a reasonable opportunity to add to or modify its attachment. In addition, we sought comment regarding the establishment of rules apportioning the cost of a modification among the various users of the modified facility. Finally, we requested comment on whether any payment of costs should be offset by the potential increase in revenues to the owner. If, for example, an owner modifies a pole to allow additional attachments that generate additional fees for the owner, should such revenues offset the share of modification costs borne by entities with preexisting access to the pole?

b. Comments

(1) Manner and Timing of Notice

1195. Several commenters state that no firm notice period should be established, due to the impracticalities of applying a single standard to the wide variety of situations that may necessitate modifications. Ameritech argues that the appropriate manner and timing for notice will vary according to local factors, such as the specific facility, the attachment, and the nature,

[2918] 47 U.S.C. § 224(h).

event and reason for the change.[2919] According to Ameritech, time frames for responding to circumstances will vary according to the reason for the modification, including modifications due to damage, deterioration, technological improvements, public works projects and demand growth. Given these variables, Ameritech contends that rigid notification rules could impair the facility owner's ability to respond to emergencies, and would unnecessarily complicate and delay expansion, improvement and maintenance of facilities.[2920]

1196. Most of the commenters agree that exceptions to any firm notice requirements should be made for emergency situations, such as storm restoration work, and minor modifications.[2921] Electric utilities argue that written notification requirements must not restrict their ability to respond to emergencies, customer complaints or routine maintenance.[2922] Incumbent LECs echo these suggestions.[2923] Duquesne urges an exception to any specific notice requirement where the utility's database does not show that the attachment exists.[2924] Duquesne contends that telecommunications providers often make attachments without prior notice to the utility. Although the utility will discover the attachment when it goes to service the pole, Duquesne argues it should not have to suspend that service to give notice to a communications provider that attached without notice to the utility. As proposed by Duquesne, this exception would sunset in five years, by which time the utility would be required to have an accurate database.[2925]

1197. Those commenters who propose specific notice periods varied widely with regard to what they deem "reasonable" notice: periods of 10,[2926] 30,[2927] 60,[2928] 90,[2929] and 180[2930] days

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[2919] Ameritech comments at 39.

[2920] *Id.*; *accord*, ConEd comments at 13, NU System Companies comments at 6.

[2921] Ameritech comments at 39; AT&T reply at 20; Bell Atlantic comments at 15; ConEd comments at 13-14; Delmarva comments at 23-24; Duquesne comments at 24-25; MFS comments at 12; NU System Companies comments at 6.

[2922] Public Service Company of New Mexico comments at 27; Virginia Electric comments at 19; Carolina Power reply at 2; American Electric Power reply at 41-43.

[2923] USTA comments at 10; Bell Atlantic comments at 15; SBC reply at 31-32.

[2924] Duquesne comments at 25.

[2925] *Id.*

[2926] AT&T comments at 20; Delmarva comments at 23-24; Duquesne comments at 24.

[2927] PECO comments at 8. PECO also notes that a period exceeding 30 days may be appropriate in the case of particular rights-of-ways, such as ducts, which have special logistical difficulties and greater expenses associated with them. *Id.* at 9.

were recommended, with at least one commenter requesting a full year's notice before modifications could take place.[2931] In justifying the various notice periods and exceptions presented, commenters cite existing notification periods in standard contracts.[2932] They also express concerns that longer periods would interfere with a utility's ability to allocate work crews and schedule necessary outages efficiently,[2933] that upgrade schedules could be disrupted if a longer period were mandated,[2934] or that longer periods would be necessary to allow users to determine future business and economic needs.[2935] Teleport recommends that modifications which benefit only some users should not interrupt usage by others.[2936]

1198. A number of commenters express a preference for negotiated notification terms.[2937] For example, BellSouth currently negotiates contractual notice provisions with attaching communications providers and expresses concern that these contracts may have to be re-negotiated should rigid notice periods be established.[2938] BellSouth also has online notification programs, which it argues should be recognized as meeting any written notification obligations.[2939] Similarly, NEES points out that a group of New England utilities, local exchange carriers, and cable systems are developing a joint electronic information system for all construction-related notifications, and notes that specific notice requirements could reduce the effectiveness of such a system.[2940] Bell Atlantic argues that any duty of notice should be deemed waived when an

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[2928] AT&T comments at 20, and AT&T reply at 20; GST Telecom comments at 7; U S West comments at 19.

[2929] Cole comments at 20; MFS comments at 11; Time Warner comments at 15.

[2930] MCI comments at 25.

[2931] Teleport comments at 10.

[2932] Cole comments at 20.

[2933] PECO comments at 8; USTA comments at 10, reply at 9.

[2934] PECO comments at 8.

[2935] Teleport comments at 10.

[2936] *Id.*

[2937] *See, e.g.*, Bell Atlantic comments at 15; GTE comments at 27; Illinois Commission Comments at 72-73; NEES comments at 15-16; PacTel comments at 18; USTA reply at 9.

[2938] BellSouth comments at 17-18.

[2939] *Id.*, at 18 n.39.

[2940] NEES comments at 16.

attachment contract grants the utility modification power as needed.[2941]

(2) Allocation of Costs

1199. Several commenters argue that the circumstances surrounding modifications will vary so greatly that uniform application of a single cost allocation formula is infeasible.[2942] Others propose a variety of cost allocation formulas, including dividing the total cost of the modification by the number of entities modifying their attachments,[2943] tying an entity's share of modification costs to the share of space reserved on the pole for that entity's use,[2944] and applying a total service long-run incremental cost methodology based on proportionate space used by each carrier.[2945] One commenter suggests that costs of modifications should be shared only when the user requests the modification, in which case the user would pay a *pro rata* share of the cost.[2946]

1200. AT&T contends that, while the attacher should pay the cost of the addition, if the addition involves more capacity than is needed by existing users, then the owner should pay the balance, subject to recovery later when other entities seek attachments.[2947] According to AT&T, attachers should not pay the cost of modifications by owner, but should only pay their share of the costs to make the structure accessible.[2948] AT&T adds that owners should not be allowed to charge new attachers for modifications paid for by existing attachers.[2949] PECO argues that if the utility has decided to replace a 50-foot pole with a 55-foot pole, an attaching party should not be permitted to request a 60-foot pole unless the requesting party intended to make a modification necessitating the 60-foot pole within six months. According to PECO, the requesting party should be permitted to reserve space in this manner only if it was willing to cover maintenance,

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[2941] Bell Atlantic comments at 15.

[2942] Ameritech comments at 39-40; GTE comments at 28; USTA comments at 11; U S West comments at 20.

[2943] Bell Atlantic comments at 16; Delmarva comments at 24-25; Duquesne comments at 26. Duquesne also contends that section 224(e)(1) dictates that any such rule should apply to a party's "proportionate costs" only if the parties are unable to resolve a dispute over such charges. *Id.*

[2944] AT&T comments at 21, reply at 22; MCI comments at 25; USTA comments at 11.

[2945] MCI comments at 24.

[2946] Teleport comments at 11.

[2947] AT&T comments at 19.

[2948] *Id.*, at 21.

[2949] AT&T reply at 22.

insurance, and other operational costs associated with the reserved space.[2950]

1201. Cole observes that an applicant must pay for the make-ready needed to accommodate its own attachments. This would include the cost to pre-existing users to transfer their lines to new locations on the pole, or to install a new pole if such a pole is necessary to accommodate the new attachment.[2951] Cole argues that the new user should be protected from having to pay for preexisting NESC violations that are corrected at the same time the new attachment is made.[2952] In addition, reading sections 224(h) and (i) together,[2953] Cole concludes that, if a change out is required to correct a pre-existing utility violation on the pole, the utility must bear the cost of the change out, and should also be solely responsible for change out costs if the change out is attributable solely to the needs of the utility, such as an increase in the load carried by the utility. Under this approach, if a change out is necessitated by something other than the needs of an entity that already has, or seeks to have, an attachment, then entities with existing attachments must be given an opportunity to maintain or modify their attachments, with each party bearing their own costs. As an example, all attaching parties would share the cost of a new pole that was needed due to a road widening project.[2954]

1202. A few commenters suggest that cost arrangements currently in place in certain states should be considered as possible solutions to this problem. For example, ConEd recommends adoption of the rule which it says is currently applied in New York and is an accepted practice: "If a utility causes an attachment to be modified within two years of an attachment, then the utility is responsible for the modification. (However, if it is the attaching entity, then the provider would be responsible for these costs.) Then, if a modification is made after two years, the provider is required to pay the costs of the modification."[2955] PacTel currently bills the attacher when it modifies a conduit to facilitate space for that attacher; if the modification is to benefit PacTel, PacTel picks up the whole cost. PacTel requests that this approach, which is currently used in California and Nevada, be recognized as a safe harbor under the 1996 Act.[2956] The NU System Companies contend that costs should be borne equally by all parties that have existing attachments on the facility, claiming that this method has generally been

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[2950] *Id.*

[2951] Cole comments at 18.

[2952] *Id. accord*, Summit comments at 1.

[2953] Note that section 224 (i) was not the subject of the *Notice*.

[2954] Cole comments at 19.

[2955] ConEd comments at 14.

[2956] PacTel comments at 22.

used among electric and telephone companies in its territories.[2957]

1203. Measuring modification costs poses a separate concern. Electric utilities, for example, contend that modification costs incurred to accommodate an attaching entity impose long-term costs beyond the initial cost of modification. Utilities have argued that the presence of attachments adds to the cost of maintaining and modifying the facility. One commenter suggests that modifications to increase pole height to accommodate attaching parties could impose on utilities additional costs of new trucks to service the pole.[2958] According to this commenter, unless attaching parties cover these added costs, utility owners will be subsidizing attaching parties on a continuous basis.[2959] At the same time, some commenters suggest that facility owners may engage in unnecessary or unduly burdensome modifications, imposing costs that could discourage new entrants from offering telecommunications services.[2960] Other commenters contend that normal market forces will prevent facility owners from making such modifications.[2961]

1204. Delmarva contends that it will be difficult, if not impossible, for the Commission to establish a rule that fairly defines what modifications are "unnecessary or unduly burdensome." Similarly, the NU System Companies argue that limitations on an owner's right to modify a facility and on "unnecessary or unduly burdensome modifications" would potentially and directly interfere with crucial day-to-day utility operations. They further argues that applicable codes, state laws and company standards will generally dictate when and where modifications are needed, and it would be impractical to suggest a "limitation" or standard that could be applied in all cases.[2962] A number of commenters note that if a utility seeks to modify a facility and the attaching carrier will not benefit from the modification, the attaching entity bears none of the costs associated with the modification. Given the large costs associated with such arrangements, this allocation of rearrangement costs will preclude utilities from making any "unnecessary or unduly burdensome" modifications, according to these commenters.[2963]

[2957] NU System Companies comments at 6-7.

[2958] UTC comments at 18.

[2959] *Id.*; *see* Puget Sound comments at 5-6.

[2960] WinStar comments at 8; Teleport comments at 10; GST Telecom comments at 8; NCTA reply at 7-8.

[2961] *See, e.g.*, Bell Atlantic comments at 15, Public Service Company of New Mexico reply at 18-19.

[2962] NU System Companies comments at 7.

[2963] Delmarva comments at 26-27; *accord* Duquesne comments at 28.

1205. Some commenters supported,[2964] while many opposed,[2965] our proposal to require facility owners to offset modification costs with additional revenues from new attachments made possible by those modifications. Several of those opposed to offsetting note that pole owners modify out of necessity, not to attract additional attachers, and any additional revenues generated by the new capacity added through modifications would be speculative.[2966] One commenter notes that offsetting costs by potential additional revenues would be inconsistent with a scheme that allocates the cost of modifications only to those parties who benefit from such modifications.[2967] ConEd adds that the facility belongs to the utility and it therefore should be permitted to receive any revenues it can from the use of those facilities.[2968]

1206. Cole suggests that regular attachment fees paid over the term of a pole attachment agreement constitute a return on the utility's investment in the pole. Cole contends such fees should be minimal if parties with attachments have contributed to the cost of a new pole. "Otherwise," Cole states, "the utility will be recovering a return and other compensation for an investment which was made in part by its tenants."[2969] In such circumstances, Cole recommends that the ongoing rental fee should be limited to the incremental cost to the utility of the attachment.[2970]

c. Discussion

1207. We recognize that, when a modification is planned, parties with preexisting attachments to a pole or conduit need time to evaluate how the proposed modification affects their interest and whether activity related to the modification presents an opportunity to adjust the attachment in a desirable manner.[2971] At the same time, we also recognize that not all adjustments to utility facilities are alike. Some adjustments may be sufficiently routine or minor as to not create the type of opportunity that triggers the notice requirement.[2972] Indeed, it is possible that in

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[2964] AT&T comments at 21; GST Telecom comments at 9.

[2965] ConEd comments at 14; Delmarva comments at 25-26; Duquesne comments at 27; NEES comments at 16.

[2966] Bell Atlantic comments at 16; NU Systems comments at 7; NEES comments at 16; PECO comments at 10.

[2967] Duquesne comments at 27.

[2968] ConEd comments at 14.

[2969] Cole comments at 20.

[2970] *Id.*

[2971] Teleport comments at 10; AT&T reply at 20.

[2972] USTA comments at 10; Bell Atlantic comments at 15; MFS comments at 12; SBC reply at 33.

some cases lengthy notice requirements could delay unnecessarily the kinds of modifications that would expedite the onset of meaningful competition in the provision of telecommunications services.[2973] Although the period of advance notice has varied widely among commenters, we note that 60 days has been advocated by several parties.[2974]

1208. Several commenters expressed a preference for negotiated notification terms.[2975] They have explained that circumstances will vary among owners of facilities.[2976] The time needed to commence a modification could vary according to pole conditions, technological improvements and demand growth.[2977] Attaching parties in rural markets may need more time to study facilities than facility users in urban markets.[2978] To demonstrate their ability to develop appropriate negotiated agreements, some commenters have described notice requirements in existing agreements. Such cases, they contend, illustrate that notification rules are unnecessary.[2979]

1209. We conclude that, absent a private agreement establishing notification procedures, written notification of a modification must be provided to parties holding attachments on the facility to be modified at least 60 days prior to the commencement of the physical modification itself. Notice should be sufficiently specific to apprise the recipient of the nature and scope of the planned modification. These notice requirements should provide small entities with sufficient time to evaluate the impact of or opportunities made possible by the proposed modifications on their interests and plan accordingly.[2980] If the contemplated modification involves an emergency situation for which advanced written notice would prove impractical, the notice requirement does not apply except that notice should be given as soon as reasonably practicable, which in some cases may be after the modification is completed. Further, we believe that the burden of requiring specific written notice of routine maintenance activities would not produce a commensurate benefit. Utilities and parties with attachments should exchange maintenance

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[2973] AT&T reply at 20; USTA reply at 9; U S West reply at 8; Massachusetts Electric, *et al*., reply at 4-5.

[2974] *See, e.g.*, U S West comments at 19; AT&T comments at 20; GST Telecom comments at 7; AT&T reply at 20; Cincinnati Bell reply at 6.

[2975] GTE comments at 28; PacTel comments at 21-22; Rural Tel. Coalition comments at 16; American Electric Power reply at 40; Ohio Edison reply at 23.

[2976] American Electric Power comments at 46.

[2977] Ameritech comments at 39; Municipal Utilities reply at 6-7; Cincinnati Bell reply at 6.

[2978] GVNW comments at 11.

[2979] PacTel comments at 21-22; BellSouth comments at 17-18; American Electric Power reply at 40.

[2980] *See* Regulatory Flexibility Act, 5 U.S.C. §§ 601 et seq.

handbooks or other written descriptions of their standard maintenance practices.[2981] Changes to these practices should be made only upon 60 days written notice. Recognizing that the parties themselves are best able to determine the circumstances where notice would be reasonable and sufficient, as well as the types of modifications that should trigger notice obligations, we encourage the owner of a facility and parties with attachments to negotiate acceptable notification terms.

1210. Even with the adoption of a specific notice period, however, we still encourage communication among owners and attaching parties. Indeed, in cases where owners and users routinely share information about upgrades and modifications, agreements regarding notice periods and procedures are ancillary matters.[2982]

1211. With respect to the allocation of modification costs, we conclude that, to the extent the cost of a modification is incurred for the specific benefit of any particular party, the benefiting party will be obligated to assume the cost of the modification, or to bear its proportionate share of cost with all other attaching entities participating in the modification.[2983] If a user's modification affects the attachments of others who do not initiate or request the modification, such as the movement of other attachments as part of a primary modification, the modification cost will be covered by the initiating or requesting party.[2984] Where multiple parties join in the modification, each party's proportionate share of the total cost shall be based on the ratio of the amount of new space occupied by that party to the total amount of new space occupied by all of the parties joining in the modification. For example, a CAP's access request might require the installation of a new pole that is five feet taller than the old pole, even though the CAP needs only two feet of space. At the same time, a cable operator may claim one foot of the newly-created capacity. If these were the only parties participating in the modification, the CAP would pay two-thirds of the modification costs and the cable operator one-third.

1212. As a general approach, requiring that modification costs be paid only by entities for whose benefit the modification is made simplifies the modification process. For these purposes, however, if an entity uses a proposed modification as an opportunity to adjust its preexisting attachment, the "piggybacking" entity should share in the overall cost of the modification to reflect its contribution to the resulting structural change. A utility or other party that uses a modification as an opportunity to bring its facilities into compliance with applicable safety or

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[2981] Although we do not offer a definition of "routine maintenance" in this proceeding, we anticipate that the parties to an attachment agreement will have established understandings in this regard. We do not believe that routine maintenance of a facility encompasses actions that would disrupt or impair the service of a facility user.

[2982] Frontier comments at 7.

[2983] NYNEX reply at 8; Carolina Power Reply comments at 3.

[2984] Cole comments at 18; MFS reply at 24.

other requirements will be deemed to be sharing in the modification and will be responsible for its share of the modification cost. This will discourage parties from postponing necessary repairs in an effort to avoid the associated costs.

1213. We recognize that limiting cost burdens to entities that initiate a modification, or piggyback on another's modification, may confer incidental benefits on other parties with preexisting attachments on the newly modified facility. Nevertheless, if a modification would not have occurred absent the action of the initiating party, the cost should not be borne by those that did not take advantage of the opportunity by modifying their own facilities. Indeed, the Conference Report accompanying the passage of the 1996 Act imposes cost sharing obligations on an entity "that takes advantage of such opportunity to modify its own attachments." This suggests that an attaching party, incidentally benefiting from a modification, but not initiating or affirmatively participating in one, should not be responsible for the resulting cost.[2985] As for pole owners themselves, the imposition of cost burdens for modifications they do not initiate could be particularly cumbersome if excess space created by modifications remained unused for extended periods.[2986]

1214. Apart from entities that initiate modifications and preexisting attachers that use the opportunity to modify their own attachments, some entities may seek to add new attachments to the modified facility after the modification is completed to avoid any obligation to share in the cost. If this occurs, the entity initiating and paying for the modification might pay the entire cost of expanding a facility's capacity only to see a new competitor take advantage of the additional capacity without sharing in the cost.[2987] Moreover, entities with preexisting attachments may, due to cost considerations, forgo the opportunity to adjust their attachment only to see a new entrant attach to a pole without sharing the modification cost. To protect the initiators of modifications from absorbing costs that should be shared by others, we will allow the modifying party or parties to recover a proportionate share of the modification costs from parties that later are able to obtain access as a result of the modification. The proportionate share of the subsequent attacher should be reduced to take account of depreciation to the pole or other facility that has occurred since the modification. These provisions are intended to ensure that new entrants, especially small entities with limited resources, bear only their proportionate costs and are not forced to subsidize their later-entering competitors. To the extent small entities avail themselves of this cost-saving mechanism, however, they will incur certain record keeping obligations.[2988]

[2985] GST Telecom comments at 8; MFS comments at 12; NCTA reply at 8.

[2986] Cincinnati Bell reply at 8.

[2987] *See* AT&T comments at 19.

[2988] *See* Regulatory Flexibility Act, 5 U.S.C. §§ 601 et seq.

1215. Parties requesting or joining in a modification also will be responsible for resulting costs to maintain the facility on an ongoing basis. We believe determining the method by which to allocate such costs can best be resolved in the context of a proceeding addressing the determination of appropriate rates for pole attachments or other facility uses.[2989] We will postpone consideration of these issues until such time.

1216. We recognize that in some cases a facility modification will create excess capacity that eventually becomes a source of revenue for the facility owner, even though the owner did not share in the costs of the modification.[2990] We do not believe that this requires the owner to use those revenues to compensate the parties that did pay for the modification. Section 224(h) limits responsibility for modification costs to any party that "adds to or modifies its existing attachment after receiving notice" of a proposed modification.[2991] The statute does not give that party any interest in the pole or conduit other than access. Creating a right for that party to share in future revenues from the modification would be tantamount to bestowing an interest that the statute withholds.[2992] Requiring an owner to offset modification costs by the amount of future revenues emanating from the modification expands the category of responsible parties based on factors that Congress did not identify as relevant. Since Congress did not provide for an offset, we will not impose it ourselves. Indeed, a requirement that utilities pass additional attachment fees back to parties with preexisting attachments may be a disincentive to add new competitors to modified facilities, in direct contravention of the general intent of Congress.

5. Dispute Resolution

a. Background

1217. Implementation of the access requirements of sections 224 and 251(b)(4) require the adoption of enforcement procedures. In the NPRM, we sought comment on, among other things, whether to impose upon a utility the burden of justifying its denial of access to its poles, ducts, conduits, and rights-of-way due to lack of capacity, safety, reliability, and engineering issues.[2993]

b. Comments

[2989] BellSouth comments at 18; NYNEX comments at 14; SBC comments at 18.

[2990] AT&T comments at 21; GST Telecom comments at 9; WinStar reply at 8-9.

[2991] 47 U.S.C. § 224(h).

[2992] American Electric Power reply at 46.

[2993] NPRM at para. 223; *see* 47 U.S.C. § 224(f)(2).

1218. With respect to dispute resolution procedures generally, a few commenters note that existing complaint procedure mechanisms have worked well in the cable television pole context and should be adequate in this broader context as well.[2994] Other commenters argue that dispute resolution should be left to the states, with federal intervention only where the states failed to regulate.[2995] Some commenters request that any complaint mechanism established should provide for the expeditious resolution of disputes, with short time frames for responses and final resolution.[2996]

1219. Several commenters argue that, where access has been denied, the party denying access should have the burden of proving that such denial was justified.[2997] Others contend that, historically, cable operators have had the burden of proof in pole attachment cases, and that no principled basis exists for altering historic procedures.[2998] In addition, commenters expressed concern that placing the burden of proof on a utility unfairly presumes bad faith.[2999]

1220. PECO agrees with some cable commenters that the reasonableness of a denial of access should be based on industry safety and operational standards. A restriction on access imposed in accordance with such standards should be irrebuttably presumed reasonable, according to PECO. If the utility seeks to impose stricter standards, the burden would be on the utility to establish the reasonableness of the stricter standard. Predicting the likelihood of fact-intense disputes on such issues, PECO recommends the adoption of adequate dispute-resolution procedures.[3000] Similarly, Cole contends that a utility cannot deny a request for access based upon safety or reliability concerns as long as the applicant is willing to undertake the obligations necessary to comply with NESC standards.[3001] Safety and reliability standards that exceed NESC standards should be presumed unreasonable if they are used to deny access to a pole. The utility

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[2994] *See, e.g.*, BellSouth reply at 16-17; GTE reply at 29-30; U S West reply at 8.

[2995] ICC comments at 72-73; Bell Atlantic reply at 10-11; GTE reply at 29-30; PacTel reply at 27.

[2996] *See, e.g.*, Joint Cable commenters at 20-22; NEXTLINK comments at 6-7.

[2997] Delmarva comments at 19; Duquesne comments at 22; Joint Cable commenters at 20-22; NEXTLINK comments at 6-7; OCC reply at 6; PUCO Staff comments at 11-12; Sprint reply at 20.

[2998] ConEd comments at 12; American Electric Power reply at 32-36; BellSouth reply at 16-17; SBC reply at 26-27.

[2999] GTE reply at 26-27; NEES comments at 14.

[3000] PECO comments at 6.

[3001] Cole comments at 16.

would then have the burden of showing the reasonableness of such standards.[3002]

1221. Duquesne argues that it is appropriate for the utility to bear the burden of establishing a threat to reliability if that rationale is used to deny access. Once a utility makes a showing, based on an engineering analysis, that the attachments "quantifiably threaten reliability," the burden would shift to the party seeking the attachment to show that the utility's analysis is incomplete or invalid, with the utility holding the ultimate burden of proof.[3003]

c. Discussion

(1) General Complaint Procedures Under Section 224

1222. Section 224(f)(2) provides that an electric utility may deny non-discriminatory access "where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes."[3004] We have determined that other utilities also may consider these concerns when faced with an access request.[3005] A denial of access, while proper in some cases, is an exception to the general mandate of section 224(f). We note that utilities contend that they are in the best position to determine when access should be denied, because they possess the information and expertise to make such decisions and because of the varied circumstances impacting these decisions.[3006] We think it appropriate that the utility bear the burden of justifying why its denial of access to a cable television or telecommunications carrier fits within that exception.[3007] We therefore agree that utilities have the ultimate burden of proof in denial-of-access cases.[3008] We believe this will minimize uncertainty and reduce litigation and transaction costs, because new entrants generally, and small entities in particular, are unlikely to have access to the relevant information without cooperation from the utilities.[3009]

[3002] *Id.*, at 17-18.

[3003] Duquesne comments at 22, *accord* Delmarva Comments at 19.

[3004] *See* 47 U.S.C. § 224(f)(2).

[3005] *See supra*, Section B(1)(c)(2).

[3006] *See generally* Comments of American Electric Power; Delmarva Power and Light; NEES; Puget Sound; Public Service Company of New Mexico; UTC; Virginia Power.

[3007] Public Service Company of New Mexico at 20-23; Delmarva Power and Light at 19; Joint Cable commenters at 18; WinStar reply at 7; Sprint reply at 20.

[3008] Comments of Public Service Company of New Mexico at 20-23; Ohio Consumers' Counsel reply at 6; PUCO Staff comments at 12.

[3009] *See* Regulatory Flexibility Act, 5 U.S.C. §§ 601 et seq.

1223. We also agree with Virginia Power that a telecommunications carrier or cable television provider filing a complaint with the Commission must establish a prima facie case.[3010] A petitioner's complaint, in addition to showing that it is timely filed, must state the grounds given for the denial of access, the reasons those grounds are unjust or unreasonable, and the remedy sought. The complaint must be supported by the written request for access, the utility's response, and information supporting its position.[3011] The Commission will deny the petitioner's claim if a prima facie case is not established.[3012] A complaint will not be dismissed if a petitioner is unable to obtain a utility's written response, or if a petitioner is denied any other relevant information by the utility needed to establish a prima facie case. Thus, we expect a utility that receives a legitimate inquiry regarding access to its facilities or property to make its maps, plats, and other relevant data available for inspection and copying by the requesting party, subject to reasonable conditions to protect proprietary information.[3013] This provision eliminates the need for costly discovery in pursuing a claim of improper denial of access, allowing attaching parties, including small entities with limited resources, to seek redress of such denials.[3014]

1224. We agree with the Joint Cable Commenters that "time is of the essence."[3015] The Joint Cable Commenters contend that the Commission should implement an expedited review process for denial of access cases.[3016] By implementing specific complaint procedures for denial of access cases, we seek to establish swift and specific enforcement procedures that will allow for competition where access can be provided.[3017] In order to provide a complete record, written requests for access must be provided to the utility. If access is not granted within 45 days of the request, the utility must confirm the denial in writing by the 45th day. Although these written requirements involve some recordkeeping obligations, which could impose a burden on small incumbent LECs and small entities, we believe that burden is outweighed by the benefits of

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[3010] Virginia Power comments at 14, American Electric Power comments at 40–42, Carolina Power and Light comments at 5 (*citing* 47 C.F.R. § 1.1409(b)); *see also* SBC comments at 15-17.

[3011] Virginia Power comments at 15 (*citing* 47 C.F.R. § 1.1404(f) and (g)).

[3012] 47 C.F.R. § 1.1409(d).

[3013] AT&T comments at 19; GST comments at 6.

[3014] *See* Regulatory Flexibility Act, 5 U.S.C. §§ 601, et seq.

[3015] Joint Cable Commenters reply at 24.

[3016] Joint Cable Commenters reply at 25.

[3017] Joint Cable Commenters reply at 24.

certainty and expedient resolution of disputes which this procedure encourages.[3018] The denial must be specific, and include all relevant evidence or information supporting its denial. It must enumerate how the evidence relates to one of the reasons that access can be denied under section 224(f)(2), *i.e.*, lack of capacity, safety, reliability or engineering standards.

1225. For example, a utility may attempt to deny access because of lack of capacity on a 40-foot pole. We would expect a utility to provide the information demonstrating why there is no capacity. In addition, the utility should show why it declined to replace the pole with a 45-foot pole. Upon the receipt of a denial notice from the utility, the requesting party shall have 60 days to file its complaint with the Commission. We anticipate that by following this procedure the Commission will, upon receipt of a complaint, have all relevant information upon which to make its decision. The petition must be served pursuant to section 1.1404(b) of the Commission's rules.[3019] Final decisions relating to access will be resolved by the Commission expeditiously.[3020] Because we are using the expedited process described herein, we do not believe stays or other equitable relief will be granted in the absence of a specific showing, beyond the prima facie case, that such relief is warranted.

(2) Procedures Under Section 251

1226. A telecommunications carrier seeking access to the facilities or property of a LEC may invoke section 251(b)(4) in lieu of, or in addition to, section 244(f)(1). Because section 251(b)(4) mandates access "on rates terms, and conditions that are consistent with ...tion 224," we believe that the section 224 complaint procedures established above should be available regardless of whether a telecommunications provider invokes section 224(f)(1) or section 251(b)(4), or both.

1227. If a telecommunications carrier seeks access to the facilities or property of an incumbent LEC, however, it shall have the option of invoking the procedures established by section 252 in lieu of filing a complaint under section 224. Section 252 governs procedures for the negotiation, arbitration, and approval of certain agreements between incumbent LECs and telecommunications carriers.[3021] In pertinent part, section 252(a)(1) provides:

[3018] *See* Regulatory Flexibility Act, 5 U.S.C. §§ 601 et seq.

[3019] 47 C.F.R. § 1.1404(b).

[3020] We note, however, that if the Commission requests additional information from any party, such party will have 5 days to respond to the request. Failure to provide the requested information within the 5 days, will result in a review of the record provided thus far.

[3021] 47 U.S.C. § 252. The requirements of section 252, and the conditions set forth in this section 3(a) of this Order, do not apply if the party seeking access is not a telecommunications carrier, or if the party receiving the request for access is not an incumbent LEC.

> Upon receiving a request for interconnection, services, or network elements pursuant to section 251, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) or (c) of section 251.[3022]

1228. Where parties are unable to reach an agreement under this section, any party may petition the relevant state commission to arbitrate the open issues.[3023] In resolving the dispute, the state commission must ensure, among other things, that the ultimate resolution "meet[s] the requirements of section 251, including the regulations prescribed by the Commission pursuant to section 251 . . . . ."[3024] The Commission may assume the state's authority under section 252 if the state "fails to carry out its responsibility" under that section.[3025]

1229. Section 251(c)(1) creates an obligation on the part of an incumbent LEC "to negotiate in good faith in accordance with section 252 the particular terms and conditions of agreements . . . " to fulfill its section 251(b)(4) obligation.[3026] Therefore, a telecommunications carrier may seek access to the facilities or property of an incumbent LEC pursuant to section 251(b)(4) and trigger the negotiation and arbitration procedures of section 252. If a telecommunications carrier intends to invoke the section 252 procedures, it should affirmatively state such intent in its formal request for access to the incumbent LEC. We impose this requirement because the two procedures have separate deadlines by which the parties may or must take certain steps, and therefore the incumbent LEC receiving the request has a need to know which procedure has been invoked. Section 224 shall be the default procedure that will apply if the telecommunications carrier fails to make an affirmative election.

1230. We note that section 252 does not impose any obligations on utilities other than incumbent LECs, and does not grant rights to entities that are not telecommunications providers. Therefore, section 252 may be invoked in lieu of section 224 only by a telecommunications carrier and only if it is seeking access to the facilities or property of an incumbent LEC.

1231. In addition, incumbent LECs cannot use section 251(b)(4) as a means of gaining access to the facilities or property of a LEC. A LEC's obligation under section 251(b)(4) is to afford access "on rates, terms, and conditions that are consistent with section 224." Section 224

[3022] 47 U.S.C. § 251(a).

[3023] 47 U.S.C. § 252(b)(1).

[3024] 47 U.S.C. § 252(c)(1).

[3025] 47 U.S.C. § 252(e)(5).

[3026] 47 U.S.C. § 251(c)(1).

does not prescribe rates, terms, or conditions governing access by an incumbent LEC to the facilities or rights-of-way of a competing LEC. Indeed, section 224 does not provide access rights to incumbent LECs. We cannot infer that section 251(b)(4) restores to an incumbent LEC access rights expressly withheld by section 224. We give deference to the specific denial of access under section 224 over the more general access provisions of section 251(b)(4). Accordingly, no incumbent LEC may seek access to the facilities or rights-of-way of a LEC or any utility under either section 224 or section 251(b)(4).

6. Reverse preemption

a. Background

1232. Even prior to enactment of the 1996 Act, section 224(b)(1) gave the Commission jurisdiction to "regulate the rates, terms, and conditions for pole attachments . . . ."[3027] Under former section 224(c)(1), that jurisdiction was preempted where a state regulated such matters. Such reverse preemption was conditioned upon the state following a certification procedure and meeting certain compliance requirements set forth in sections 224(c)(2) and (3). The 1996 Act expanded the Commission's jurisdiction to include not just rates, terms, and conditions, but also the authority to regulate non-discriminatory access to poles, ducts, conduits and rights-of-way under section 224(f).[3028] At the same time, the 1996 Act expanded the preemptive authority of states to match the expanded scope of the Commission's jurisdiction. section 224(c)(1) now provides:

> Nothing in this section shall be construed to apply to, or to give the Commission jurisdiction with respect to rates, terms and conditions, or access to poles, ducts, conduits, and rights-of-way as provided in subsection (f), for pole attachments in any case where such matters are regulated by the State.[3029]

b. Comments

1233. Cole contends that the nondiscriminatory access provisions of section 224 and our jurisdiction thereunder survive when a telecommunications provider seeks access to the facilities or property of a LEC under section 251(b)(4), even where such matters are regulated by a

[3027] 47 U.S.C. § 224(b)(1).

[3028] 47 U.S.C. § 224(f).

[3029] 47 U.S.C. § 224(c)(1).

state.[3030] Cole notes that section 251(b)(4) requires LECs to afford access to its facilities and rights-of-way to competing telecommunications carriers "on rates, terms, and conditions that are consistent with section 224," with no reference to the possibility of state regulation.[3031] Cole further cites the competitive checklist of section 271 which requires an RBOC to provide such access "in accordance with the requirements of section 224," but which does not provide for state regulation of access.[3032] Cole argues that neither section 251 nor section 271 exempts a LEC or BOC from the access requirements of section 224 where the state has undertaken regulation of such matters. Cole argues that allowing states to preempt federal authority "would defeat the purpose of the Act to promote access" to local facilities.[3033]

1234. Similarly, Nextlink contends that the Commission's access requirements should apply to any LEC that receives an access request under section 251(b)(4), regardless of whether a state has attempted to assert jurisdiction under section 224(c).[3034] Nextlink describes section 251 as "an entirely separate section providing entirely different bases for Commission jurisdiction."[3035]

1235. Other commenters argue that a request for access under section 251(b)(4) always implicates section 224, including the provisions of section 224(c)(1) that allow the states to preempt federal regulation.[3036] The District of Columbia Commission argues that section 251(b)(4) only requires that access be given "'on rates, terms and conditions that are consistent with section 224.'"[3037] Thus, this commenter asserts that any federal regulation of access under section 251(b)(4) is subject to the state's authority under section 224(c)(1).[3038] Bell Atlantic agrees, arguing that the only obligation of section 251(b)(4) is to provide access consistent with section 224 and that providing access in accordance with a valid scheme of state access regulations meets this requirement, regardless of any federal access requirements that otherwise

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[3030] Cole reply at 26-27.

[3031] 47 U.S.C. § 251(b)(4); *see* Cole comments at 26-27.

[3032] 47 U.S.C. § 271(c)(2)(B)(iii); *see* Cole comments at 27.

[3033] Cole reply at 27.

[3034] Nextlink reply at 5.

[3035] *Id.*

[3036] Ameritech comments at 33, NYNEX comments at 11-12, USTA reply at 7.

[3037] District of Columbia Commission comments at 9, *quoting* 47 U.S.C. § 251(b)(4).

[3038] *Id.*

would apply.[3039] UTC states that "the statute clearly gives the states authority to establish access requirements if they elect to assert jurisdiction."[3040]

c. Discussion

1236. To resolve this issue, we will begin with access requests that can arise solely under section 224(f)(1). These circumstances include when a cable system or telecommunications carrier seeks access to the facilities or rights-of-way of a non-LEC utility. In such cases, the expansion of the Commission's authority to require utilities to provide nondiscriminatory access under section 224(f) is countered by a corresponding expansion in the scope of a state's authority under section 224(c)(1) to preempt federal requirements. The authority of a state under section 224(c)(1) to preempt federal regulation in these cases is clear.[3041]

1237. The issue becomes more complicated when a telecommunications carrier seeks access to LEC facilities or property under section 251(b)(4). By its express terms, section 251(b)(4) imposes upon LECs, "[t]he duty to afford access to the poles, ducts, conduits, and rights-of-way of such a carrier to competing providers of telecommunications services on rates, terms and conditions that are consistent with section 224."[3042] We believe the reference in section 251(b)(4) to section 224 incorporates all aspects of the latter section, including the state preemption authority of section 224(c)(1). This interpretation is consistent not only with the plain meaning of the statute but with the overall application of sections 251 and 252.

1238. In the 1996 Act, Congress expanded section 224(c)(1) to reach access issues. Congress' clear grant of authority to the states to preempt federal regulation in these cases undercuts the suggestion that Congress sought to establish federal access regulations of universal applicability. Moreover, we do not find it significant that the access provisions of sections 251 and 271 contain no specific reference to the preemptive authority of states under section 224(c)(1), since both provisions expressly refer to section 224 generally.

1239. Thus, when a state has exercised its preemptive authority under section 224(c)(1), a LEC satisfies its duty under section 251(b)(4) to afford access by complying with the state's regulations. If a state has not exercised such preemptive authority, the LEC must comply with the

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[3039] Bell Atlantic comments at 12.

[3040] UTC reply at 29.

[3041] As in other circumstances, and subject to certain limitations, the Commission may preempt an otherwise valid state or local access requirement that "prohibit[s] or ha[s] the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunication service." 47 U.S.C. § 253(a).

[3042] 47 U.S.C. § 254(b)(1)(4).

federal rules. Similarly, when a telecommunications carrier seeks access rights from an incumbent LEC by choosing to avail itself of the negotiation and arbitration procedures established in section 252, a state that has exercised its preemption rights will apply its own set of regulations in the arbitration process pursuant to section 252 (c)(1). Finally, we note that state regulation in this area is subject to the provisions of section 253.

1240. We note that Congress did not amend sections 224(c)(2) to prescribe a certification procedure with respect to access (as distinct from the rates, terms, and conditions of access). Therefore, upon the filing of an access complaint with the Commission, the defending party or the state itself should come forward to apprise us whether the state is regulating such matters.[3043] If so, we shall dismiss the complaint without prejudice to it being brought in the appropriate state forum. A party seeking to show that a state regulates access issues should cite to state laws and regulations governing access and establishing a procedure for resolving access complaints in a state forum. Especially probative will be a requirement that the relevant state authority resolve an access complaint within a set period of time following the filing of the complaint.[3044]

C. IMPOSING ADDITIONAL OBLIGATIONS ON LECS

1. Background

1241. Section 251(c) imposes obligations on incumbent LECs in addition to the obligations set forth in sections 251(a) and (b). It establishes obligations of incumbent LECs regarding: (1) good faith negotiation; (2) interconnection; (3) unbundling network elements; (4) resale; (5) providing notice of network changes; and (6) collocation.

1242. Section 251(h)(1) defines an incumbent LEC as a LEC within a particular service area that: (1) as of the enactment of the 1996 Act, provided telephone exchange service in such area; and (2) as of the enactment of the 1996 Act, was deemed to be a member of the exchange carrier association pursuant to 47 C.F.R. § 69.601(b) or, on or after the enactment of the 1996 Act, became a successor or assign of such carrier. Section 252(h)(2) provides that, "[t]he Commission may, by rule, provide for the treatment of a local exchange carrier (or class or category thereof) as an incumbent local exchange carrier for purposes of this section if (A) such carrier occupies a position in the market for telephone exchange service within an area that is comparable to the position occupied by a carrier described in paragraph (1); (B) such carrier has substantially replaced an incumbent local exchange carrier described in paragraph (1); and (C) such treatment is consistent with the public interest, convenience, and necessity and the purposes

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[3043] Our rules require service of a pole attachment complaint on both the defending utility and the state. 47 C.F.R. § 1.1404(b).

[3044] *See* 47 U.S.C. § 224(c)(3) (establishing deadlines for states to take final action on complaints concerning the rates, terms, or conditions of access).

of this section."[3045]

1243. In the NPRM, we sought comment on whether we should establish at this time standards and procedures by which interested parties could prove that a particular LEC should be treated as an incumbent LEC. We also sought comment on whether carriers that are not deemed to be incumbent LECs under section 251(h) may be required to comply with any or all of the obligations that apply to incumbent LECs, and whether states may impose on non-incumbent LECs the obligations that are imposed on incumbent LECs under section 251(c).[3046]

2. Comments

1244. Most parties that commented on the issue contend that the Commission should not establish in this proceeding standards and procedures for determining whether a LEC should be treated as an incumbent LEC.[3047]

1245. Many incumbent LECs and state commissions contend that it is not inconsistent with the Act for states to impose the requirements in section 251(c) on carriers that do not fall within the 1996 Act's definition of incumbent. These parties note that sections 251(d)(3), 252(e)(3), and 253(b) permit states to impose additional requirements on carriers.[3048] State commissions allege that they are in the best position to determine when it is appropriate to impose particular obligations on new entrants.[3049] These parties contend that state imposition of reciprocal obligations would be equitable,[3050] and would help promote fair negotiation and realistic demands by the new entrants.[3051]

[3045] 47 U.S.C. § 252(h)(2).

[3046] NPRM at paras. 44-45.

[3047] BellSouth comments at 10; NCTA comments at 15 n.46; Sprint comments at 10; Time Warner comments at 14; *contra* PacTel comments at 16.

[3048] *See, e.g.*, BellSouth comments at 10; California Commission comments at 12; Illinois Commission comments at 19-20 (it is not inconsistent with the Act for states to impose additional obligations on non-incumbents, although it would not be permissible for FCC to do so); Ohio Commission comments at 21-22; PacTel comments at 16; Pennsylvania Commission comments at 19.

[3049] *See, e.g.*, District of Columbia Commission comments at 14.

[3050] *See, e.g.*, Colorado Commission comments at 14-15; MECA comments at 18; Municipal Utilities comments at 10-12 (reciprocal obligations should be permitted as long as they are allowed under state law and city charter); Ohio Consumers' Counsel comments at 5-6 (the loop is a bottleneck regardless of whether the provider is an incumbent or a new entrant); Ohio Commission reply at 8.

[3051] *See, e.g.*, MCI comments at 16, 20; New Jersey Commission at 1.

1246. Potential local competitors argue that states may not impose any of the requirements of section 251(c) on non-incumbent LECs.[3052] These parties contend that the 1996 Act specifically imposes different, and additional obligations on incumbent carriers.[3053] In addition, these parties contend that imposing the same regulatory obligations on non-incumbents is unnecessary because they lack market power,[3054] and is contrary to Congress's desire to facilitate new entry into the local telephone market.[3055] In addition, they assert that section 251(h)(2), which gives the FCC authority to determine when to treat additional carriers as incumbent LECs, would be meaningless if states could decide on their own to subject any LEC to obligations imposed by section 251(c) on incumbent LECs.[3056] Some parties assert that states already impose reciprocal obligations on new entrants, or require them to comply with requirements the 1996 Act only imposes on incumbent LECs.[3057]

3. Discussion

1247. We conclude that allowing states to impose on non-incumbent LECs obligations that the 1996 Act designates as "Additional Obligations on Incumbent Local Exchange Carriers," distinct from obligations on all LECs,[3058] would be inconsistent with the statute.[3059] Some parties

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[3052] *See, e.g.*, MCI comments at 5 n.7, MFS comments at 10, TCI comments at 14.

[3053] *See, e.g.*, ACTA comments at 5, Comcast comments at 17, Sprint comments at 10, Cox reply at 41, ICTA reply at 5.

[3054] *See, e.g.*, Comcast comments at 15-16, DoJ comments at 7 (absent a showing of market power, there is no basis for imposing additional obligations on new entrants), MCI comments at 5 n.7, Cox reply at 40, Time Warner reply at 11.

[3055] *See, e.g.*, Continental comments at 18, Metricom comments at 2 (imposing such requirements on non-dominant carriers would hinder competition), NEXTLINK comments at 15-16 (for states to impose additional obligations on non-incumbent LECs could constitute a barrier to entry in violation of section 253), Cox reply at 41, ICTA reply at 6 (imposing 251(c) requirements on new entrants would raise costs and thereby discourage potential competitors from entering the local market).

[3056] *See, e.g.*, GST comments at 3-4, MFS comments at 10, Time Warner comments at 15 (fact that Congress authorizes the FCC (but not state commissions) to impose incumbent obligations on the FCC suggests that Congress did not intend to give states that authority), TCI reply at 12, Teleport reply at 36.

[3057] TCI comments at 14 n.23; *see also* Colorado Commission comments at 11-12 (stating that it exempts new entrants from certain rules for a period of three years, after which the new entrant must demonstrate the continued need for such exemption), Illinois Commission comments at 19 (stating that it imposes intraLATA presubscription and line-side interconnection obligations on new entrants for policy reasons).

[3058] *Compare* 47 U.S.C. §§ 251(b) and 251(c).

assert that certain provisions of the 1996 Act, such as sections 252(e)(3) and 253(b), explicitly permit states to impose additional obligations. Such additional obligations, however, must be consistent with the language and purposes of the 1996 Act.

1248. Section 251(h)(2) sets forth a process by which the FCC may decide to treat LECs as incumbent LECs. Thus, when the conditions set forth in section 251(h)(2) are met, the 1996 Act contemplates that new entrants will be subject to the same obligations imposed on incumbents. While we find that states may not unilaterally impose on non-incumbent LECs obligations the 1996 Act expressly imposes only on incumbent LECs, we find that state commissions or other interested parties could ask the FCC to classify a carrier as an incumbent LEC pursuant to section 251(h)(2). At this time, we decline to adopt specific procedures or standards for determining whether a LEC should be treated as an incumbent LEC. Instead, we will permit interested parties to ask the FCC to issue an order declaring a particular LEC or a class or category of LECs to be treated as incumbent LECs. We expect to give particular consideration to filings from state commissions. We further anticipate that we will not impose incumbent LEC obligations on non-incumbent LECs absent a clear and convincing showing that the LEC occupies a position in the telephone exchange market comparable to the position held by an incumbent LEC, has substantially replaced an incumbent LEC, and that such treatment would serve the public interest, convenience, and necessity and the purposes of section 251.[3060]

[3059] We understand that some states may be imposing on non-incumbent LECs obligations set forth in section 251(c). *See, e.g.*, Colorado Commission comments at 11-12; Draft Decision, State of Connecticut Department of Public Utility Control, Docket No. 94-10-04 at 60, 65 (Connecticut Commission July 11, 1996); Illinois Commission comments at 19. We believe that these actions may be inconsistent with the 1996 Act.

[3060] 47 U.S.C. § 251(h)(2).

XII. EXEMPTIONS, SUSPENSIONS, AND MODIFICATIONS OF SECTION 251 REQUIREMENTS

A. BACKGROUND

1249. Section 251(f)(1) grants rural telephone companies an exemption from section 251(c), until the rural telephone company has received a bona fide request for interconnection, services, or network elements, and the state commission determines that the exemption should be terminated.[3061] Section 251(f)(2) allows LECs with fewer than two percent of the nation's subscriber lines to petition a state commission for a suspension or modification of any requirements of sections 251(b) and (c). Section 251(f) imposes a duty on state commissions to make determinations under this section, and establishes the criteria and procedures for the state commissions to follow. In the NPRM, we tentatively concluded that state commissions have the sole authority to make determinations under section 251(f). In addition, we sought comment on whether we should issue guidelines to assist state commissions when they make determinations regarding exemptions, suspensions, or modifications under section 251(f).

1250. Although subsections (f)(1) and (f)(2) both address the circumstances under which an incumbent LEC could be relieved of duties otherwise imposed by section 251, subsection 251(f)(2) also applies to non-incumbent LECs. The standard for determining whether to exempt a carrier under subsection 251(f)(1) is different from the standard for determining whether to grant a suspension or modification under subsection (f)(2). Subsection 251(f)(1)(B) requires state commissions to determine that terminating a rural exemption is consistent with the universal service provisions of the 1996 Act.[3062] Subsection 251(f)(2)(A)(i) requires state commissions to grant a suspension or modification if it is necessary to "avoid a significant adverse economic impact on users of telecommunications services generally," and subsection 251(f)(2)(B) requires a suspension or modification to be "consistent with the public interest, convenience, and necessity."[3063] Although we address these two subsections together, we highlight instances in which we believe that differences in statutory language require different treatment by state

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[3061] A rural telephone company is defined as a local exchange carrier operating entity to the extent that such entity "(A) provides common carrier service to any local exchange carrier study area that does not include either– (i) any incorporated place of 10,000 inhabitants or more, or any part thereof . . . , or (ii) any territory, incorporated or unincorporated, included in an urbanized area . . ., (B) provides telephone exchange service, including exchange access, to fewer than 50,000 access lines, (C) provides telephone exchange service to any local exchange carrier study area with fewer than 100,000 access lines; or (D) has less than 15 percent of its access lines in communities of more than 50,000 on the date of enactment of the Telecommunications Act of 1996." 47 U.S.C. § 153(37).

[3062] The provision states, "the State commission shall terminate the exemption if the request . . . is consistent with section 254 (other than subsections (b)(7) and (c)(1)(D) thereof)." 47 U.S.C. § 251(f)(1)(B).

[3063] 47 U.S.C. § 251(f)(2).

commissions.

1251. We discuss below issues raised by the commenters, and establish some rules regarding the requirements of section 251(f) that we believe will assist state commissions as they carry out their duties under section 251(f). For the most part, however, we expect that states will interpret the requirements of section 251(f) through rulemaking and adjudicative proceedings. We may in the future initiate a Notice of Proposed Rulemaking on certain additional issues raised by section 251(f) if it appears that further action by the Commission is warranted.

B. NEED FOR NATIONAL RULES

1. Comments

1252. Most state commissions[3064] and some other parties[3065] assert that states should have exclusive responsibility for the guidelines and determinations made under this section. Several commenters contend that any guidelines the Commission might issue would be useless, because generalized national guidelines could not take into account the variations among states and among individual LECs.[3066] For example, the Minnesota Independent Coalition argues that the additional grant of authority to states under section 214(e) confirms that state commissions have the sole authority to make determinations under section 251(f).[3067] A number of small telephone companies and associations of LECs advocate mandatory national rules regarding implementation of section 251(f). They assert that such rules would ensure that states carry out this provision in accordance with congressional intent.[3068] Some commenters favor a middle ground, claiming that non-mandatory guidelines from the Commission would be helpful, but that mandatory requirements would conflict with the Act's delegation to the states to make determinations under

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[3064] *See e.g.*, Alaska Commission comments at 6; Alabama Commission comments at 33-34; California Commission comments at 46; Idaho Commission comments at 14; Illinois Commission comments at 84; Louisiana Commission comments at 22-23; Ohio Commission comments at 80; Oregon Commission comments at 31; Pennsylvania Commission comments at 42; Texas Commission comments at 34; Wyoming Commission comments at 38-39.

[3065] Ad Hoc Telecommunications Users Committee comments at 11; ALLTEL comments at 16; Citizens Utilities comments at 34; Colorado Ind. Tel. Ass'n comments at 5-6; GVNW comments at 42; GTE comments at 80; Home Tel. comments at 1; Illinois Ind. Tel. Ass'n comments at 7; Minnesota Ind. Coalition comments at 14; Ohio Consumers' Counsel reply at 25-26; PacTel comments at 99; Puerto Rico Tel. reply at 16-17; Rural Tel. Coalition comments at 11-15.

[3066] Minnesota Ind. Coalition comments at 14; Western Alliance comments at 7.

[3067] Minnesota Ind. Coalition comments at 14.

[3068] Anchorage Tel. Utility comments at 2-4; Bay Springs, *et al.* comments at 10; Centennial Cellular Corp. comments at 12; Alaska Tel. Ass'n comments at 6; Matanuska Tel. Ass'n comments at 5; USTA comments at 87-93.

section 251(f).[3069]

2. Discussion

1253. We agree with parties, including small incumbent LECs, who argue that determining whether a telephone company is entitled, pursuant to section 251(f), to exemption, suspension, or modification of the requirements of section 251 generally should be left to state commissions.[3070] Requests made pursuant to section 251(f) seek to carve out exceptions to application of the section 251 rules that we are establishing in this proceeding. We find that Congress intended the section 251 requirements, and the Commission's implementing rules thereunder, to apply to all carriers throughout the country, except in the circumstances delineated in the statute. We find convincing assertions that it would be an overwhelming task at this time for the Commission to try to anticipate and establish national rules for determining when our generally-applicable rules should *not* be imposed upon carriers. Therefore, we establish in this Order a very limited set of rules that will assist states in their application of the provisions in section 251(f).

1254. Many parties have proposed varying interpretations of the provisions in section 251(f), and have asked for Commission determination or a statement of agreement. Because it appears that many parties welcome some guidance from the Commission, we briefly set forth our interpretation of certain provisions of section 251(f). Such statements will assist parties and, in particular, state commissions that must make determinations regarding requests for exemption, suspension, and modification.

C. APPLICATION OF SECTION 251(f)

1. Comments

1255. Some commenters urge the Commission to require states to grant exemptions, suspensions, or modifications only on a case-by-case basis, and only to the extent warranted by the particular circumstances. They ask the Commission to prohibit states from granting broad-scale or generalized exemptions, suspensions or modifications.[3071] AT&T argues that, to ensure that states do not allow LECs to avoid the regulatory and policy framework that Congress has mandated, the Commission should clarify that states must narrowly tailor suspensions and

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[3069] Kentucky Commission comments at 7; Anchorage Tel. Utility comments at 4. Several parties argue that any federal action should not be mandatory. Ohio Commission comments at 80; Citizens Utilities comments at 33; Colorado Ind. Tel. Ass'n comments at 6; Rural Tel. Coalition reply at 18-19.

[3070] *See, e.g.*, Minnesota Ind. Coalition comments at 14; Rural Tel. Coalition comments at 11.

[3071] *See, e.g.*, Centennial Cellular Corp. comments at 16; NCTA comments at 64; Vanguard reply at 21-22.

modifications to protect against specific, identifiable harm.[1072] Telecommunications Carriers for Competition and GCI argue that section 251(f) allows states to delay imposing the requirements under section 251(b) and (c), but it does not allow states to protect LECs from those requirements indefinitely.[1073] In response, Rural Tel. Coalition and SNET state that, while the term "suspensions" could be interpreted as allowing a time delay in implementation, the addition of the term "modifications" allows states to act more broadly.[1074] SNET favors allowing the states "broad discretion to change the nature of any requirement imposed by subsections (b) and (c)."[1075] USTA argues that states should not be permitted to eliminate all exemptions for all carriers.[1076]

1256. A number of parties allege that the Commission should encourage or require states to establish a legal presumption that the LEC seeking an exemption, suspension, or modification must prove to the state commission that such request is merited under the criteria set forth in section 251(f). AT&T argues that a carrier petitioning for suspension or modification under section 251(f)(2) should be obliged to demonstrate that "the application to it of the [s]ection 251(b) or (c) obligations that are the subject of its petition would inflict substantial harm on the LEC and customers in its territories that would not be inflicted on larger LECs and customers in their territories."[1077] SCBA asserts that the burden should be upon the incumbent LEC, which has strong disincentives to promote competitive entry.[1078] Local exchange carriers contend, on the other hand, that the party making a request under section 251(b) or (c) should have to prove that an exemption, suspension, or modification is not justified. For example, TCA, Inc. argues that, because of the high cost of providing telephone service in rural areas, competing carriers should be required to prove that competition will benefit a given rural area.[1079] Bay Springs, *et al.* and Bogue, Kansas argue that rural carriers should benefit from a presumption that they continue to qualify for the exemption in section 251(f)(1).[1080] SNET suggests that, if a LEC makes a *prima*

[1072] AT&T comments at 90-93; *accord* Ohio Consumers' Counsel reply at 26.

[1073] GCI comments at 16-19; TCC comments at 51-53, reply at 28.

[1074] Rural Tel. Coalition reply at 19-20; SNET comments at 36-37.

[1075] SNET comments at 36-37.

[1076] USTA comments at 87; Continental comments at 17 (citing actions of New Hampshire and Connecticut Commissions); Rural Tel. Coalition reply at 25.

[1077] AT&T comments at 92-93; *contra* Cincinnati Bell reply at 14; PacTel reply at 41; SNET reply at 8; USTA reply at 35-36.

[1078] SCBA comments at 17.

[1079] TCA comments at 10.

[1080] Bay Springs, *et al.* comments at 11; Bogue, Kansas comments at 8; *contra* Classic Tel. reply at 9.

facie case in its petition for suspension or modification, the state should automatically grant a temporary suspension of section 251(b) and (c) obligations, as allowed by section 251(f)(2).[3081]

1257. USTA, some rural LECs, and several other parties advocate that the Commission clarify what constitutes a bona fide request under section 251(f)(1).[3082] USTA recommends that a bona fide request must include, at a minimum: (1) a request for service to begin within one year from the date of the request, with a minimum one-year service period; (2) identification of the points where interconnection is sought, specification of network components and quantities needed, and the date when interconnection is desired; and (3) an indication that the requesting carrier is willing to agree to pay charges sufficient to compensate the LEC for all costs incurred in fulfilling the terms of the interconnection agreement as part of the agreement. USTA also contends that the states should be allowed to mandate longer minimum service periods and require competitive providers to post bonds or submit deposits to ensure that a rural telephone company does not bear the cost of interconnection.[3083] Anchorage Telephone Utility claims that simply responding to requests for interconnection imposes a tremendous burden and expense on rural telephone companies, and that rural LECs should not have to respond to requests that do not meet minimum criteria.[3084] Several parties state that they do not believe that generalized form letter requests should be considered a bona fide request.[3085]

1258. Other commenters either favor a broader definition of a bona fide request or oppose federal standards entirely.[3086] NCTA and GCI argue that a request for interconnection

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[3081] SNET comments at 37, *see also* Anchorage Tel. Utility comments at 3-4; Cincinnati Bell comments at 41-42; USTA comments at 91-93.

[3082] Anchorage Tel. Utility comments at 5; Bay Springs, *et al.* at 10; Bogue, Kansas comments at 7; NECA comments at 12; TDS reply at 5-6; USTA comments at 87-88; *see also* Kentucky Commission comments at 7.

[3083] USTA comments at 87-88; *accord* Anchorage Tel. Utility comments at 6-7 (carriers that ultimately do not order the items identified in a request for interconnection, services, or network elements should be required to reimburse the incumbent LEC for the costs of responding to such request); Matanuska Tel. Ass'n comments at 5.

[3084] Anchorage Tel. Utility comments at 6 (reporting the receipt of two letters "purporting to request interconnection." "One is a 1-page letter that simply asserts a need for interconnection. The other is an 8-page, single-spaced letter that demands detailed technical, operational and cost information on practically every facet of Anchorage Tel. Utility's local exchange service, without providing any indication of what the requesting carrier actually plans, needs or wants"); *accord* NECA reply at 10-11 (any bona fide request standard should permit LECs to recover costs of responding to requests and enable LECs to avoid unnecessary costs in responding to requests); TDS reply at 5-6.

[3085] TDS reply at 5; Anchorage Tel. Utility comments at 6; Rural Tel. Coalition reply at 24-25.

[3086] *See, e.g.*, Louisiana Commission comments at 22-23 (opposing any attempt by the Commission to define a standard for bona fide requests); *see also* Western Alliance comments at 7 n.16.

should be presumed bona fide until a rural telephone company shows that it is not. They object to a bona fide request requirement, such as the one proposed by USTA, that includes burdensome "pre-filing" requirements as a condition for state review under section 251(f).[3087]

1259. Subsection 251(f)(2) applies to LECs "with fewer than 2 percent of the Nation's subscriber lines installed in the aggregate nationwide."[3088] Several parties suggest that the Commission clarify which carriers meet the numerical standard.[3089] AT&T and a number of other parties argue that the 2 percent should be applied at the holding company level in order to ensure that no BOC operating company can apply for a suspension or modification under this subsection.[3090] Some parties further question whether Tier 1 LECs should be allowed to petition for suspension or modification under subsection (f)(2).[3091] Other parties argue that the two percent statutory cut-off is not a loophole and that the statutory standard should not be altered by the Commission to exclude Tier 1 LECs.[3092] PacTel suggests that the standard should be applied at the operating company level because section 251(f)(2) by its terms applies to "local exchange carrier[s]" not local exchange carriers "and their affiliates."[3093]

1260. Some parties recommend that the Commission offer guidance on how to determine whether a request for exemption, modification, or suspension should be granted.[3094] For example, sections 251(f)(1) and (f)(2) both include consideration of "technical feasibility" in deciding whether to grant an exemption, suspension, or modification. Some parties urge the Commission to clarify whether the standard for determining technical feasibility for purposes of section 251(f)

[3087] NCTA comments at 26-27; GCI reply at 17-18; *but see* USTA reply at 37 (disagreeing that its proposal would constitute "pre-filing" requirements).

[3088] 47 U.S.C. § 251(f)(2).

[3089] BellSouth comments at 76; Ohio Consumers' Counsel comments at 47-48.

[3090] AT&T comments at 90-93; Lincoln Tel. reply at 9-10; GCI reply at 17; TCC reply at 28; Ohio Consumers' Counsel argues that this interpretation is sound because section 251(f)(2) discusses the number of lines "in the aggregate nationwide," and individual operating companies do not operate on a nationwide scale. Ohio Consumers' Counsel reply at 26.

[3091] AT&T comments at 92; TLD comments at 6-7; Centennial Cellular Corp. comments at 12-15.

[3092] Alaska Tel. Ass'n comments at 6; Cincinnati Bell comments at 40, reply at 13; Lincoln Tel. comments at 10-11.

[3093] PacTel reply at 40-41.

[3094] *See, e.g.*, NCTA comments at 63-67 (urging a very limited construction of the exemption, suspension and modification provisions); *contra* Western Alliance reply at 7; Rural Tel. Coalition reply at 21-22.

is different than the technical feasibility standard set forth in sections 251(b) and (c).[3095] Sections 251(f)(1) and (f)(2) require the states to consider whether a request is "unduly economically burdensome."[3096] Generally, comments from rural LECs and others contend that smaller LECs cannot afford to hire staff to respond to requests, or expend funds for additional facilities or operational systems without jeopardizing their financial stability.[3097] In contrast, other parties argue that LECs should not be relieved of any duties otherwise imposed by sections 251(b) and (c) merely because they would require the expenditure of funds.[3098]

1261. Some incumbent LECs recommend that carriers that compete with rural LECs should be required to assume some of the universal service obligations of rural carriers.[3099] They argue that, without such safeguards, competing LECs will enter rural markets and take the incumbent LECs' profitable customers. USTA argues that state commissions should be encouraged to grant waivers until universal service issues are resolved.[3100] Commenters also propose varying interpretations of what constitutes "significant adverse impact on users."[3101] USTA proposes that the definition include any request that would cause a LEC to "have difficulty raising sufficient investment capital, and where the remaining customers . . . would likely bear an increase in rates or a reduction in service to cover a shortfall or subsidy to a new entrant."[3102] TLD proposes that the Commission establish a numerical benchmark, for example, that more than 50 percent of the users would suffer a rate increase of at least 20 percent before a request would be considered in violation of subsection (f)(2)(A)(i).[3103]

3. Discussion

[3095] *See, e.g.*, Bay Springs, *et al.* comments at 11; Lincoln Tel. comments at 23-24; SNET comments at 35; USTA comments at 92; Rural Tel. Coalition reply at 22-23.

[3096] 47 U.S.C. § 251(f).

[3097] A number of parties argue that, if smaller and rural LECs cannot recover their total costs, including any required investments and costs associated with developing rate levels and modifying support systems, the request should be deemed unduly economically burdensome. *See, e.g.*, USTA comments at 92; SNET comments at 36; TLD comments at 2; Lincoln Tel. comments at 23-25; TLD comments at 11-13.

[3098] *See, e.g.*, NCTA comments at 64 n.218.

[3099] Bay Springs, *et al.* comments at 12; TLD comments at 5; *accord* NECA comments at 11.

[3100] USTA comments at 91; *but see* NCTA reply at 25-26.

[3101] 47 U.S.C. § 251(f)(2)(A)(i).

[3102] USTA comments at 92.

[3103] TLD comments at 11.

1262. Congress generally intended the requirements in section 251 to apply to carriers across the country, but Congress recognized that in some cases, it might be unfair or inappropriate to apply all of the requirements to smaller or rural telephone companies.[3104] We believe that Congress intended exemption, suspension, or modification of the section 251 requirements to be the exception rather than the rule, and to apply only to the extent, and for the period of time, that policy considerations justify such exemption, suspension, or modification. We believe that Congress did not intend to insulate smaller or rural LECs from competition, and thereby prevent subscribers in those communities from obtaining the benefits of competitive local exchange service. Thus, we believe that, in order to justify continued exemption once a bona fide request has been made, or to justify suspension, or modification of the Commission's section 251 requirements, a LEC must offer evidence that application of those requirements would be likely to cause undue economic burdens beyond the economic burdens typically associated with efficient competitive entry. State commissions will need to decide on a case-by-case basis whether such a showing has been made.

1263. Given the pro-competitive focus of the 1996 Act, we find that rural LECs must prove to the state commission that they should continue to be exempt pursuant to section 251(f)(1) from requirements of section 251(c), once a bona-fide request has been made, and that smaller companies must prove to the state commission, pursuant to section 251(f)(2), that a suspension or modification of requirements of sections 251(b) or (c) should be granted. We conclude that it is appropriate to place the burden of proof on the party seeking relief from otherwise applicable requirements. Moreover, the party seeking exemption, suspension, or modification is in control of the relevant information necessary for the state to make a determination regarding the request. A rural company that falls within section 251(f)(1) is not required to make any showing until it receives a bona fide request for interconnection, services, or network elements. We decline at this time to establish guidelines regarding what constitutes a bona fide request. We also decline in this Report and Order to adopt national rules or guidelines regarding other aspects of section 251(f). For example, we will not rule in this proceeding on the universal service duties of requesting carriers that seek to compete with rural LECs. We may offer guidance on these matters at a later date, if we believe it is necessary and appropriate.

1264. We find that Congress intended section 251(f)(2) only to apply to companies that, at the holding company level, have fewer than two percent of subscriber lines nationwide. This is consistent with the fact that the standard is based on the percent of subscriber lines that a carrier has "*in the aggregate nationwide*."[3105] Moreover, any other interpretation would permit almost any company, including Bell Atlantic, Ameritech, and GTE affiliates, to take advantage of the suspension and modification provisions in section 251(f)(2). Such a conclusion would render the two percent limitation virtually meaningless.

[3104] 47 U.S.C. § 251(f).

[3105] 47 U.S.C. 251(f)(2) (emphasis added).

1265. We note that some parties recommend that, in adopting rules pursuant to section 251, the Commission provide different treatment or impose different obligations on smaller or rural carriers.[3106] We conclude that section 251(f) adequately provides for varying treatment for smaller or rural LECs where such variances are justified in particular instances. We conclude that there is no basis in the record for adopting other special rules, or limiting the application of our rules to smaller or rural LECs.

[3106] For example, the Rural Tel. Coalition argues that interconnection and collocation points should be set in a flexible manner to take into account size and volume differences among carriers. Rural Tel. Coalition comments at 31.

XIII. ADVANCED TELECOMMUNICATIONS CAPABILITIES

1266. Section 706(a) provides that the Commission "shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment."[3107] In the NPRM, we sought comment on how we can advance Congress's section 706(a) goal within the context of our implementation of sections 251 and 252.[3108]

1267. A number of parties suggest that rules allowing them to compete effectively and earn a profit in the telecommunications industry would assist the industry in providing telecommunications services to all Americans.[3109] MFS suggests that "all LECs should be required, as a condition of eligibility for universal service subsidies, to meet network modernization standards for rural telephone companies."[3110] Several state commissions indicate that they have already established programs to assist institutions eligible under section 706 in deploying advanced telecommunications services.[3111] The Alliance for Public Technology asserts that section 706 should underlie all of the FCC's proceedings.[3112] Ericsson states that the industry should work with government agencies to promote leading edge technology to ensure that it is introduced on a reasonably timely basis. For example, it contends that "Plug and Play Internet use" will greatly help the public and schools access information, and that advanced technology such as asynchronous transfer mode (ATM), wireless data/video, and AIN will enhance interconnection capabilities of public and private networks.[3113] The Illinois Commission contends that, depending on the pricing standard the Commission adopts for interconnection and access to unbundled elements, and the Commission's interpretation of the prohibition against discrimination, the Commission should adopt special rules for carriers when they provide interconnection or access to unbundled network elements to serve a school, library, or healthcare

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[3107] 47 U.S.C. § 706(a).

[3108] NPRM at para. 263.

[3109] Colorado Ind. Tel. Ass'n comments at 6; COMAV comments at 60-61; GVNW comments at 42; Illinois Ind. Tel. Ass'n comments at 7; Louisiana Commission comments at 24-27.

[3110] MFS comments at 88.

[3111] Illinois Commission comments at 85; Louisiana Commission comments at 24-27; Texas Commission comments at 36.

[3112] Alliance for Public Technology reply at 1-5.

[3113] Ericsson comments at 7-8.

provider.[3114]

1268. We decline to adopt rules regarding section 706 in this proceeding. We intend to address issues related to section 706 in a separate proceeding.

[3114] Illinois Commission comments at 86.

XIV. PROVISIONS OF SECTION 252

A. Section 252(e)(5)

1. Background

1269. Section 252(e)(5) directs the Commission to assume responsibility for any proceeding or matter in which the state commission "fails to act to carry out its responsibility" under section 252.[3115] In the NPRM, we asked whether the Commission should establish rules and regulations necessary to carry out our obligation under section 252(e)(5).[3116] In addition, we sought comment on whether in this proceeding we should establish regulations necessary and appropriate to carry out our obligations under section 252(e)(5). In particular, we sought comment on what constitutes notice of failure to act, what procedures, if any, we should establish for parties to notify the Commission, and what are the circumstances under which a state commission should be deemed to have "fail[ed] to act" under section 252(e)(5).[3117]

1270. Section 252(e)(4) provides that, if the state commission does not approve or reject (1) a negotiated agreement within 90 days, or (2) an arbitrated agreement within 30 days, from the time the agreement is submitted by the parties, the agreement shall be "deemed approved."[3118] We sought comment on the relationship between this provision and our obligation to assume responsibility under section 252(e)(5). We also sought comment on whether the Commission, once it assumes the responsibility of the state commission, is bound by all of the laws and standards that would have applied to the state commission, and whether the Commission is authorized to determine whether an agreement is consistent with applicable state law as the state commission would have been under section 252(e)(3).[3119] In addition, we sought comment on whether, once the Commission assumes responsibility under section 252(e)(5), it retains jurisdiction, or whether that matter or proceeding subsequently should be remanded to the state.

1271. Finally, we sought comment on whether we should adopt, in this proceeding, some standards or methods for arbitrating disputes in the event we must conduct an arbitration under section 252(e)(5). We noted some of the benefits and drawbacks of both "final offer" arbitration and open-ended arbitration, and asked for comment on both.

[3115] 47 U.S.C. § 252(e)(5).

[3116] NPRM at ¶ 265.

[3117] NPRM at ¶ 266.

[3118] 47 U.S.C. § 252(e)(4).

[3119] NPRM at ¶ 267.

2. Comments

1272. The majority of the parties that commented on this issue assert that the Commission should establish guidelines under which it will carry out its responsibilities under section section 252(e)(5).[3120] The Illinois Commission, for example, argues that regulations are needed in order to avoid jurisdictional disputes that may arise.[3121] Some parties, on the other hand, argue that it is not critical for the Commission at this time to develop rules governing the arbitration process.[3122] The Pennsylvania Commission, for example, argues that such rules should be adopted in this proceeding only if the Commission perceives a real possibility that it will be asked in the near future to arbitrate an interconnection agreement.[3123]

1273. A broad range of parties comment on what constitutes a "failure to act" and whether the Commission should establish a definition and procedures for interested parties to notify us if a state commission fails to act.[3124] The Illinois Commission, for example, argues that, upon receipt of a petition to mediate or arbitrate, or a BOC statement of generally available terms, the state commission should issue and serve upon the Commission a notice of its intent to act. This will put the Commission and interested parties on notice that the state commission intends to act.[3125] Some state commissions argue that "failure to act" occurs only if the state commission fails to respond to a request for mediation or arbitration, or fails to issue an arbitration decision within nine months after the incumbent LEC receives a request for interconnection under section 252.[3126]

1274. Other parties contend that failure to act should mean that a state commission has

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[3120] *See, e.g.*, Jones Intercable comments at 16-18; California Commission comments at 49; Illinois Commission comments at 87; MCI comments at 94-95; BellSouth comments at 78; Cable & Wireless comments at 50-51; Time Warner comments at 104-105; Oregon Commission comments at 4.

[3121] Illinois Commission comments at 87.

[3122] *See, e.g.*, Pennsylvania Commission comments at 42; PacTel comments at 99; Iowa Commission comments at 7; GTE comments at 80-81.

[3123] Pennsylvania Commission comments at 42.

[3124] *See, e.g.*, Illinois Commission comments at 89; District of Columbia comments at 40; Ohio Commission comments at 81-82; Time Warner comments at 106-107; PacTel comments at 99; Jones Intercable comments at 16 (failure to act occurs where a state fails to respond to a request for arbitration or fails to render a decision on time in arbitration).

[3125] Illinois Commission comments at 89.

[3126] District of Columbia Commission comments at 40; Ohio Commission comments at 81-82; *accord* Cable & Wireless comments at 51.

not taken any steps to act upon a request for arbitration, or has not taken any steps to approve an arbitrated agreement within the time set out in section 252(e)(4).[3127] Jones argues that a failure to act occurs where a state fails to respond to a request for arbitration or fails to render a decision on time in the arbitration proceeding.[3128] Ohio Consumers' Counsel contends that failure to carry out a state's responsibility means more than mere inaction, and that, for example, willfully disregarding the standards in section 252(e)(2) for approving or disapproving agreements might also "constitute a failure to act to carry out its responsibility" under section 252.[3129] USTA argues that, where there has been no agreement and the state fails to act, the Commission must step in and, in some instances, the Commission may need to step in to arbitrate or mediate before an agreement has been reached.[3130]

1275. Regarding the relationship between sections 252(e)(5) and 252(e)(4), most commenters assert that, if a state fails to approve a negotiated agreement within 90 days, or an arbitrated agreement within 30 days, the agreement will be deemed approved, and no Commission action is required.[3131] These parties contend that approval or disapproval of negotiated or arbitrated agreements are not reviewable by the Commission, but that aggrieved parties may seek relief in the appropriate federal district court.

1276. A number of commenters believe that it is important that procedures be in place for interested parties to notify the Commission if a state fails to act. These parties argue that notice of failure to act should be in writing, and should contain the relevant factual circumstances including the provision of the statute under which the state allegedly has failed to act.[3132] They contend that notice should be given to allow interested parties and the state adequate time to respond. MCI asserts that existing Commission procedures are adequate. MCI argues that any notice of an alleged state commission failure to act should set forth relevant facts and the

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[3127] *See, e.g.*, Oregon Commission comments at 4; California Commission comments at 47; Ohio Consumers' Counsel comments at 49; Texas Commission comments at 36-37.

[3128] Jones Intercable comments at 16.

[3129] Ohio Consumers' Counsel comments at 49; *see also* California Commission comments at 48 (an agreement automatically approved because the state did not act within the specified time frame should not be deemed to be in compliance with state law).

[3130] USTA comments at 93-94.

[3131] *See, e.g.*, USTA comments at 93-94; Illinois Commission comments at 88; BellSouth comments at 79; Jones Intercable comments at 15; Time Warner reply at 106-107; PacTel comments at 99.

[3132] *See, e.g.*, Ohio Commission comments at 81; Ohio Consumers' Counsel comments at 49; Illinois Commission comments at 89-90.

Commission should place the item on public notice.[3133]

1277. A majority of the commenting parties argue that, if the Commission assumes the responsibility of a state commission, it should be bound by laws and standards that would have applied to the state commission.[3134] These parties allege that this approach would produce consistent results, and that Congress did not intend to create another forum with a separate set of rules. Time Warner, on the other hand, argues against the Commission being bound by state law.[3135]

1278. Parties disagree over whether authority would revert back to the states once the Commission assumes a state commission's responsibility. A number of state commissions argue that the Commission does not retain jurisdiction; it only assumes jurisdiction over a particular proceeding or matter but does not substitute for the state commission on an ongoing basis.[3136] The District of Columbia Commission asserts that, at any time, the state should be able to petition the Commission to reconsider its decision to preempt, and such petitions should be granted upon a reasonable assurance the state intends to carry out its obligations.[3137] A number of parties contend that, once the Commission assumes jurisdiction over a proceeding or matter, it should retain jurisdiction.[3138] Teleport, for example, argues that the Commission "should not risk returning jurisdiction to a state that has demonstrated an ineptitude for implementing interconnection agreements."[3139] Pacific Telesis and Cable and Wireless argue that any agreement arbitrated by the Commission must be submitted to the state for approval.[3140]

[3133] MCI comments at 95.

[3134] *See, e.g.*, PacTel comments at 13-14 (if there is any conflict between the Commission's own rules and requirements of that state, the Commission must lay aside its rules and enforce the state's); California Commission comments at 48; Illinois Commission comments at 90; BellSouth comments at 79; Ohio Commission comments at 82; Louisiana Commission comments at 28 (specific questions concerning a state's law could be certified to the state); SBC comments at 105.

[3135] Time Warner comments at 107-108 (the Commission's authority to interpret state law is suspect, and the Commission lacks the resources and expertise to sit as a trier of law in fifty jurisdictions).

[3136] *See, e.g.*, Ohio Commission comments at 81; Louisiana Commission comments at 28; Pennsylvania Commission comments at 43; District of Columbia Commission comments at 40-41; BellSouth comments at 80.

[3137] District of Columbia Commission comments at 40-41.

[3138] *See, e.g.*, Teleport comments at 89; Jones Intercable comments at 17; Time Warner comments at 109; Oregon Commission comments at 5 (failure by the state to act on one agreement should not vest jurisdiction over other agreements or matters).

[3139] Teleport comments at 89.

[3140] PacTel comments at 100; Cable & Wireless comments at 52.

1279. The vast majority of commenters recommend that the Commission adopt standards for arbitrating disputes in the event that it assumes responsibility under section 252(e)(5).[3141] These parties assert that sufficiently detailed rules should ensure fair and expeditious handling of arbitrations. A few of the commenters favor national rules governing state arbitration proceedings.[3142] SCBA, for example, favors national standards requiring state commissions to use abbreviated, lower cost arbitration proceedings for small cable operators.[3143] The majority of commenters, however, argue against national rules that would govern state arbitration proceedings.[3144]

1280. There is also significant disagreement regarding whether final-offer arbitration should be the arbitration model adopted by the Commission in the event the Commission must conduct the arbitration itself. A broad range of parties argue that final offer arbitration would result in reasonable recommendations to the arbitrator.[3145] Vanguard argues that the "final offer" method of arbitration should permit post-offer negotiation by the parties and allow the parties to tailor counter-proposals.[3146] Under this approach, the Commission would permit negotiation to continue after arbitration offers are exchanged in order to promote negotiated settlements.[3147]

1281. Many competitors oppose a "final offer" arbitration standard.[3148] Sprint, for example, argues that "final-offer" arbitration works well when there is a single, narrowly defined issue on the table, but, where there are numerous complex technical and economic issues, confronting the arbitrator with an "either/or" choice leaves insufficient flexibility to achieve a

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[3141] *See, e.g.*, Teleport comments at 85-86; MFS comments at 89-90; CompTel comments at 108; MCI comments at 95-96; Ohio Consumers' Counsel comments at 50; SBC comments at 99; Kentucky Commission comments at 7; Ohio Commission comments at 83; Illinois Commission comments at 91; Timer Warner comments at 109; Jones Intercable comments at 18; Vanguard comments at 35-37; Association of Telemessaging Services International reply at 18.

[3142] *See, e.g.*, Vanguard comments at 35-37; Time Warner comments at 109.

[3143] SCBA comments at 11-12.

[3144] *See, e.g.*, Oregon Commission reply at 11; Ohio Commission comment at 81; NARUC reply at 14; Illinois Commission at 91.

[3145] *See, e.g.*, Teleport comments at 88; USTA comments at 94-95; SBC comments at 103;

[3146] Vanguard comments at 39-40.

[3147] *Id.* at 40.

[3148] *See, e.g.*, MCI comments at 95-96; Sprint reply at 47; Time Warner comments at 111; Competitive Policy Institute reply at 21-22; GCI reply at 5.

result that comports with section 251.[3149] In addition, Sprint asserts that, because arbitration proceedings have a public interest component that sets them apart from mere private disputes, neither party's offer might serve the public interest.[3150] Some parties recommend an "open-ended" arbitration system,[3151] while California is in favor of a hybrid between the two.[3152]

1282. SBC contends that Congress did not intend for arbitration to be binding to the extent that parties are not legally obligated to enter into an agreement after the arbitrator issues a decision.[3153] SBC argues that parties are bound by the arbitrator's decision only if they decide to enter into an agreement. Vanguard responds that SBC's proposal is contrary to the statute, which does not give parties the opportunity to reject the results of arbitration and which does not provide for *de novo* review.[3154]

3. Discussion

1283. After careful review of the record, we are convinced that establishing regulations to carry out our obligations under section 252(e)(5) will provide for an efficient and fair transition from state jurisdiction should we have to assume the responsibility of the state commission under Section 252(e)(5). The rules we establish in this section with respect to arbitration under section 252 apply only to instances where the Commission assumes jurisdiction under section 252(e)(5); we do not purport to advise states on how to conduct arbitration when the Commission has not assumed jurisdiction. The rules we establish will give notice of the procedures and standards the Commission would apply to mediation and arbitration, avoid delay if the Commission had to arbitrate disputes in the near future, and may also offer guidance the states may, at their discretion, wish to consider in implementing their own mediation and arbitration procedures and standards. We decline to adopt national rules governing state arbitration procedures. We believe the states are in a better position to develop mediation and arbitration rules that support the objectives of the 1996 Act. States may develop specific measures that address the concerns of

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[3149] Sprint reply at 47.

[3150] *Id.*

[3151] *See, e.g.*, Time Warner comments at 111.

[3152] California Commission comments at 50. The California Commission's procedures for resolving interconnection disputes is based on a four-step expedited dispute resolution process for resolving disputes between parties who cannot agree on the terms of interconnection. Step 1 is informal resolution without state intervention. Step 2 provides for dispute resolution with mediation by the Administrative Law Judge (ALJ). Step 3 calls for the parties to submit short pleadings to the ALJ who shall use the state commission's "preferred outcomes" approach as a guideline in resolving dispute. Step 4 allows for a party to challenge an ALJ ruling by filing an expedited complaint.

[3153] SBC comments at 99.

[3154] Vanguard reply at 18-20; *accord* Competition Policy Institute reply at 18-19.

small entities and small incumbent LECs participating in mediation or arbitration.

1284. The rules we adopt herein are minimum, interim procedures. Adopting minimum interim procedures now will allow the Commission to learn from the initial experiences and gain a better understanding of what types of situations may arise that require Commission action. We note that the Commission is not required to adopt procedures and standards for mediation and arbitration within the six-month statutory deadline and that, by adopting minimum interim procedures, the Commission can better direct its resources to more pressing matters that fall within the six-month statutory deadline.

1285. Regarding what constitutes a state's "failure to act to carry out its responsibility under" section 252,[3155] the Commission was presented with numerous options. The Commission will not take an expansive view of what constitutes a state's "failure to act." Instead, the Commission interprets "failure to act" to mean a state's failure to complete its duties in a timely manner. This would limit Commission action to instances where a state commission fails to respond, within a reasonable time, to a request for mediation or arbitration, or fails to complete arbitration within the time limits of section 252(b)(4)(C).[3156] The Commission will place the burden of proof on parties alleging that the state commission has failed to respond to a request for mediation or arbitration within a reasonable time frame. We note the work done by states to date in putting in place procedures and regulations governing arbitration and believe that states will meet their responsibilities and obligations under the 1996 Act.[3157]

1286. We agree with the majority of commenters that argue that our authority to assume the state commission's responsibilities is not triggered when an agreement is "deemed approved" under section 252(e)(4) due to state commission inaction. Section 252(e)(4) provides for automatic approval if a state fails to approve or reject a negotiated or arbitrated agreement within 90 days or 30 days, respectively. Rules of statutory construction require us to give meaning to all provisions and to read provisions consistently, where it is possible to do so. We thus conclude that the most reasonable interpretation is that automatic approval under section 252(e)(4) does not constitute a failure to act.

1287. We also believe that we should establish interim procedures for interested parties to notify the Commission that a state commission has failed to act under section 252. We believe that parties should be required to file a detailed written petition, backed by affidavit, that will, at

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[3155] 47 U.S.C. § 252(e)(5).

[3156] 47 U.S.C. § 252(b)(4)(C).

[3157] *See, e.g., In the Matter of the Implementation of the Mediation and Arbitration Provisions of the Federal Telecommunications Act of 1996*, Case No. 96-463-TP-UNC, Ohio Commission, (May 30, 1996), *Illinois Commerce Commission On Its Own Motion Adoption of 83 Ill. Adm. Code 761 to Implement the Arbitration Provisions of Section 252 of the Telecommunications Act of 1996*, Docket No. 96-0297, Illinois Commission (June 14, 1996)

the outset, give the Commission a better understanding of the issues involved and the action, or lack of action, taken by the state commission. Allowing less detailed notification increases the likelihood that frivolous requests will be made. With less detailed notification, the Commission's investigations would be broader and more burdensome. A detailed written petition will facilitate a decision about whether the Commission should assume jurisdiction based on section 252(e)(5).

1288. The moving party should submit a petition to the Secretary of the Commission stating with specificity the basis for the petition and any information that supports the claim that the state has failed to act, including, but not limited to the applicable provision(s) of the Act and the factual circumstances which support a finding that a state has failed to act. The moving party must ensure that the applicable state commission and the parties to the proceeding or matter for which preemption is sought are served with the petition on the same date the party serves the petition on the Commission. The petition will serve as notice to parties to the state proceeding and the state commission who will have fifteen days from the date the petition is filed with the Commission to comment. Under section 252(e)(5), the Commission must "issue an order preempting the state commission's jurisdiction of that proceeding or matter" no later than 90 days from the date the petition is filed.[3158] If the Commission takes notice, as section 252(e)(5) permits, that a state commission has failed to act, it will, on its own motion, issue a public notice and provide fifteen days for interested parties to submit comment on whether the Commission should assume responsibility under section 252(e)(5).

1289. If the Commission assumes authority under section 252(e)(5), the Commission must also decide whether it retains authority for that proceeding or matter. We agree with those parties who argue that, once the Commission assumes jurisdiction of a proceeding or matter, it retains authority for that proceeding or matter. For example, if the Commission obtains jurisdiction after a state commission fails to respond to a request for arbitration, the Commission maintains jurisdiction over the arbitration proceeding. Therefore, once the proceeding is before the Commission, any and all further action regarding that proceeding or matter will be before the Commission. We note that there is no provision in the Act for returning jurisdiction to the state commission; moreover, the Commission, with significant knowledge of the issues at hand, would be in the best position efficiently to conclude the matter. Thus, as both a legal and policy matter, we believe that the Commission retains jurisdiction over any matter and proceeding for which it assumes responsibility under Section 252(e)(5).

1290. We reject the suggestion by some parties that, once the Commission has mediated or arbitrated an agreement, the agreement must be submitted to the state commission for approval under state law. We note that section 252(e)(5) provides for the Commission to "assume the responsibility of the State commission under this section with respect to the proceeding or matter

[3158] 47 U.S.C. § 252(e)(5)

and act for the State commission."[3159] This includes acting for the state commission under section 252(e)(1), which calls for state commission approval of "any interconnection agreement adopted by negotiation or arbitration."[3160] We, therefore, do not read section 252(e)(1) or any other provision as calling for state commission approval or rejection of agreements mediated or arbitrated by the Commission. In those instances where a state has failed to act, the Commission acts on behalf of the state and no additional state approval is required.

1291. Requirements set forth in section 252(c) for arbitrated agreements would apply to arbitration conducted by the Commission. We see no reason, and no party has suggested a policy or legal basis, for not applying such standards when the Commission conducts arbitration. Thus, arbitrated agreements must: (1) meet the requirements of section 251, including regulations prescribed by the Commission pursuant to section 251; (2) establish any rates for interconnection, services, or network elements according to section 252(d); and (3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.[3161] We reject the suggestion made by some parties that, if the Commission steps into the state commission role, it is bound by state laws and standards that would have applied to the state commission. While states are permitted to establish and enforce other requirements, these are not binding standards for arbitrated agreements under section 252(c). Moreover, the resources and time potentially needed to review adequately and interpret the different laws and standards of each state render this suggestion untenable. Finally, we conclude that it would not make sense to apply to the Commission the timing requirements that section 252(b)(4)(c) imposes on state commissions. The Commission, in some instances, might not even assume jurisdiction until nine months (or more) have lapsed since a section 251 request was initiated.

1292. Based on the comments of the parties, we conclude that a "final offer" method of arbitration, similar to the approach recommended by Vanguard, would best serve the public interest.[3162] Under "final offer" arbitration, each party to the negotiation proposes its best and final offer and the arbitrator determines which of the proposals become binding. The arbitrator would have the option of choosing one of the two proposals in its entirety, or the arbitrator could decide on an issue-by-issue basis. Each final offer must: (1) meet the requirements of section 251, including the Commission's rules thereunder; (2) establish rates for interconnection, services, or network elements according to section 252(d); and (3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.[3163] If a final offer submitted by one

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[3159] 47 U.S.C. § 252(e)(5).

[3160] 47 U.S.C. § 252(e)(1).

[3161] 47 U.S.C. § 252(c).

[3162] Vanguard comments at 39-40.

[3163] 47 U.S.C. § 252(c).

or more parties fails to comply with these requirements, the arbitrator would have discretion to take steps designed to result in an arbitrated agreement that satisfies the requirements of section 252(c), including requiring parties to submit new final offers within a time frame specified by the arbitrator, or adopting a result not submitted by any party that is consistent with the requirements in section 252(c).

1293. The parties could continue to negotiate an agreement after they submit their proposals and before the arbitrator makes a decision. Under this approach, the Commission will encourage negotiations, with or without the assistance of the arbitrator, to continue after arbitration offers are exchanged. Parties are not precluded from submitting subsequent final offers following such negotiations. We believe that permitting post-offer negotiations will increase the likelihood that the parties will reach consensus on unresolved issues. In addition, permitting post-offer negotiations will increase flexibility and will allow parties to tailor counter-proposals after arbitration offers are exchanged. To provide an opportunity for final post-offer negotiation, the arbitrator will not issue a decision for at least 15 days after submission of the final offers by the parties. In addition, the offers must be consistent with section 251, including the regulations prescribed by the Commission. We reject SBC's suggestion that an arbitrated agreement is not binding on the parties. Absent mutual agreement to different terms, the decision reached through arbitration is binding. We conclude that it would be inconsistent with the 1996 Act to require incumbent LECs to provide interconnection, services, and unbundled elements, impose a duty to negotiate in good faith and a right to arbitration, and then permit incumbent LECs to not be bound by an arbitrated determination. We also believe that, although competing providers do not have an affirmative duty to enter into agreements under section 252, a requesting carrier might face penalties if, by refusing to enter into an arbitrated agreement, that carrier is deemed to have failed to negotiate in good faith.[3164] Such penalties should serve as a disincentive for requesting carriers to force an incumbent LEC to expand resources in arbitration if the requesting carrier does not intend to abide by the arbitrated decision.

1294. Adopting a "final offer" method of arbitration and encouraging negotiations to continue allows us to maintain the benefits of final offer arbitration, giving parties an incentive to submit realistic "final offers," while providing additional flexibility for the parties to agree to a resolution that best serves their interests. To the extent that these procedures encourage parties to negotiate voluntarily rather than arbitrate, such negotiated agreements will be subject to review pursuant to section 252(e)(2)(A), which would allow the Commission to reject agreements if they are inconsistent with the public interest. This approach also addresses the argument that under "final offer" arbitration neither offer might best serve the public interest, because it allows the parties to obtain feedback from the arbitrator on public interest matters.

1295. We believe that the arbitration proceedings generally should be limited to the requesting carrier and the incumbent local exchange provider. This will allow for a more

[3164] *See* 47 U.S.C. § 252(b)(5) (requiring parties to negotiate in good faith in the course of arbitration).

efficient process and minimize the amount of time needed to resolve disputed issues. We believe that opening the process to all third parties would be unwieldy and would delay the process. We will, however, consider requests by third parties to submit written pleadings. This may, in some instances, allow interested parties to identify important public policy issues not raised by parties to an arbitration.

B. Requirements of Section 252(i)

1. Background

1296. Section 251 requires that interconnection, unbundled element, and collocation rates be "nondiscriminatory" and prohibits the imposition of "discriminatory conditions" on the resale of telecommunications services.[3165] Section 252(i) of the 1996 Act provides that a "local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under [section 252] to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement."[3166] In the NPRM, we expressed the view that section 252(i) appears to be a primary tool of the 1996 Act for preventing discrimination under section 251, and we sought comment on whether we should adopt national standards for resolving disputes under section 252(i) in the event that we must assume the state's responsibilities pursuant to section 252(e)(5). In addition, because we may need to interpret section 252(i) if we assume the state commission's responsibilities, we sought comment on the meaning of section 252(i).

1297. We also sought comment in the NPRM on whether section 252(i) requires that only similarly-situated carriers may enforce against incumbent LECs provisions of agreements filed with state commissions, and, if so, how "similarly-situated carrier" should be defined. In particular, we asked whether section 252(i) requires that the same rates for interconnection must be offered to all requesting carriers regardless of the cost of serving that carrier, or whether it would be consistent with the statute to permit different rates if the costs of serving carriers are different. We also asked whether the section can be interpreted to allow incumbent LECs to make available interconnection, services, or network elements only to requesting carriers serving a comparable class of subscribers or providing the same service (*i.e.*, local, access, or interexchange) as the original parties to the agreement. In the NPRM, we tentatively concluded that the language of the statute appears to preclude such differential treatment among carriers.

[3165] 47 U.S.C. §§ 251(c)(2)(D) (interconnection rates, terms, and conditions); 251(c)(3) (unbundled network elements rates, terms, and conditions); 251(c)(6) (collocation rates, terms, and conditions); and 251(c)(4)(B) (resale). Section 252(d)(1) also requires nondiscriminatory interconnection and network element charges. 47 U.S.C. § 252(d)(1).

[3166] 47 U.S.C. § 252(i).

1298. Additionally, we sought comment in the NPRM on whether section 252(i) permits requesting telecommunications carriers to choose among individual provisions of publicly-filed interconnection agreements or whether they must subscribe to an entire agreement. We also sought comment regarding what time period an agreement must remain available for use by other requesting telecommunications carriers.

2. Comments

1299. Two state commissions and SBC believe that implementation of section 252(i) should be left to the states,[3167] while Time Warner favors national standards.[3168] CompTel argues that we should adopt expedited procedures whereby carriers may complain to the Commission when incumbent LECs refuse to make agreements available to them in alleged violation of section 252(i).[3169]

1300. New entrants generally support the view that section 252(i) does not require that requesting carriers seeking to avail themselves of a prior negotiated or arbitrated agreement be "similarly situated" with respect to the original party who negotiated the agreement.[3170] They argue that such a limitation would be contrary to Congress's intent,[3171] or that it could invite perpetual dispute over which carriers are similarly situated and what cost differences are real and material.[3172] Winstar questions whether states could implement a "similarly situated" carrier requirement without unintentionally creating a vehicle for incumbent LECs to discriminate against competitive entrants.[3173] LDDS specifically agrees with the NPRM's tentative conclusion that section 252(i) prohibits incumbent LECs from limiting the availability of agreements to a carrier based on the class of customers the carrier serves or the type of service it provides.[3174] The

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[3167] Pennsylvania Commission comments at 43; Louisiana Commission comments at 28-29; SBC Comments at 24.

[3168] Time Warner comments at 112.

[3169] CompTel comments at 107.

[3170] WinStar comments at 18-19; CompTel comments at 106; LDDS comments at 88; Time Warner comments at 113; ACSI reply at 23-24; Telecommunications Resellers Ass'n comments at 50.

[3171] CompTel comments at 106; LDDS comments at 88; Time Warner comments at 113. CompTel also asserts that, subject to cost-based deviations, no carrier should pay more than any other carrier when it purchases the same service or facility from the same incumbent LEC, nor should agreements include language regarding the nature of the carrier who may subsequently enter into the same agreements. CompTel comments at 106.

[3172] Telecommunications Resellers Ass'n comments at 50-51.

[3173] WinStar comments at 18-19.

[3174] LDDS comments at 88.

Telecommunications Resellers Ass'n believes section 252(i) prohibits discrimination on the basis of the cost of serving a carrier, and claims its members have been, and continue to be, denied preferred service offerings and price points in the interexchange market under the guise of a "similarly situated" criterion.[3175]

1301. WinStar suggests we assign to the incumbent LEC a heavy burden of proving that a new carrier is substantially different from the original parties to an agreement, and that we require the incumbent LEC to provide service to the new entrant according to the individual terms of an agreement while the dispute is pending. WinStar asserts that, absent such requirements, the incumbent LEC could use alleged technological differences to create barriers to entry.[3176]

1302. GTE, PacTel, USTA, BellSouth, and the Ohio Consumers' Counsel believe the statute contemplates drawing distinctions between carriers,[3177] such as, for instance, where the incumbent LEC faces different costs in serving different carriers.[3178] According to GTE and PacTel, carriers must be "similarly situated" because the subsequent carrier's technical requirements may be incompatible with the incumbent LEC's network.[3179] GTE asserts that providing service under an agreement to carriers that are not similarly situated with respect to the technical feasibility and costs of interconnection and transport and termination would be inconsistent with the 1996 Act's requirements that interconnection be technically feasible and offered at cost-based rates.[3180]

1303. Incumbent LECs also generally oppose the view that section 252(i) permits competitive carriers to choose among provisions in a publicly-filed interconnection agreement.[3181] For instance, BellSouth contends that the text of section 252(i) supports its view, and that the legislative history reference cited in the NPRM casts no light on Congress' intent because the

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[3175] Telecommunications Resellers Ass'n comments at 50-51.

[3176] WinStar comments at 19 n.14. WinStar further suggests that the LEC should be required to adjust the arrangement to account for differences in technology employed by the new entrant, without revising material terms of the arrangement. *Id.*

[3177] GTE comments at 82-83; PacTel comments at 101; USTA comments at 95-96; BellSouth comments at 80-81; Ohio Consumers' Counsel comments at 51.

[3178] GTE comments at 82-83; Municipal Utilities comments at 14; USTA comments at 96.

[3179] GTE comments at 82-83; PacTel comments at 101.

[3180] GTE comments at 83.

[3181] *See, e.g.*, Ameritech comments at 98-99; BellSouth comments at 81; Bay Springs *et al* comments at 19; GTE comments at 83; SBC comments at 24; USTA comments at 96-97.

House did not recede to the Senate's language.[3182] GTE urges the Commission to treat the availability of agreements under section 252(i) the same way it treats AT&T Tariff 12 and Contract Tariff offerings.[3183] Ameritech, GTE and SBC also contend that section 252(i)'s requirement that a requesting carrier take service upon the same terms and conditions as the original carrier precludes unbundled availability.[3184] USTA argues unbundled availability of agreement provisions will skew the individualized nature of negotiations, magnify the importance of each individual term of an agreement, and encourage incumbent LECs to offer only standardized, relatively high-cost packages.[3185]

1304. New entrants, joined by the Ohio Commission, support the view that the statute makes individual provisions of agreements available to carriers.[3186] They argue that this comports with the statutory language and legislative history,[3187] and that requiring requesting carriers to take an entire agreement will cause delay[3188] and foster discrimination by enabling incumbent LECs to fashion agreements so that no subsequent carrier may benefit from them.[3189] MCI argues that, although this approach may make incumbents less likely to compromise, the effect on negotiations will be small.[3190] The SBA asserts allowing entrants to utilize individual provisions of agreements will lead to increased competition, which, in turn, will drive prices towards the most economically efficient levels, and that these benefits outweigh any additional burden that

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[3182] BellSouth comments at 81.

[3183] GTE comments at 83; *see also* BellSouth comments at 81; USTA comments at 97.

[3184] Ameritech comments at 99; GTE comments at 83; SBC comments at 24.

[3185] USTA comments at 96.

[3186] *See, e.g.*, ALTS comments at 54-55; LDDS comments at 89; Jones Intercable comments at 36; Sprint reply at 48; CompTel reply at 45; AT&T comments at 89-90; NEXTLINK comments at 36-37; MFS comments at 90-91; Time Warner reply at 45-46; Telecommunications Resellers Ass'n comments at 51; Ohio Commission comments at 84. Teleport argues that, if the FCC does not adopt its "preferred outcomes" paradigm for negotiations, it should allow carriers to pick and choose among provisions, asserting that without the ability to pick and choose among provisions, unequal bargaining conditions between LECs and competitive LECs will make meaningful negotiations impossible. Teleport comments at 54-55.

[3187] WinStar comments at 17-18; MCI comments at 96; Jones Intercable comments at 36; SBA comments at 17; Time Warner reply at 46.

[3188] WinStar comments at 18.

[3189] *See, e.g.*, Telecommunications Resellers Ass'n comments at 51; Sprint reply at 48; AT&T comments at 90 n.139; MFS comments at 90-91.

[3190] MCI comments at 96.

such unbundling may place upon incumbents in negotiating agreements.[3191] SBA further argues that failure to permit unbundling of agreements would deter entry by smaller competitors that are unable or unwilling to pay for all of the elements contained in a an agreement negotiated by a larger competitor.[3192] CompTel asks that we rule that an incumbent LEC may not insist upon the observance of any term or condition that is not reasonable in the context of the requesting carrier.[3193]

1305. ALTS suggests that we permit unbundled availability to the level of the individual paragraphs and sections of section 251, with the exception of network elements provided pursuant to section 251(c)(3), which ALTS believes should be provided individually to non-parties on a disaggregated basis.[3194] ALTS argues such a rule would reduce concern that unbundled availability would slow the negotiation process by magnifying the importance of individual terms.[3195] Jones Intercable requests that we clarify that the statute permits so-called "most favored nation" provisions, which allow a new entrant with an interconnection agreement in place with an incumbent LEC to modify such an agreement to substitute the preferable terms included in a later agreement that the incumbent LEC enters with a subsequent new entrant.[3196]

1306. Parties' suggestions for the length of time agreements should remain on file pursuant to section 252(i) range from a reasonable period,[3197] until changes in the network adopted for independent reasons make it no longer feasible to provide interconnection under an agreement,[3198] to as long as the agreement remains in operation.[3199] Out of concern that incumbent LECs might force competitors to renegotiate agreements at unreasonably short

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[3191] SBA comments at 18.

[3192] SBA comments at 16-17; *see also* R. Koch comments at 3.

[3193] CompTel comments at 107.

[3194] ALTS comments at 54-55.

[3195] *Id.*

[3196] Jones Intercable comments at 36.

[3197] BellSouth comments at 81-82. GTE suggested agreements remain publicly available for a reasonable period, as Commission requires for AT&T's Tariff 12. GTE comments at 83.

[3198] MCI comments at 97.

[3199] Telecommunications Resellers Ass'n comments at 51-52; Time Warner comments at 114; Lincoln Tel. comments at 25-26.

intervals, the SBA argues that there should be no arbitrary limit on the duration of agreements.[3200]

1307. Several new entrants also raise issues concerning the filing of agreements pursuant to section 252(i). Jones Intercable urges us to require that incumbent LECs file copies of all negotiated agreements at the FCC, as well as at state commissions.[3201]

1308. AT&T and the Telecommunications Resellers Ass'n believe section 252(i) requires that interconnection agreements negotiated prior to enactment of the 1996 Act be available for use by requesting telecommunications carriers,[3202] while F. Williamson opposes this view.[3203] MFS, NCTA and WinStar urge us to find that section 252(i) applies to interconnection agreements between adjacent, non-competing LECs.[3204] BellSouth is opposed.[3205]

3. Discussion

1309. We conclude that it will assist the carriers in determining their respective obligations, facilitate the development of a single, uniform legal interpretation of the Act's requirements and promote a procompetitive, national policy framework to adopt national standards to implement section 252(i). Issues such as whether section 252(i) allows requesting telecommunications carriers to choose among provisions of prior interconnection agreements or requires them to accept an entire agreement are issues of law that should not vary from state to state and are also central to the statutory scheme and to the emergence of competition. National standards will help state commissions and parties to expedite the resolution of disputes under section 252(i).

1310. We conclude that the text of section 252(i) supports requesting carriers' ability to choose among individual provisions contained in publicly filed interconnection agreements. As we note above, section 252(i) provides that a "local exchange carrier shall make available any

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[3200] SBA comments at 18.

[3201] Jones Intercable comments at 20.

[3202] AT&T comments at 89; Telecommunications Resellers Ass'n comments at 52.

[3203] F. Williamson comments at 5 (arguing that nothing in the 1996 Act requires that existing agreements be submitted or resubmitted to a state commission for approval). F. Williamson further comments that the statute does not permit one party to an existing agreement compel renegotiation (and/or arbitration) under the procedures in section 252. *Id.*

[3204] MFS comments at 86; NCTA reply at 13; WinStar reply at 19.

[3205] BellSouth comments at 64; *see also* Rural Tel. Coalition comments at 15-16 (asserting sections 251-252 do not apply to agreements between adjacent, non-competing carriers).

interconnection, service, or network element provided under an agreement . . . to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement."[1206] Thus, Congress drew a distinction between "any interconnection, service, or network element[s] provided under an agreement," which the statute lists individually, and agreements in their totality. Requiring requesting carriers to elect entire agreements, instead of the provisions relating to specific elements, would render as mere surplusage the words "any interconnection, service, or network element."

1311. We disagree with BellSouth regarding the significance of the legislative history quoted in the NPRM. The Conference Committee amended section 251(g), S. 652's predecessor to section 252(i), and changed "service, facility, or function" to "interconnection, service, or element." The House of Representatives' bill did not contain a version of section 252(i).[1207] We find that section 252(i)'s language does not differ substantively from the text of the Senate bill's section 251(g). The Senate Commerce Committee stated its provision, section 251(g), was intended to "make interconnection more efficient by making available to other carriers the individual elements of agreements that have been previously negotiated."[1208]

1312. We also find that practical concerns support our interpretation. As observed by AT&T and others, failure to make provisions available on an unbundled basis could encourage an incumbent LEC to insert into its agreement onerous terms for a service or element that the original carrier does not need, in order to discourage subsequent carriers from making a request under that agreement. In addition, we observe that different new entrants face differing technical constraints and costs. Since few new entrants would be willing to elect an entire agreement that would not reflect their costs and the specific technical characteristics of their networks or would not be consistent with their business plans, requiring requesting carriers to elect an entire agreement would appear to eviscerate the obligation Congress imposed in section 252(i).

1313. We also choose this interpretation despite concerns voiced by some incumbent LECs that allowing carriers to choose among provisions will harm the public interest by slowing down the process of reaching interconnection agreements by making incumbent LECs less likely to compromise. In reaching this conclusion, we observe that new entrants, who stand to lose the most if negotiations are delayed, generally do not argue that concern over slow negotiations would outweigh the benefits they would derive from being able to choose among terms of publicly filed agreements. Unbundled access to agreement provisions will enable smaller carriers

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[1206] 47 U.S.C. § 252(i).

[1207] Although H.R. 1555's section 244(d) contained similar ideas, its language and structure are sufficiently different from that of section 252(i) that we do not consider section 244(d) to be a prior version of section 252(i).

[1208] *Report of the Committee on Commerce, Science and Transportation on S. 652*, S. Rpt. 104-23, 104th Cong., 1st Sess. (1995) at 21-22.

who lack bargaining power to obtain favorable terms and conditions -- including rates -- negotiated by large IXCs, and speed the emergence of robust competition.[3209]

1314. We conclude that incumbent LECs must permit third parties to obtain access under section 252(i) to any individual interconnection, service, or network element arrangement on the same terms and conditions as those contained in any agreement approved under section 252. We find that this level of disaggregation is mandated by section 252(a)(1), which requires that agreements shall include "charges for interconnection and each service or network element included in the agreement," and section 251(c)(3), which requires incumbent LECs to provide "non-discriminatory access to network elements on an unbundled basis." In practical terms, this means that a carrier may obtain access to individual elements such as unbundled loops at the same rates, terms, and conditions as contained in any approved agreement. We agree with ALTS that such a view comports with the statute, and lessens the concerns of carriers that argue that unbundled availability will delay negotiations.

1315. We reject GTE's argument that section 252(i)'s statement, that requesting carriers must receive individual elements "upon the same terms and conditions" as those contained in the agreement, precludes unbundled availability of individual elements. GTE's argument fails to give meaning to Congress's distinction between agreements and elements, and ignores the 1996 Act's prime goals of nondiscriminatory treatment of carriers and promotion of competition. Instead, we conclude that the "same terms and conditions" that an incumbent LEC may insist upon shall relate solely to the individual interconnection, service, or element being requested under section 252(i). For instance, where an incumbent LEC and a new entrant have agreed upon a rate contained in a five-year agreement, section 252(i) does not necessarily entitle a third party to receive the same rate for a three-year commitment. Similarly, that one carrier has negotiated a volume discount on loops does not automatically entitle a third party to obtain the same rate for a smaller amount of loops. Given the primary purpose of section 252(i) of preventing discrimination, we require incumbent LECs seeking to require a third party agree to certain terms and conditions to exercise its rights under section 252(i) to prove to the state commission that the terms and conditions were legitimately related to the purchase of the individual element being sought. By contrast, incumbent LECs may not require as a "same" term or condition the new entrant's agreement to terms and conditions relating to other interconnection, services, or elements in the approved agreement. Moreover, incumbent LEC efforts to restrict availability of interconnection, services, or elements under section 252(i) also must comply with the 1996 Act's general nondiscrimination provisions. *See* Section VII.d.3.

1316. We further conclude that section 252(i) entitles all parties with interconnection agreements to "most favored nation" status regardless of whether they include "most favored nation" clauses in their agreements. Congress's command under section 252(i) was that parties may utilize any individual interconnection, service, or element in publicly filed interconnection

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[3209] *See* Regulatory Flexibility Act, 5 U.S.C. §§ 601 et seq.

agreements and incorporate it into the terms of their interconnection agreement. This means that any requesting carrier may avail itself of more advantageous terms and conditions subsequently negotiated by any other carrier for the same individual interconnection, service, or element once the subsequent agreement is filed with, and approved by, the state commission. We believe the approach we adopt will maximize competition by ensuring that carriers' obtain access to terms and elements on a nondiscriminatory basis.

1317. We find that section 252(i) permits differential treatment based on the LEC's cost of serving a carrier. We further observe that section 252(d)(1) requires that unbundled element rates be cost-based, and sections 251(c)(2) and (c)(3) require incumbent LECs to provide only technically-feasible forms of interconnection and access to unbundled elements, while section 252(i) mandates that the availability of publicly-filed agreements be limited to carriers willing to accept the same terms and conditions as the carrier who negotiated the original agreement with the incumbent LEC. We conclude that these provisions, read together, require that publicly-filed agreements be made available only to carriers who cause the incumbent LEC to incur no greater costs than the carrier who originally negotiated the agreement, so as to result in an interconnection arrangement that is both cost-based and technically feasible. However, as discussed in Section VII regarding discrimination, where an incumbent LEC proposes to treat one carrier differently than another, the incumbent LEC must prove to the state commission that that differential treatment is justified based on the cost to the LEC of providing that element to the carrier.

1318. We conclude, however, that section 252(i) does not permit LECs to limit the availability of any individual interconnection, service, or network element only to those requesting carriers serving a comparable class of subscribers or providing the same service (*i.e.*, local, access, or interexchange) as the original party to the agreement. In our view, the class of customers, or the type of service provided by a carrier, does not necessarily bear a direct relationship with the costs incurred by the LEC to interconnect with that carrier or on whether interconnection is technically feasible. Accordingly, we conclude that an interpretation of section 252(i) that attempts to limit availability by class of customer served or type of service provided would be at odds with the language and structure of the statute, which contains no such limitation.

1319. We agree with those commenters who suggest that agreements remain available for use by requesting carriers for a reasonable amount of time. Such a rule addresses incumbent LEC concerns over technical incompatibility, while at the same time providing requesting carriers with a reasonable time during which they may benefit from previously negotiated agreements. In addition, this approach makes economic sense, since the pricing and network configuration choices are likely to change over time, as several commenters have observed. Given this reality, it would not make sense to permit a subsequent carrier to impose an agreement or term upon an incumbent LEC if the technical requirements of implementing that agreement or term have changed.

1320. We observe that section 252(h) expressly provides that state commissions maintain for public inspection copies of interconnection agreements approved under section 252(e). We therefore decline Jones Intercable's suggestion that we require carriers to file agreements at the FCC, in addition to section 252(h)'s filing requirement. However, when the Commission performs the state's responsibilities under section 252(e)(5), parties must file their agreements with the Commission, as well as with the state commission.[3210]

1321. We further conclude that a carrier seeking interconnection, network elements, or services pursuant to section 252(i) need not make such requests pursuant to the procedures for initial section 251 requests, but shall be permitted to obtain its statutory rights on an expedited basis. We find that this interpretation furthers Congress's stated goals of opening up local markets to competition and permitting interconnection on just, reasonable, and nondiscriminatory terms, and that we should adopt measures that ensure competition occurs as quickly and efficiently as possible. We conclude that the nondiscriminatory, pro-competition purpose of section 252(i) would be defeated were requesting carriers required to undergo a lengthy negotiation and approval process pursuant to section 251 before being able to utilize the terms of a previously approved agreement. Since agreements shall necessarily be filed with the states pursuant to section 252(h), we leave to state commissions in the first instance the details of the procedures for making agreements available to requesting carriers on an expedited basis. Because of the importance of section 252(i) in preventing discrimination, however, we conclude that carriers seeking remedies for alleged violations of section 252(i) shall be permitted to obtain expedited relief at the Commission, including the resolution of complaints under section 208 of the Communications Act, in addition to their state remedies.

1322. We conclude as well that agreements negotiated prior to enactment of the 1996 Act must be available for use by subsequent, requesting carriers. Section 252(i) must be read in conjunction with section 252(a)(1), which clearly states that "agreement" for purposes of section 252, "includ[es] any interconnection agreement negotiated before the date of enactment . . . ."[3211] We conclude that this language demonstrates that Congress intended 252(i) to apply to agreements negotiated prior to enactment of the 1996 Act and approved by the state commission pursuant to section 252(e), as well as those approved under the section 251/252 negotiation process. Accordingly, we find that agreements negotiated prior to enactment of the 1996 Act must be disclosed publicly, and be made available to requesting telecommunications carriers pursuant to section 252(i).

1323. We also find that section 252(i) applies to interconnection agreements between adjacent, incumbent LECs. We note that section 252(i) requires a local exchange carrier to make

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[3210] We note section 22.903(d) of our rules, which remains in effect, requires the BOCs to file with us their interconnection agreements with their affiliated cellular providers. 47 C.F.R. § 22.903(d).

[3211] 47 U.S.C. § 252(a)(1).

available to requesting telecommunications carriers "any interconnection service, or network element *provided under an agreement approved under this section* . . . ."[3212] The plain meaning of this section is that any interconnection agreement approved by a state commission, including one between adjacent LECs, must be made available to requesting carriers pursuant to section 252(i). Requiring availability of such agreements will provide new entrants with a realistic benchmark upon which to base negotiations, and this will further the Congressional purpose of increasing competition. As stated in Section III of this Order, adjacent, incumbent LECs will be given an opportunity to renegotiate such agreements before they become subject to section 252(i)'s requirements. In Section III, we also consider, and reject, the Rural Tel. Coalition's argument that making agreements between adjacent, non-competing LECs available under section 252 will have a detrimental effect on small, rural carriers. *See* Section III, *supra*.

[3212] 47 U.S.C. § 252(i) (emphasis supplied).

XV. FINAL REGULATORY FLEXIBILITY ANALYSIS

1324. As required by Section 603 of the Regulatory Flexibility Act (RFA), 5 U.S.C. § 603, an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the NPRM. The Commission sought written public comment on the proposals in the NPRM. The Commission's Final Regulatory Flexibility Analysis (FRFA) in this Order conforms to the RFA, as amended by the Contract With America Advancement Act of 1996 (CWAAA), Pub. L. No. 104-121, 110 Stat. 847 (1996).[3213]

A. Need for and Objectives of this Report and Order and the Rules Adopted Herein

1325. The Commission, in compliance with section 251(d)(1) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (the 1996 Act), promulgates the rules in this Order to ensure the prompt implementation of sections 251 and 252 of the 1996 Act, which are the local competition provisions. Congress sought to establish through the 1996 Act "a pro-competitive, de-regulatory national policy framework" for the United States telecommunications industry.[3214] Three principal goals of the telephony provisions of the 1996 Act are: (1) opening local exchange and exchange access markets to competition; (2) promoting increased competition in telecommunications markets that are already open to competition, particularly long distance services markets; and, (3) reforming our system of universal service so that universal service is preserved and advanced as local exchange and exchange access markets move from monopoly to competition.

1326. The rules adopted in this Order implement the first of these goals -- opening local exchange and exchange access markets to competition. The objective of the rules adopted in this Order is to implement as quickly and effectively as possible the national telecommunications policies embodied in the 1996 Act and to promote the development of competitive, deregulated markets envisioned by Congress.[3215] In doing so, we are mindful of the balance that Congress struck between this goal of bringing the benefits of competition to all consumers and its concern for the impact of the 1996 Act on small incumbent local exchange carriers, particularly rural carriers, as evidenced in section 251(f) of the 1996 Act.

[3213] Subtitle II of the CWAAA is "The Small Business Regulatory Enforcement Fairness Act of 1996" (SBREFA), codified at 5 U.S.C. § 601 *et seq*

[3214] S. Conf. Rep. No. 230, 104th Cong., 2d Sess. 1 (1996).

[3215] *Id.*

B. Analysis of Significant Issues Raised in Response to the IRFA

1327. *Summary of the Initial Regulatory Flexibility Analysis (IRFA).* In the NPRM, the Commission performed an IRFA.[3216] In the IRFA, the Commission found that the rules it proposed to adopt in this proceeding may have a significant impact on a substantial number of small business as defined by section 601(3) of the RFA. The Commission stated that its regulatory flexibility analysis was inapplicable to incumbent LECs because such entities are dominant in their field of operation. The Commission noted, however, that it would take appropriate steps to ensure that the special circumstances of smaller incumbent LECs are carefully considered in our rulemaking. The Commission also found that the proposed rules may overlap or conflict with the Commission's Part 69 access charge and *Expanded Interconnection* rules. Finally, the IRFA solicited comment on alternatives to our proposed rules that would minimize the impact on small entities consistent with the objectives of this proceeding.

1. Treatment of Small LECs

1328. *Comments.* The Small Business Administration (SBA), the Rural Telephone Coalition (Rural Tel. Coalition), and CompTel maintain that the Commission violated the RFA when it failed to include small incumbent LECs in its IRFA without first consulting SBA to establish a definition of "small business."[3217] Rural Tel. Coalition and CompTel also argue that the Commission failed to explain its statement that "incumbent LECs are dominant in their field of operation" or how that finding was reached.[3218] Rural Tel. Coalition states that such an analysis of the market power of incumbent LECs is necessary because incumbent LECs are now facing competition from a variety of sources, including wireline and wireless carriers. Rural Tel. Coalition recommends that the Commission abandon its determination that all incumbent LECs are dominant, and perform regulatory flexibility analysis for incumbent LECs having fewer than 1500 employees.[3219]

1329. *Discussion.* In essence, SBA and Rural Tel. Coalition argue that we exceeded our authority under the RFA by certifying all incumbent LECs as dominant in their field of operation, and concluding on that basis that they are not small businesses under the RFA. SBA and Rural Tel. Coalition contend that the authority to make a size determination rests solely with SBA and that, by excluding a group (small incumbent LECs) from coverage under the RFA, the

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[3216] NPRM at paras. 274-287.

[3217] SBA RFA comments at 3-5; Rural Tel. Coalition reply at 38-39; CompTel reply at 46.

[3218] Rural Tel. Coalition reply at 39; CompTel reply at 46.

[3219] Rural Tel. Coalition reply at 40.

Commission made an unauthorized size determination.[3220] Neither SBA nor Rural Tel. Coalition cites any specific authority for this latter proposition.

1330. We have found incumbent LECs to be "dominant in their field of operation" since the early 1980's, and we consistently have certified under the RFA[3221] that incumbent LECs are not subject to regulatory flexibility analyses because they are not small businesses.[3222] We have made similar determinations in other areas.[3223] We recognize SBA's special role and expertise with regard to the RFA, and intend to continue to consult with SBA outside the context of this proceeding to ensure that the Commission is fully implementing the RFA. Although we are not fully persuaded on the basis of this record that our prior practice has been incorrect, in light of the special concerns raised by SBA and Rural Tel. Coalition in this proceeding, we will, nevertheless, include small incumbent LECs in this FRFA to remove any possible issue of RFA compliance. We, therefore, need not address Rural Tel. Coalition's arguments that incumbent LECs are not dominant.[3224]

2. Other Issues

1331. *Comments.* Parties raised several other issues in response to the Commission's IRFA in the NPRM. SBA and CompTel contend that commenters should not be required to separate their comments on the IRFA from their comments on the other issues raised in the NPRM.[3225] SBA maintains that separating RFA comments and discussion from the rest of the comments "isolates" the regulatory flexibility analysis from the remainder of the discussion, thereby handicapping the Commission's analysis of the impact of the proposed rules on small businesses.[3226] SBA further suggests that our IRFA failed to: (1) give an adequate description of the projected reporting, recordkeeping, and other compliance requirements of the proposed rules,

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[3220] SBA RFA comments at 4-5 (citing 15 U.S.C. §632(a)(2)); Rural Tel. Coalition reply at 38.

[3221] *See* 5 U.S.C. § 605(b).

[3222] *See, e.g., Expanded Interconnection with Local Telephone Company Facilities*, Supplemental Notice of Proposed Rulemaking, 6 FCC Rcd 5809 (1991); *MTS and WATS Market Structure*, Report and Order, 2 FCC Rcd 2953, 2959 (1987) (citing *MTS and WATS Market Structure*, Third Report and Order, 93 F.C.C.2d 241, 338-39 (1983)).

[3223] *See, e.g., In the Matter of Implementation of Sections of the Cable Television Consumer Protection Act of 1992: Rate Regulation*, Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393, 7418 (1995).

[3224] Rural Tel. Coalition reply at 39-40.

[3225] SBA RFA comments at 2-3, CompTel reply at 46.

[3226] *Id.*

including an estimate of the classes of small entities that will be subject to the requirement and the professional skills necessary to prepare such reports or records;[3227] and (2) describe significant alternatives that minimize the significant economic impact of the proposal on small entities, including exemption from coverage of the rule.[3228] SBA also asserts that none of the alternatives in the NPRM is designed to minimize the impact of the proposed rules on small businesses.

1332. The Idaho Commission argues that the Commission's rules will be devised for large carriers and therefore will be "de facto burdensome" to Idaho's incumbent LECs and probably to potential new entrants, which may be small companies.[3229] Therefore, Idaho requests that state commissions be permitted flexibility to address the impacts of our rules on smaller incumbent LECs.

1333. The Small Cable Business Association (SCBA) contends that the Commission's IRFA is inadequate because it does not state that small cable companies are among the small entities affected by the proposed rules.[3230] In its comments on the IRFA, SCBA refers to its proposal that the Commission establish the following national standards for small cable companies: (1) the definition of "good faith" negotiation; (2) the development of less burdensome arbitration procedures for interconnection and resale; (3) the designation of a small company contact person at incumbent LECs and state commissions; and (4) the application of section 251(f) of the 1996 Act.[3231]

1334. *Discussion.* We disagree with SBA's assessment of our IRFA. Although the IRFA referred only generally to the reporting and recordkeeping requirements imposed on incumbent LECs, our Federal Register notice set forth in detail the general reporting and recordkeeping requirements as part of our Paperwork Reduction Act statement.[3232] The IRFA also sought comment on the many alternatives discussed in the body of the NPRM, including the statutory exemption for certain rural telephone companies.[3233] The numerous general public comments concerning the impact of our proposal on small entities in response to the NPRM, including

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[3227] SBA RFA comments at 5-6, *citing* 5 U.S.C. § 603(b)(4).

[3228] SBA RFA comments at 7-8, *citing* 5 U.S.C. § 603(c).

[3229] Idaho Commission comments at 15.

[3230] SCBA RFA comments at 1.

[3231] *Id.* at 1-2.

[3232] NPRM, at para. 283 (rel. Apr. 19, 1996), *summarized at* 61 Fed. Reg. 18311, 18312 (Apr. 25, 1996).

[3233] 47 U.S.C. § 251(f).

comments filed directly in response to the IRFA,[3234] enabled us to prepare this FRFA. Thus, we conclude that the IRFA was sufficiently detailed to enable parties to comment meaningfully on the proposed rules and, thus, for us to prepare this FRFA. We have been working with, and will continue to work with SBA, to ensure that both our IRFAs and FRFAs fully meet the requirements of the RFA.

1335. SBA also objects to the NPRM's requirement that responses to the IRFA be filed under a separate and distinct heading, and proposes that we integrate RFA comments into the body of general comments on a rule.[3235] Almost since the adoption of the RFA, we have requested that IRFA comments be submitted under a separate and distinct heading.[3236] Neither the RFA nor SBA's rules prescribe the manner in which comments may be submitted in response to an IRFA[3237] and, in such circumstances, it is well established that an administrative agency can structure its proceedings in any manner that it concludes will enable it to fulfill its statutory duties.[3238] Based on our past practice, we find that separation of comments responsive to the IRFA facilitates our preparation of a compulsory summary of such comments and our responses to them, as required by the RFA. Comments on the impact of our proposed rules on small entities have been integrated into our analysis and consideration of the final rules. We, therefore, reject SBA's argument that we improperly required commenters to include their comments on the IRFA in a separate section.

1336. We also reject SBA's assertion that none of the alternatives in the NPRM is designed to minimize the impact of the proposed rules on small businesses. For example, we proposed that incumbent LECs be required to offer competitors access to unbundled local loop, switching, and transport facilities.[3239] These proposals permit potential competitors to enter the market by relying, in part or entirely, on the incumbent LEC's facilities. Reduced economic entry barriers are designed to provide reasonable opportunities for new entrants, particularly small entities, to enter the market by minimizing the initial investment needed to begin providing service. In addition, we believe section 251(f) and our rules provide states with significant

[3234] SBA RFA comments; Rural Tel. Coalition reply at 38-41; Idaho Commission comments at 15; SCBA RFA comments, CompTel reply at 45-46.

[3235] SBA RFA comments at 2.

[3236] *See, e.g., Inquiry into the Development of Regulatory Policy in Regard to Direct Broadcast Satellites*, Notice of Proposed Policy Statement and Rulemaking, 86 F.C.C.2d 719, 755 (1981).

[3237] *See* 5 U.S.C. § 603 (IRFA requirements).

[3238] *See Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 524-25 (1978), *citing FCC v. Schreiber*, 381 U.S. 279, 290 (1965) and *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940).

[3239] NPRM paras. 94-97.

flexibility to "deal with the needs of individual companies in light of public interest concerns," as requested by the Idaho Commission. With regard to the potential burdens on small entities other than incumbent LECs, we believe our rules permit states to structure arbitration procedures, for example, in ways that minimize filing or other burdens on new entrants that are small entities.

1337. We also disagree with SCBA's assertion that the IRFA was deficient because it did not identify small cable operators as entities that would be affected by the proposed rules. The IRFA in the NPRM states: "Insofar as the proposals in this Notice apply to telecommunications carriers other than incumbent LECs (generally interexchange carriers and new LEC entrants), they may have a significant impact on a substantial number of small entities."[3240] The phrase "new LEC entrants" clearly encompasses small cable operators that become providers of local exchange service. The NPRM even identifies cable operators as potential new entrants.[3241]

1338. We agree with SCBA's argument that the Commission should identify certain minimum standards to provide guidance on the requirement that parties negotiate in good faith.[3242] As discussed in Section III.B, we conclude that we should establish minimum standards that will offer parties guidance in determining whether they are acting in good faith. We believe that these minimum standards address SCBA's assertion that federal guidelines for good faith negotiations may be particularly important for small entities because unreasonable delays in negotiations could represent an entry barrier for small entities.

1339. We also agree with SCBA's recommendation that we should establish guidelines for the application of section 251(f) regarding exemptions, suspensions, and modifications of our rules governing interconnection with rural carriers. As discussed in section XII.B, we find that a rural incumbent LEC should not be able to obtain an exemption, suspension, or modification of its obligations under section 251 unless it offers evidence that the application of those requirements would be likely to cause injury beyond the financial harm typically associated with efficient competitive entry. We are also persuaded by the suggestion of SCBA and others that incumbent LECs should bear the burden of showing that they should be exempt pursuant to section 251(f)(1) from national interconnection requirements. We believe that this finding is consistent with the pro-competitive goals of the 1996 Act and our determination in Section XII that Congress did not intend to withhold from consumers the benefits of local telephone competition that could be provided by small entities, such as small cable operators.

[3240] NPRM para. 277.

[3241] NPRM para. 7.

[3242] This good faith requirement is found in 47 U.S.C. § 251(c)(1).

1340. We do not adopt SCBA's proposal to establish abbreviated arbitration procedures.[3243] Most commenters oppose adoption of federal rules to govern state mediation and arbitration proceedings. As set out in Section XIV.A, we conclude that state commissions are better positioned to develop rules for mediation and arbitration that support the objectives of the 1996 Act. The rules we adopt in Section XIV.A apply only where the Commission assumes a state commission's responsibilities pursuant to section 252(e)(5). States may develop specific measures that address the concerns of small entities participating in mediation or arbitration, as suggested by SCBA. In addition, although we do not specifically incorporate SCBA's request that the Commission designate a "small company contact person at incumbent LECs and state commissions,"[3244] we find that a refusal throughout the negotiation process to designate a representative with authority to make binding representations on behalf of the party, and thereby significantly delay resolution of issues, would constitute failure to negotiate in good faith. Therefore, we conclude that the potential benefits of SCBA's proposal are achieved by our determination that the failure of an incumbent LEC to designate a person authorized to bind his or her company in negotiations is a violation of the good faith obligation of section 251.

C. Description and Estimates of the Number of Small Entities Affected by this Report and Order

1341. For the purposes of this Order, the RFA defines a "small business" to be the same as a "small business concern" under the Small Business Act, 15 U.S.C. § 632, unless the Commission has developed one or more definitions that are appropriate to its activities.[3245] Under the Small Business Act, a "small business concern" is one that: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) meets any additional criteria established by the Small Business Administration (SBA).[3246] SBA has defined businesses in Standard Industrial Classification (SIC) categories 4812 (Radiotelephone Communications) and 4813 (Telephone Communications, Except Radiotelephone) to be small entities when they have fewer than 1,500 employees.[3247] We first discuss generally the total number of small telephone companies falling within both of those SIC categories. Then, we discuss the number of small businesses within the two subcategories, and attempt to refine further those estimates to correspond with the categories of telephone companies that are commonly used under our rules.

[3243] SCBA RFA comments at 1-2.

[3244] SCBA RFA comments at 2.

[3245] *See* 15 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in 5 U.S.C. § 632).

[3246] 15 U.S.C. § 632. *See, e.g., Brown Transport Truckload, Inc. v. Southern Wipers, Inc.*, 176 B.R. 82 (N.D. Ga. 1994).

[3247] 13 C.F.R. § 121.201.

1342. Consistent with our prior practice, we shall continue to exclude small incumbent LECs from the definition of a small entity for the purpose of this FRFA. Nevertheless, as mentioned above, we include small incumbent LECs in our FRFA. Accordingly, our use of the terms "small entities" and "small businesses" does not encompass "small incumbent LECs." We use the term "small incumbent LECs" to refer to any incumbent LECs that arguably might be defined by SBA as "small business concerns."[3248]

1. Telephone Companies (SIC 481)

1343. *Total Number of Telephone Companies Affected.* Many of the decisions and rules adopted herein may have a significant effect on a substantial number of the small telephone companies identified by SBA. The United States Bureau of the Census ("the Census Bureau") reports that, at the end of 1992, there were 3,497 firms engaged in providing telephone services, as defined therein, for at least one year.[3249] This number contains a variety of different categories of carriers, including local exchange carriers, interexchange carriers, competitive access providers, cellular carriers, mobile service carriers, operator service providers, pay telephone operators, PCS providers, covered SMR providers, and resellers. It seems certain that some of those 3,497 telephone service firms may not qualify as small entities or small incumbent LECs because they are not "independently owned and operated."[3250] For example, a PCS provider that is affiliated with an interexchange carrier having more than 1,500 employees would not meet the definition of a small business. It seems reasonable to conclude, therefore, that fewer than 3,497 telephone service firms are small entity telephone service firms or small incumbent LECs that may be affected by this Order.

1344. *Wireline Carriers and Service Providers.* SBA has developed a definition of small entities for telephone communications companies other than radiotelephone (wireless) companies. The Census Bureau reports that, there were 2,321 such telephone companies in operation for at least one year at the end of 1992.[3251] According to SBA's definition, a small business telephone company other than a radiotelephone company is one employing fewer than 1,500 persons.[3252] All but 26 of the 2,321 non-radiotelephone companies listed by the Census Bureau were reported to have fewer than 1,000 employees. Thus, even if all 26 of those companies had more than 1,500 employees, there would still be 2,295 non-radiotelephone companies that might qualify as

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[3248] *Id.*

[3249] United States Department of Commerce, Bureau of the Census, *1992 Census of Transportation, Communications, and Utilities: Establishment and Firm Size*, at Firm Size 1-123 (1995) (*1992 Census*).

[3250] 15 U.S.C. § 632(a)(1).

[3251] *1992 Census, supra*, at Firm Size 1-123.

[3252] 13 C.F.R. § 121.201, Standard Industrial Classification (SIC) Code 4812.

small entities or small incumbent LECs. Although it seems certain that some of these carriers are not independently owned and operated, we are unable at this time to estimate with greater precision the number of wireline carriers and service providers that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 2,295 small entity telephone communications companies other than radiotelephone companies that may be affected by the decisions and rules adopted in this Order.

1345. *Local Exchange Carriers.* Neither the Commission nor SBA has developed a definition of small providers of local exchange services (LECs). The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of LECs nationwide of which we are aware appears to be the data that we collect annually in connection with the Telecommunications Relay Service (TRS). According to our most recent data, 1,347 companies reported that they were engaged in the provision of local exchange services.[3253] Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of LECs that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 1,347 small incumbent LECs that may be affected by the decisions and rules adopted in this Order.

1346. *Interexchange Carriers.* Neither the Commission nor SBA has developed a definition of small entities specifically applicable to providers of interexchange services (IXCs). The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of IXCs nationwide of which we are aware appears to be the data that we collect annually in connection with TRS. According to our most recent data, 97 companies reported that they were engaged in the provision of interexchange services.[3254] Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of IXCs that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 97 small entity IXCs that may be affected by the decisions and rules adopted in this Order.

1347. *Competitive Access Providers.* Neither the Commission nor SBA has developed a definition of small entities specifically applicable to providers of competitive access services (CAPs). The closest applicable definition under SBA rules is for telephone communications

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[3253] Federal Communications Commission, CCB, Industry Analysis Division, *Telecommunications Industry Revenue: TRS Fund Worksheet Data*, Tbl. 21 (Average Total Telecommunications Revenue Reported by Class of Carrier) (Feb. 1996) (*TRS Worksheet*).

[3254] *Id.*

companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of CAPs nationwide of which we are aware appears to be the data that we collect annually in connection with the TRS. According to our most recent data, 30 companies reported that they were engaged in the provision of competitive access services.[3255] Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of CAPs that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 30 small entity CAPs that may be affected by the decisions and rules adopted in this Order.

1348. *Operator Service Providers.* Neither the Commission nor SBA has developed a definition of small entities specifically applicable to providers of operator services. The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of operator service providers nationwide of which we are aware appears to be the data that we collect annually in connection with the TRS. According to our most recent data, 29 companies reported that they were engaged in the provision of operator services.[3256] Although it seems certain that some of these companies are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of operator service providers that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 29 small entity operator service providers that may be affected by the decisions and rules adopted in this Order.

1349. *Pay Telephone Operators.* Neither the Commission nor SBA has developed a definition of small entities specifically applicable to pay telephone operators. The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of pay telephone operators nationwide of which we are aware appears to be the data that we collect annually in connection with the TRS. According to our most recent data, 197 companies reported that they were engaged in the provision of pay telephone services.[3257] Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of pay telephone operators that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 197 small entity pay telephone operators that may be affected by the decisions and rules adopted in this Order.

[3255] *Id.*

[3256] *Id.*

[3257] *Id.*

1350. *Wireless (Radiotelephone) Carriers.* SBA has developed a definition of small entities for radiotelephone (wireless) companies. The Census Bureau reports that there were 1,176 such companies in operation for at least one year at the end of 1992.[1258] According to SBA's definition, a small business radiotelephone company is one employing fewer than 1,500 persons.[1259] The Census Bureau also reported that 1,164 of those radiotelephone companies had fewer than 1,000 employees. Thus, even if all of the remaining 12 companies had more than 1,500 employees, there would still be 1,164 radiotelephone companies that might qualify as small entities if they are independently owned are operated. Although it seems certain that some of these carriers are not independently owned and operated, we are unable at this time to estimate with greater precision the number of radiotelephone carriers and service providers that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 1,164 small entity radiotelephone companies that may be affected by the decisions and rules adopted in this Order.

1351. *Cellular Service Carriers.* Neither the Commission nor SBA has developed a definition of small entities specifically applicable to providers of cellular services. The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of cellular service carriers nationwide of which we are aware appears to be the data that we collect annually in connection with the TRS. According to our most recent data, 789 companies reported that they were engaged in the provision of cellular services.[1260] Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of cellular service carriers that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 789 small entity cellular service carriers that may be affected by the decisions and rules adopted in this Order.

1352. *Mobile Service Carriers.* Neither the Commission nor SBA has developed a definition of small entities specifically applicable to mobile service carriers, such as paging companies. The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of mobile service carriers nationwide of which we are aware appears to be the data that we collect annually in connection with the TRS. According to our most recent data, 117 companies reported that they were engaged in the provision of mobile

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[1258] United States Department of Commerce, Bureau of the Census, *1992 Census of Transportation, Communications, and Utilities: Establishment and Firm Size*, at Firm Size 1-123 (1995) (*1992 Census*).

[1259] 13 C.F.R. § 121.201, Standard Industrial Classification (SIC) Code 4812.

[1260] *Id.*

services.[3261] Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of mobile service carriers that would qualify under SBA's definition. Consequently, we estimate that there are fewer than 117 small entity mobile service carriers that may be affected by the decisions and rules adopted in this Order.

1353. *Broadband PCS Licensees.* The broadband PCS spectrum is divided into six frequency blocks designated A through F. As set forth in 47 C.F.R. § 24.720(b), the Commission has defined "small entity" in the auctions for Blocks C and F as a firm that had average gross revenues of less than $40 million in the three previous calendar years. Our definition of a "small entity" in the context of broadband PCS auctions has been approved by SBA.[3262] The Commission has auctioned broadband PCS licenses in Blocks A, B, and C. We do not have sufficient data to determine how many small businesses bid successfully for licenses in Blocks A and B. There were 90 winning bidders that qualified as small entities in the Block C auction. Based on this information, we conclude that the number of broadband PCS licensees affected by the decisions in this Order includes, at a minimum, the 90 winning bidders that qualified as small entities in the Block C broadband PCS auction.

1354. At present, no licenses have been awarded for Blocks D, E, and F of broadband PCS spectrum. Therefore, there are no small businesses currently providing these services. However, a total of 1,479 licenses will be awarded in the D, E, and F Block broadband PCS auctions, which are scheduled to begin on August 26, 1996. Eligibility for the 493 F Block licenses is limited to entrepreneurs with average gross revenues of less than $125 million.[3263] We cannot estimate, however, the number of these licenses that will be won by small entities under our definition, nor how many small entities will win D or E Block licenses. Given that nearly all radiotelephone companies have fewer than 1,000 employees[3264] and that no reliable estimate of the number of prospective D, E, and F Block licensees can be made, we assume for purposes of this FRFA, that all of the licenses in the D, E, and F Block Broadband PCS auctions may be awarded to small entities under our rules, which may be affected by the decisions and rules adopted in this Order.

[3261] *Id.*

[3262] *See Implementation of Section 309(j) of the Communications Act -- Competitive Bidding*, PP Docket No. 93-253, Fifth Report and Order, 9 FCC Rcd 5532, 5581-84 (1994).

[3263] *Amendment of Parts 20 and 24 of the Commission's Rules -- Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap*, WT Docket No. 96-59, *Amendment of the Commission's Cellular/PCS Cross-Ownership Rule*, Report and Order, GN Docket No. 90-314, FCC 96-278 (rel. June 24, 1996).

[3264] *1992 Census*, Table 5, Employment Size of Firms: 1992, SIC Code 4812.

1355. *SMR Licensees.* Pursuant to 47 C.F.R. § 90.814(b)(1), the Commission has defined "small entity" in auctions for geographic area 800 MHz and 900 MHz SMR licenses as a firm that had average annual gross revenues of less than $15 million in the three previous calendar years. This definition of a "small entity" in the context of 800 MHz and 900 MHz SMR has been approved by the SBA.[3265] The rules adopted in this Order may apply to SMR providers in the 800 MHz and 900 MHz bands that either hold geographic area licenses or have obtained extended implementation authorizations. We do not know how many firms provide 800 MHz or 900 MHz geographic area SMR service pursuant to extended implementation authorizations, nor how many of these providers have annual revenues of less than $15 million. We assume, for purposes of this FRFA, that all of the extended implementation authorizations may be held by small entities, which may be affected by the decisions and rules adopted in this Order.

1356. The Commission recently held auctions for geographic area licenses in the 900 MHz SMR band. There were 60 winning bidders who qualified as small entities in the 900 MHz auction. Based on this information, we conclude that the number of geographic area SMR licensees affected by the rule adopted in this Order includes these 60 small entities. No auctions have been held for 800 MHz geographic area SMR licenses. Therefore, no small entities currently hold these licenses. A total of 525 licenses will be awarded for the upper 200 channels in the 800 MHz geographic area SMR auction. However, the Commission has not yet determined how many licenses will be awarded for the lower 230 channels in the 800 MHz geographic area SMR auction. There is no basis, moreover, on which to estimate how many small entities will win these licenses. Given that nearly all radiotelephone companies have fewer than 1,000 employees and that no reliable estimate of the number of prospective 800 MHz licensees can be made, we assume, for purposes of this FRFA, that all of the licenses may be awarded to small entities who, thus, may be affected by the decisions in this Order.

1357. *Resellers.* Neither the Commission nor SBA has developed a definition of small entities specifically applicable to resellers. The closest applicable definition under SBA rules is for all telephone communications companies. The most reliable source of information regarding the number of resellers nationwide of which we are aware appears to be the data that we collect annually in connection with the TRS. According to our most recent data, 206 companies reported that they were engaged in the resale of telephone services.[3266] Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500

[3265] *See Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and the 935-940 MHz Bands Allotted to the Specialized Mobile Radio Pool*, PR Docket No. 89-583, Second Order on Reconsideration and Seventh Report and Order, 11 FCC Rcd 2639, 2693-702 (1995); *Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band*, PR Docket No. 93-144, First Report and Order, Eighth Report and Order, and Second Further Notice of Proposed Rulemaking, 11 FCC Rcd 1463 (1995).

[3266] *TRS Worksheet, supra.*

employees, we are unable at this time to estimate with greater precision the number of resellers that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 206 small entity resellers that may be affected by the decisions and rules adopted in this Order.

2. Cable System Operators (SIC 4841)

1358. SBA has developed a definition of small entities for cable and other pay television services, which includes all such companies generating less than $11 million in revenue annually. This definition includes cable systems operators, closed circuit television services, direct broadcast satellite services, multipoint distribution systems, satellite master antenna systems and subscription television services. According to the Census Bureau, there were 1,323 such cable and other pay television services generating less than $10 million in revenue that were in operation for at least one year at the end of 1992.[3267]

1359. The Commission has developed its own definition of a small cable system operator for the purposes of rate regulation. Under the Commission's rules, a "small cable company," is one serving fewer than 400,000 subscribers nationwide.[3268] Based on our most recent information, we estimate that there were 1,439 cable operators that qualified as small cable system operators at the end of 1995.[3269] Since then, some of those companies may have grown to serve over 400,000 subscribers, and others may have been involved in transactions that caused them to be combined with other cable operators. Consequently, we estimate that there are fewer than 1,468 small entity cable system operators that may be affected by the decisions and rules adopted in this Order.

1360. The Communications Act also contains a definition of a small cable system operator, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000."[3270] There were 63,196,310 basic cable subscribers at the end of 1995, and 1,450 cable system operators serving fewer than one percent (631,960) of subscribers.[3271] Although it seems certain that some of these

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[3267] *1992 Census, supra*, Table 4 (Revenue Size of Firms: 1992), SIC 4841.

[3268] 47 C.F.R. § 76.901(e). The Commission developed this definition based on its determination that a small cable system operator is one with annual revenues of $100 million or less. *Implementation of Sections of the 1992 Cable Act: Rate Regulation*, Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393.

[3269] Paul Kagan Associates, Inc., *Cable TV Investor*, Feb. 29, 1996 (based on figures for Dec. 30, 1995).

[3270] 47 U.S.C. § 543(m)(2).

[3271] Paul Kagan Associates, Inc., *Cable TV Investor*, Feb. 29, 1996 (based on figures for Dec. 30, 1995).

cable system operators are affiliated with entities whose gross annual revenues exceed $250,000,000, we are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

D. Summary Analysis of the Projected Reporting, Recordkeeping, and Other Compliance Requirements and Steps Taken to Minimize the Significant Economic Impact of this Report and Order on Small Entities and Small Incumbent LECs, Including the Significant Alternatives Considered and Rejected

1361. *Structure of the Analysis.* In this section of the FRFA, we analyze the projected reporting, recordkeeping, and other compliance requirements that may apply to small entities and small incumbent LECs as a result of this Order.[3272] As a part of this discussion, we mention some of the types of skills that will be needed to meet the new requirements. We also describe the steps taken to minimize the economic impact of our decisions on small entities and small incumbent LECs, including the significant alternatives considered and rejected.[3273] Due to the size of this Order, we set forth our analysis separately for individual sections of the item, using the same headings as were used above in the corresponding sections of the Order.

1362. We provide this summary analysis to provide context for our analysis in this FRFA. To the extent that any statement contained in this FRFA is perceived as creating ambiguity with respect to our rules or statements made in preceding sections of this Order, the rules and statements set forth in those preceding sections shall be controlling.

Summary Analysis of Section II SCOPE OF THE COMMISSION'S RULES

1363. *Summary of Projected Reporting, Recordkeeping and Other Compliance Requirements.* As discussed in Section II.E, a common carrier, which may be a small entity or a small incumbent LEC, may be subject to an action for relief in several different fora if a party believes that small entity or incumbent LEC violated the standards under section 251 or 252. Should a small entity or a small incumbent LEC be subjected to such an action for relief, it will require the use of legal skills.

1364. *Steps Taken to Minimize Significant Economic Impact on Small Entities and Small Incumbent LECs, and Alternatives Considered.* We believe that our actions establishing minimum national rules will facilitate the development of competition in the local exchange and exchange

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[3272] *See* 5 U.S.C. § 604(a)(4).

[3273] *See* 5 U.S.C. § 604(a)(5).

access markets for the reasons discussed in Sections II.A and II.B above. For example, national rules may: help equalize bargaining power; minimize the need for duplicative marketing strategies and multiple network configurations; lower administrative costs; lessen the need to re-litigate the same issue in multiple jurisdictions; and reduce delay and transaction costs, which can pose particular burdens for small businesses. In addition, our rules are designed to accommodate differences among regions and carriers, and the reduced regulatory burdens and increased certainty produced by national rules may be expected to minimize the economic impact of our decisions for all parties, including any small entities and small incumbent LECs. As set forth in Section II.A above, we reject suggestions to adopt more, or fewer, national rules than we ultimately adopt in this Order. We reject the arguments that we should establish "preferred outcomes" from which parties could deviate upon an adequate showing, or that we establish a process by which state commissions could seek a waiver from the Commission's rules, for the reasons set forth in Section II.B above.

1365. We believe that our determination that there are multiple methods for bringing enforcement actions against parties regarding their obligations under sections 251 and 252 will assist all parties, including small entities and small incumbent LECs, by providing a variety of methods and fora for seeking enforcement of such obligations. (Section II.E - Authority to Take Enforcement Action.) Similarly, our conclusion that Bell Operating Company (BOC) statements of generally available terms and conditions are governed by the same national rules that apply to agreements arbitrated under section 252 should ease administrative burdens for all parties in markets served by BOCs, which may include small entities, because they will not need to evaluate and comply with different sets of rules. (Section II.F - BOC Statements of Generally Available Terms.) Finally, we decline to adopt different requirements for agreements arbitrated under section 252 and BOC statements of generally available terms and conditions for the reasons set forth in section II.F above.

Summary Analysis of Section III
DUTY TO NEGOTIATE IN GOOD FAITH

1366. *Summary of Projected Reporting, Recordkeeping and Other Compliance Requirements.* Incumbent LECs, including small incumbent LECs that receive requests for access to network elements and/or services pursuant to sections 251 and 252 of the Act will be required to negotiate in good faith over the terms of interconnection agreements. As set forth in Section III.C. above, this Order identifies several practices as violations of the duty to negotiate in good faith, including: (1) a party's seeking or entering into an agreement prohibiting disclosure of information requested by the FCC or a state commission, or supplied in support of a request for arbitration pursuant to section 252(b)(2)(B); (2) seeking or entering into an agreement precluding amendment of the agreement to account for changes in federal or state rules; (3) an incumbent's denial of a reasonable request for cost data during negotiations; and (4) an entrant's failure to provide to the incumbent LEC information necessary to reach agreement. Complying with the projected requirements of this section may require the use of legal skills, as discussed above in

Section III.D. In addition, incumbent LECs and new entrants having interconnection agreements that predate the 1996 Act must file such agreements with the state commission for approval under section 252(e).

1367. *Steps Taken to Minimize Significant Economic Impact on Small Entities and Small Incumbent LECs, and Alternatives Considered.* As set forth above, we believe our decision to establish national rules and a review process concerning parties' duties to negotiate in good faith are designed to facilitate good faith negotiations, which should minimize regulatory burdens and the economic impact of our decisions for all parties, including small entities and small incumbent LECs. (Section III.B. - Advantages and Disadvantages of National Rules.) We also expect economic impacts to be minimized for small entities seeking to enter into agreements with incumbent LECs as a result of the decision that incumbent LECs may not impose a bona fide request requirement on carriers seeking agreements pursuant to sections 251 and 252. (Section III.C. - Specific Practices that may Constitute a Violation of Good Faith Negotiation.) For the reasons set forth in Section III.D. above, we also find that certain additional practices are not always violations of the duty to negotiate in good faith, including the suggested alternative that all nondisclosure agreements violate the good faith duty.

1368. We do not require immediate filing of preexisting interconnection agreements, including those involving small incumbent LECs and small entities. We set an outer time limit of June 30, 1997, by which preexisting agreements between Class A carriers must be filed with the relevant state commission. This decision will ensure that third parties, including small entities, are not prevented indefinitely from reviewing and taking advantage of the terms of preexisting agreements. It also limits burdens that a national filing deadline might impose on small carriers. In addition, the determination that preexisting agreements must be filed with state commissions seems likely to foster opportunities for small entities and small incumbent LECs to gain access to such agreements without requiring investigation or discovery proceedings or other administrative burdens that could increase regulatory burdens. (Section III.D. - Applicability of Section 252 to Preexisting Agreements). For the reasons set forth in Section III.D. above, we reject the alternative of not requiring certain agreements to be filed with state commissions.

Summary Analysis of Section IV
INTERCONNECTION

1369. *Summary of Projected Reporting, Recordkeeping and Other Compliance Requirements.* Incumbent LECs, including small incumbent LECs, are required by section 251(c) to provide interconnection to all requesting telecommunications carriers for the transmission and routing of telephone exchange service and exchange access service. Such interconnection must be: (1) provided at any technically feasible point; (2) at least equal in quality to that provided to the incumbent LEC itself and to any other parties with interconnection agreements; and (3)

provided on rates, terms, and conditions that are "just, reasonable, and nondiscriminatory . . . ."[3274] As set forth in Section IV.A. above, we conclude that interconnection refers solely to the physical linking of networks for the mutual exchange of traffic, and identify a minimum set of technically feasible points of interconnection. The minimum points at which an incumbent LEC, which may be a small incumbent LEC, must provide interconnection are: (1) the line side of a local switch; (2) the trunk side of a local switch; (3) the trunk interconnection points for a tandem switch; (4) central office cross-connect points; and (5) out-of-band signaling facilities. In addition, the points of access to unbundled elements (discussed below) are also technically feasible points of interconnection. Compliance with these requests may require the use of engineering, technical, operational, accounting, billing, and legal skills.

1370. To obtain interconnection pursuant to section 251(c)(2), telecommunications carriers must seek interconnection for the purpose of transmitting and routing telephone exchange traffic, or exchange access traffic, or both. (Section IV.E. - Definition of "Technically Feasible.") This will require new entrants to provide either local exchange service or exchange access service to obtain section 251(c)(2) interconnection. A requesting carrier will be required to bear the additional costs imposed on incumbent LECs as a result of interconnection. (Section IV.F. - Technically Feasible Points of Interconnection.) Carriers seeking interconnection, including small entities, may be required to collect information to refute claims by incumbent LECs that the requested interconnection poses a legitimate threat to network reliability. (*Id.*)

1371. *Steps Taken to Minimize Significant Economic Impact on Small Entities and Small Incumbent LECs, and Alternatives Considered.* The decision to adopt clear national rules in this section of the Order is also intended to help equalize bargaining power between incumbent LECs and requesting carriers, expedite and simplify negotiations, and facilitate comprehensive business and network planning. This could decrease entry barriers and provide reasonable opportunities for all carriers, including small entities and small incumbent LECs, to provide service in markets for local exchange and exchange access services. (Section IV.B. - National Interconnection Rules). National rules should also facilitate the consistent development of standards and resolution of issues, such as technical feasibility, without imposing additional litigation costs on parties, including small entities and small incumbent LECs. We determine that successful interconnection at a particular point in a network creates a rebuttable presumption that interconnection is technically feasible at other comparable points in the network. (Section IV.E - Definition of "Technically Feasible.") We also identify minimum points of interconnection where interconnection is presumptively technically feasible: (1) the line side of a switch; (2) the trunk side of a switch; (3) trunk interconnection points at a tandem switch; (4) central office cross-connect points; and (5) out-of-band signaling facilities. (Section IV.F - Technically Feasible Points of Interconnection.) These decisions may be expected to facilitate negotiations by promoting certainty and reducing transaction costs, which should minimize regulatory burdens

[3274] 47 U.S.C. § 251(c)(2).

and the economic impact of our decisions for all parties, including small entities and small incumbent LECs. We decline, however, to identify additional points where interconnection is technically feasible for the reasons set forth in section IV.F above.

1372. The ability to enter local markets by offering only telephone exchange service or only exchange access service may minimize regulatory burdens and the economic impact of our decisions for some entrants, including small entities. We decline, however, to interpret section 251(c)(2) as requiring incumbent LECs to provide interconnection to carriers seeking to offer only interexchange services for the reasons set forth in section IV.D. above. In addition, we determine that an incumbent LEC may refuse to interconnect on the grounds that specific, significant, and demonstrable network reliability concerns may make interconnection at a particular point sufficiently infeasible. We further determine that the incumbent LEC must prove such infeasibility to the state commission. (Section IV.E - Definition of "Technically Feasible.")

1373. Competitive carriers, many of whom may be small entities, will be permitted to request interconnection at any technically feasible point, and the determination of feasibility must be conducted without consideration of the cost of providing interconnection at a particular point. (Section IV.E. - Definition of "Technically Feasible.") Consequently, our rules permit the party requesting interconnection, which may be a small entity, and not the incumbent LEC to decide the points that are necessary to compete effectively. (Section IV.E. - Definition of "Technically Feasible"). We decline, however, to impose reciprocal terms and conditions for interconnection on carriers requesting interconnection. Our decision that an party requesting interconnection must pay the costs of interconnecting should minimize regulatory burdens and the economic impact of our interconnection decisions for small incumbent LECs. Similarly, regulatory burdens and the economic impact of our decisions may be minimized through the decision that, while a requesting party is permitted to obtain interconnection that is of higher quality than that which the incumbent LEC provides to itself, the requesting party must pay the additional costs of receiving the higher quality interconnection. (Section IV.H - Interconnection that is Equal in Quality.)

Summary Analysis of Section V
ACCESS TO UNBUNDLED NETWORK ELEMENTS

1374. *Summary of Projected Reporting, Recordkeeping and Other Compliance Requirements.* Under section 251(c), incumbent LECs are required to provide nondiscriminatory access to unbundled network elements. We identify a minimum set of network elements: (1) local loops; (2) local and tandem switches; (3) interoffice transmission facilities; (4) network interface devices; (5) signaling and call-related database facilities; (6) operations support systems and functions; and (7) operator and directory assistance facilities. (Section V.J - Specific Unbundling Requirements.) Incumbent LECs are required to provide nondiscriminatory access to operations support systems and information by January 1, 1997. States may require incumbent LECs to provide additional network elements on an unbundled basis. As discussed in Section V.F. above, LECs must perform the functions necessary to combine unbundled elements in a

manner that allows requesting carriers to offer a telecommunications service, and the incumbent LEC may not impose restrictions on the subsequent use of network elements. Compliance with these requests may require the use of engineering, technical, operational, accounting, billing, and legal skills.

1375. If a requesting carrier, which may be a small entity, seeks access to an incumbent LEC's unbundled elements, the requesting carrier is required to compensate the incumbent LEC for any costs incurred to provide such access. For example, in the case of operation support systems functions, such work may include the development of interfaces for competing carriers to access incumbent LEC functions for pre-ordering, ordering, provisioning, maintenance and repair, and billing. Requesting carriers may also have to deploy their own operations support systems interfaces, including electronic interfaces, in order to access the incumbent LEC's operations support systems functions. The development of interfaces may require new entrants, including small entities, to perform engineering work. (Section V.J.5 - Operations Support Systems Unbundling.)

1376. *Steps Taken to Minimize Significant Economic Impact on Small Entities and Small Incumbent LECs, and Alternatives Considered.* The establishment of minimum national requirements for unbundled elements should facilitate negotiations and reduce regulatory burdens and uncertainty for all parties, including small entities and small incumbent LECs. National requirements for unbundling may allow new entrants, including small entities, to take advantage of economies of scale in network design, which may minimize the economic impact of our decision. As set forth in Section V.B, above, we reject several alternatives in making this determination, including proposals suggesting that the Commission should: (1) not identify any required elements; (2) allow the states exclusively to identify required elements; or (3) adopt an exhaustive list of elements.

1377. As set forth above, the 1996 Act defines a network element to include "all facilit(ies) or equipment used in the provision of a telecommunications service," and all "features, functions, and capabilities that are provided by means of such facility or equipment, including subscriber numbers, databases, signaling systems and information sufficient for billing and collection or used in the transmission, routing or other provision of a telecommunications service." (Section V.C - Network Elements.) As a result, new entrants, which may include small entities, should have access to the same technologies and economies of scale and scope that are available to incumbent LECs. In reaching our determination, we reject for the reasons set forth in Section V.C above, the following alternatives: (1) that we should not adopt a method for identifying elements beyond those identified in the 1996 Act; and (2) that features sold directly to end users as retail services are not network elements. Finally, we reject the argument that requesting carriers, which may include small entities, are required to provide all services typically furnished by means of an element they purchase. (*Id.*) Our rejection of this last alternative may reduce burdens for some small entities by permitting them to offer some, but not all, of the services provided by the incumbent LEC.

1378. We conclude that the requirement to provide "access" to unbundled network elements is independent of the interconnection duty imposed by section 251(c)(2), and that such "access" must be provisioned under the rates, terms and conditions applicable to unbundled network elements. We believe these conclusions may provide small entities seeking to compete with incumbent LECs with the flexibility to offer other telecommunications services in addition to local exchange and exchange access services. (Section V.D. - Access to Network Elements.) For the reasons set forth above in Section V.D, we reject the argument that incumbent LECs are not required to provide access to an element's functionality, and that "access" to unbundled elements can only be achieved by interconnecting under the terms of section 251(c)(2).

1379. As set forth above, we conclude that an incumbent LEC, which may be a small incumbent LEC, may decline to provide a network element beyond those identified by the Commission where it can demonstrate that the network element is proprietary, and that the competing provider could offer the proposed telecommunications service using other nonproprietary elements within the incumbent's network. (Section V.E - Standards Necessary to Identify Unbundled Network Elements.) This should minimize regulatory burdens and the economic impact of our decisions for incumbent LECs, including small incumbent LECs, by permitting such entities to retain exclusive use of certain proprietary network elements.

1380. We conclude that incumbent LECs: (1) cannot impose restrictions, requirements or limitations on requests for, or the sale or use of, unbundled network elements; (2) must provide requesting carriers with all of the functionalities of a particular element so that requesting carriers can provide any telecommunications services that can be offered by means of that element; (3) must permit new entrants to combine network elements which new entrants purchase access to, if so requested; (4) must prove to a state commission that they cannot combine elements that are not ordinarily combined within an their network, or that are not ordinarily combined in that manner, because such combination is not technically feasible or it would impair the ability of other carriers to access unbundled elements and interconnect with the incumbent LEC; and (5) must provide the operational and support systems necessary to purchase and combine network elements. As a result of these conclusions, many small entities should face significantly reduced barriers to entry in markets for local exchange services. (Section V.F - Provision of a Telecommunications Service Using Unbundled Network Elements.) For the reasons set forth in section V.F, we reject the following alternatives: (1) that incumbent LECs, in all instances, must combine elements that are not ordinarily combined in their networks; and (2) that incumbent LECs are not obligated to combine elements for requesting carriers.

1381. By establishing minimum national rules concerning nondiscriminatory access to unbundled network elements, requesting carriers, including small entities, may face reduced transaction and regulatory costs in seeking to enter local telecommunications markets. Among these minimum rules are: (1) access and elements which new entrants receive are to be equal in quality between carriers; (2) incumbent LECs must prove technical infeasibility; (3) the rates, terms and conditions established for the provisioning of unbundled elements must be equal

between all carriers, and where applicable, between requesting carriers and the incumbent LEC itself, and they must provide efficient competitors with a meaningful opportunity to compete; and (4) incumbent LECs must provide carriers purchasing unbundled elements with access to electronic interfaces if incumbents use such functions themselves in provisioning telecommunications services. (Section V.G - Nondiscriminatory Access to Unbundled Network Elements.)

1382. As set forth above, we conclude that section 251(c)(3) does not require new entrants to own or control their own local exchange facilities in order to purchase and use unbundled network elements and, thus, new entrants can provide services solely by recombining unbundled network elements. (Section V.H - The Relationship Between Sections 251(c)(3) and 251(c)(4).)

1383. As discussed in Section V.J above, we adopt a minimum list of required unbundled network elements that incumbent LECs, including small incumbent LECs, must make available to requesting carriers. In adopting this list, we sought to minimize the regulatory burdens and economic impact for small incumbent LECs. For example, we declined to adopt a detailed list including many additional elements, as set forth in Section V.B. We also provided for the fact that certain LECs may possess switches that are incapable of performing customized routing for competitors, as discussed in Section V.J.2.(c).(ii).

Summary Analysis of Section VI
METHODS OF OBTAINING INTERCONNECTION AND ACCESS TO UNBUNDLED NETWORK ELEMENTS

1384. *Summary of Projected Reporting, Recordkeeping, and Other Compliance Requirements.* We conclude that Section 251(c)(6) requires incumbent LECs, including small incumbent LECs, to provide for any technically feasible method of interconnection or access to unbundled network elements, including physical collocation, virtual collocation, and meet-point interconnection. With certain modifications, we adopt some of the requirements concerning physical and virtual collocation that we adopted in the *Expanded Interconnection* proceeding. Compliance with these requests may require the use of engineering, technical, operational, accounting, billing, and legal skills.

1385. In a meet-point arrangement the new entrant will build out facilities to the agreed-upon point, which will likely entail the use of engineering and installation personnel as well as the acquisition of equipment. We allow incumbent LECs to impose reasonable restrictions on the warehousing of space by collocators. Therefore, small entities collocating equipment may be required to use the provided space for the collocation of equipment necessary for interconnection or access to unbundled network elements or risk losing the right to use that space. (Section VI.B.1.e - Allocation of Space.) To take advantage of its right to collocate equipment on an incumbent LEC's premises, competitive entrants, which may include small entities, will be

required to build or lease transmission facilities between their own equipment, located outside of the incumbent LECs' premises, and the collocated space. (Section VI.B.1.f - Leasing Transport Facilities.) We allow incumbent LECs to require reasonable security arrangements to separate an entrant's collocation space from the incumbent LEC's facilities. Small entities collocating equipment may therefore be required to pay for such security arrangements. (Section VI.B.1.h - Security Arrangements.)

1386. *Steps Taken to Minimize Significant Economic Impact on Small Entities and Small Incumbent LECs, and Alternatives Considered.* By readopting our *Expanded Interconnection* terms and conditions, which allow competitors to collocate equipment for interconnection with the incumbent LEC, regulatory burdens have likely been reduced because the terms and conditions for collocation have already been established. (Section VI.B.1.b - Adoption of *Expanded Interconnection* Terms and Conditions.) This seems likely to benefit all parties, including small entities and small incumbent LECs, since it should reduce the time and expense of negotiation, and reduce the costs of adapting to new terms and conditions for collocation.

1387. Due to our conclusion that requesting carriers may choose any method of technically feasible interconnection or access to unbundled elements, new entrants, including small entities, should have the flexibility to obtain interconnection or access in the manner that best suits their needs. (Section VI.A. - Methods of Obtaining Interconnection and Access to Unbundled Elements.) In particular, as discussed in Section VI.A.3, we recognize that carriers, including small entities, may find virtual collocation or meet-point arrangements more efficient than physical collocation in certain circumstances, particularly if they lack the resources to collocate physically in a large number of incumbent LEC premises.

1388. We adopt a broad definition of the term "premises," which should allow carriers, including small entities, to collocate equipment for interconnection and access to unbundled network elements at a range of incumbent LEC locations. (Section VI.B.1.c - The Meaning of the Term "Premises.") For the reasons set forth in Section VI.B above, we interpret the term "premises" broadly to include incumbent LEC central offices, serving wire centers and tandem offices, as well as all buildings or similar structures owned or leased by the incumbent LEC that house incumbent LEC facilities. However, as set forth above, we reject the suggestion that security measures be provided only at the request of the entrant, which should minimize regulatory burdens and the economic impact of our decisions for small incumbent LECs. (*Id.*)

1389. We interpret the statute broadly to allow collocation of any equipment used for interconnection or access to unbundled network elements. (Section VI.B.1.d - Collocation Equipment.) This standard should offer all competitors, including small entities, flexibility in collocating equipment they need to interconnect their networks to those of incumbent LECs. Incumbent LECs will also be required to make space available to requesting carriers on a first-come, first-served basis, and collocators seeking to expand their collocated space should be allowed to use contiguous space where available. (Section VI.B.1.e - Allocation of Space.)

These provisions should minimize regulatory burdens and economic impacts for small entity entrants by reducing opportunities for discriminatory treatment based on the size of the requesting carrier. We decline, however, to require incumbent LECs to file reports on the status, planned increase, and use of space for the reasons set forth in Section VI.B.1. above, which will reduce the regulatory burdens and economic impact of our decisions for small incumbent LECs.

1390. We conclude that a competitive entrant should be permitted to lease transmission facilities from the incumbent LEC. (Section VI.B.1.f - Leasing Transport Facilities). This provision will allow small entities to lease transmission facilities from incumbent LECs to transmit traffic between the collocated space and their own networks, which may be comparatively less burdensome for small entities than the alternative of bringing their own facilities to the collocated equipment on the incumbent LEC's premises. We also require incumbent LECs to permit two or more carriers that are collocating at the incumbent LEC's premises to interconnect their networks. (Section VI.B.1.g - Co-Carrier Cross-Connect.) This requirement should make it easier for new entrants to interconnect their networks with those of competitors.

1391. We require incumbent LECs to provide the relevant state commissions with detailed floor plans or diagrams of any premises where the incumbent LEC alleges that there are space constraints. (Section VI.B.1.i. - Allowing Virtual Collocation in Lieu of Physical). This requirement may reduce burdens for all parties, including small entities and small incumbent LECs, by aiding state commissions with their evaluation of incumbent LEC refusals to allow physical collocation on the grounds of space constraints. For the reasons set forth in Section VI.B.1 above, however, we decline to require incumbent LECs to lease additional space or provide trunking at no cost where they have insufficient space for physical collocation, which should minimize the regulatory burdens and economic impact of our decisions for incumbent LECs, including small incumbent LECs.

Summary Analysis of Section VII
PRICING OF INTERCONNECTION AND UNBUNDLED NETWORK ELEMENTS

1392. *Summary of Projected Reporting, Recordkeeping, and Other Compliance Requirements.* Pursuant to sections 251(c) and 252(d) of the 1996 Act, incumbent LECs must provide interconnection and access to unbundled network elements on rates, terms, and conditions that are just, reasonable, and nondiscriminatory. In Section VII above, we adopt a methodology for setting arbitrated prices for interconnection and unbundled elements on the basis of forward-looking economic cost studies prepared in conformance with a methodology prescribed by the Commission. Until states utilize economic studies to develop cost-based prices, they must use default proxies established by the Commission. Small incumbent LECs may be required, therefore, to prepare economic cost studies. In addition, small entities seeking arbitration for rates for interconnection or unbundled elements may find it useful to prepare economic cost

studies or prepare critiques of cost studies prepared by incumbent LECs and others. In both cases, this may entail the use of economic experts, legal advice, and possibly accounting personnel.

1393. *Steps Taken to Minimize Significant Economic Impact on Small Entities and Small Incumbent LECs, and Alternatives Considered.* Our conclusion that prices for interconnection and unbundled elements should be set at forward-looking long-run economic cost, including a reasonable share of forward-looking joint and common costs, should permit new entrants, including small entities, to interconnect with, and acquire unbundled elements from, incumbent LECs at prices that replicate, to the extent possible, those in a competitive market. (Section VII.B.2 - Pricing of Interconnection and Unbundled Elements, Cost-Based Pricing Methodology, Rate Levels.) Our forward-looking economic cost methodology for determining prices is designed to permit incumbent LECs to recover their economic costs of providing interconnection and unbundled elements, which should minimize the economic impact of our decisions on small incumbent LECs.

1394. Our conclusion that embedded costs, opportunity costs and universal service subsidies may not be included in the rates for interconnection and unbundled elements is intended, in part, to avoid distortions in investment decisions, which should lead to more efficient allocation of resources, thereby reducing regulatory burdens and economic impacts for some small entities and small incumbent LECs. (Section VII.B.2 - Pricing of Interconnection and Unbundled Elements, Cost-Based Pricing Methodology, Rate Levels.) We reject proposals that would have permitted incumbent LECs to recover their embedded costs in prices for interconnection and unbundled elements as discussed above in Section VII.B.2.a.(3)(b). As discussed in Section VII.B.2.a.(3)(b), we reject the use of the efficient component pricing rule (ECPR) to set prices for interconnection and unbundled elements.

1395. Our conclusion that forward-looking common costs should be allocated in a reasonable manner should ensure that the prices of network elements that are least likely to be subject to competition are not artificially inflated by large allocations of common costs. This, in turn, may also produce more efficient allocations of resources, thereby minimizing regulatory burdens and economic effects for many parties, including small entities and small incumbent LECs. (Section VII.B.2 - Pricing of Interconnection and Unbundled Elements, Cost-Based Pricing Methodology, Rate Levels.) We permit, but do not require, states to impose peak-sensitive pricing systems for shared facilities as discussed in Section VII.B.3.b.

1396. We conclude that incumbent LECs should not recover access charges from entrants that use unbundled network facilities to provide access services to customers that they win from incumbent LECs. We do, however, permit incumbent LECs to impose on purchasers of unbundled local switching the carrier common line charge and a charge equal to seventy-five percent of the transport interconnection charge for an interim period that shall end no later than June 30, 1997, as discussed in Section VII.B.2.a.(3)(b). As further explained in that section, this

mechanism should serve to reduce any short-term disruptive impact of our decisions on incumbent LECs, including small incumbent LECs.

1397. We conclude that the Act requires rates for interconnection and unbundled elements to be geographically deaveraged, using a minimum of three geographic zones, in a manner that appropriately reflects the costs of the underlying elements. (Section VII.B.3.c. - Geographic/Class-of-Service Averaging.) We also conclude that distinctions between the rates charged to requesting carriers for network elements should not vary based on the classes of service that the requesting carriers provide to their to customers. We expect these decisions to lead to increased competition and a more efficient allocation of resources.

1398. The default proxies we adopt for rates for interconnection and unbundled elements, which states may use to establish prices, are designed to approximate prices that will enable efficient competitors, including small entities, to enter local exchange markets. (Section VII.C. - Default Proxy Ceilings and Ranges.) We reject the use of rates in interconnection agreements that predate the 1996 Act as proxy-based ceilings for interconnection and unbundled element rates as discussed in Section VII.C.1. We also decline to adopt a generic cost model at this time, as discussed in Section VII.C.3.

1399. We determine that the nondiscrimination provisions in the Act prohibit price differences that are not based on cost differences. This should permit small entities to obtain the same terms and conditions of agreements reached by larger carriers that possess greater bargaining power without having to incur the costs of negotiation and/or arbitration. (Section VII.D.3 - Discrimination.)

Summary Analysis of Section VIII
RESALE

1400. *Summary of Projected Reporting, Recordkeeping, and Other Compliance Requirements.* Pursuant to section 251(b)(1), all LECs, which may include small entity competing LECs and small incumbent LECs, may not impose unreasonable or discriminatory conditions on, or limit the resale of, their telecommunications services. Pursuant to section 251(c)(4), incumbent LECs are required to offer for resale at wholesale rates any telecommunications services that they offer to subscribers other than telecommunications carriers. Providing such services for resale may require some small entities and small incumbent LECs to use additional billing, technical, and operational skills.

1401. Under section 252(a), resellers, which may include small entities, are required to prepare and present to incumbent LECs requests for services to resell. We do not establish guidelines for the content of these requests. Such requests may involve legal, engineering, and accounting skills. Resellers may also have to engage in arbitration proceedings with incumbent LECs if voluntary negotiations resulting from the initial request fail to yield an agreement. This

may involve legal and general negotiation skills. Where a reseller is negotiating or arbitrating with an incumbent LEC, the reseller may choose to offer arguments concerning economic and accounting data presented by state commissions or incumbent LECs. Resellers may also choose to make legal and economic arguments that certain resale restrictions are unreasonable. These tasks may require legal, economic, and accounting skills.

1402. *Steps Taken to Minimize Significant Economic Impact on Small Entities and Small Incumbent LECs, and Alternatives Considered.* As set forth in Section VIII.B, above, our decision to adopt clear national rules should reduce regulatory burdens and uncertainty for all parties, including small entities and small incumbent LECs. Moreover, our decision not to impose eligibility requirements on resellers should minimize regulatory burdens for resellers. We reject proposals that the Commission not require resale of bundled service offerings, promotions and discounts lasting longer than 90 days, residential service, and services offered at rates below cost for reasons set forth in Section VIII.A.

1403. As discussed in Section VIII.B, we expect that the opportunity to resell telecommunications services currently offered exclusively by incumbent LECs will lead to increased competition in the provision of telecommunications services. We also determine that non-cost-based factors shall not be considered when arriving at wholesale discounts, and we reject the argument that indirect costs should not be considered avoided costs. We also reject proposals that we either require or forbid a state to include a measure of profit in its avoided cost calculation. As set forth in Section VIII.B, we considered the concerns of small incumbent LECs and small entity resellers when adopting the default range for wholesale discounts. In addition, we allow a state to consider including in wholesale rates the costs that incumbent LECs incur in selling services on a wholesale basis, which may minimize the economic impact for small incumbent LECs.

1404. As discussed in Section VIII.C, we remove obstacles faced by small businesses in reselling telecommunications services by establishing a presumption, applicable to incumbent and non-incumbent LECs, that most restrictions on resale are unreasonable. This presumption should reduce unnecessary burdens on resellers, which may include small entities. It may also produce increased opportunities for resale competition, which may be expected to be beneficial for some small entities and small incumbent LECs. We do not permit state commissions to require non-incumbent LECs to offer their services at wholesale rates for the reasons set forth Section VIII.D For the reasons discussed in Section VIII.C, above, we decline to forbear from the application of section 251(b)(1) to non-incumbent LECs. We also conclude that incumbent LECs are to continue to receive access charge revenues when local services are resold under section 251(c)(4) for reasons set forth in Section VIII.E, and that such access services are not subject to resale at wholesale rates for reasons set forth in Section VIII.A.

Summary Analysis of Section IX
DUTIES IMPOSED ON "TELECOMMUNICATIONS CARRIERS" BY SECTION 251(a)

1405. *Summary of Projected Reporting, Recordkeeping, and Other Compliance Requirements.* Small entities that provide telecommunications services are subject to the same obligations imposed on all telecommunications carriers under section 251(a)(1) and section 251(a)(2), and any reporting requirements that attend such obligations. Among these duties is the duty to interconnect, directly or indirectly, with requesting telecommunications carriers. (Section IX - Duties Imposed on "Telecommunications Carriers" By Section 251(a).) This will likely require small entities to comply with the technical, economic, and legal requirements involved with interconnection, including negotiating contracts, utilizing engineering studies, and adding operational capacity. (*Id.*) Small incumbent LECs may incur similar compliance requirements to the extent they are required to interconnect with entities that qualify as "telecommunications carriers."

1406. Small incumbent LECs and small entities providing telecommunications services will also be under a duty not to install network features, functions, and capabilities that do not comply with standards and guidelines under sections 255 and 256. (Section IX - Duties Imposed on "Telecommunications Carriers" By Section 251(a)(2).) In addition, small entities that provide both information services and telecommunications services are classified as telecommunications carriers and are subject to certain requirements under 251(a). (Section IX - Duties Imposed on "Telecommunications Carriers" By Section 251(a)(2).)

1407. *Steps Taken to Minimize Significant Economic Impact on Small Entities and Small Incumbent LECs, and Alternatives Considered.* Small entities who provide for a fee local, interexchange and international services are defined as telecommunications carriers and, thus, also receive the benefits of section 251 including interconnection, services, and network elements, which may increase their ability to compete. (Section IX - Duties Imposed on "Telecommunications Carriers" By Section 251(a)(2).) We reject the suggestion that CMRS providers, some of which likely are small entities, should not be included in the definition of a "telecommunications carrier." (*Id.*) We determine that entities operating private, internal or shared communications networks do not qualify as telecommunications carriers, however, which excludes them from the obligations and benefits under section 251(a). Small entities providing information services but not telecommunications services are also not classified as telecommunications carriers and, thus, will not be bound by the duties of section 251(a). A carrier that provides both information and telecommunications services is deemed subject to the requirements of section 251(a). We also conclude that telecommunications carriers that have interconnected under either section 251(a)(1) or 251(c)(2) may offer information services through the same arrangement or agreement. This will permit new entrants, many of which may be small entities, to offer full ranges of services to end users without having to provide some of those services inefficiently through distinct facilities or agreements.

1408. We decide that competitive telecommunications carriers that have the obligation to interconnect with requesting carriers may choose, based upon their own characteristics, whether to allow direct or indirect interconnection. (Section IX - Duties Imposed on "Telecommunications Carriers" By Section 251(a).) This should allow significant flexibility for small entities to choose the most efficient and economical arrangement for their particular strategy. As set forth in Section IX, we reject an argument to forbear, under section 10 of the Communications Act,[3273] from imposing any interconnection requirements on non-dominant carriers.

Summary Analysis of Section X
COMMERCIAL MOBILE RADIO SERVICES

1409. *Summary of Projected Reporting, Recordkeeping and Other Compliance Requirements.* We are applying sections 251 and 252 to LEC-CMRS interconnection at this time. (Section X.D - Jurisdictional Authority for Regulation of LEC-CMRS Interconnection Rates.) We may revisit our determination not to invoke jurisdiction under section 332 to regulate LEC-CMRS interconnection rates if we determine that the regulatory scheme established by sections 251 and 252 does not sufficiently address the problems encountered by CMRS providers, many of which may be small entities, in obtaining interconnection on terms and conditions that are just, reasonable, and nondiscriminatory.

1410. Pursuant to our findings in Section X.D, a small CMRS entity seeking to enter into a reciprocal compensation agreement with an incumbent LEC, which may be a small incumbent LEC, will have to comply with sections 251 and 252, and state law. The reporting, recordkeeping, and other compliance requirements associated with reciprocal compensation are summarized in the following section concerning obligations under section 251(b).

1411. *Steps Taken to Minimize Significant Economic Impact on Small Entities and Small Incumbent LECs, and Alternatives Considered.* The Commission's actions may minimize the economic impact on CMRS providers, many of which are small entities, by declaring that CMRS providers are not required to comply with the obligations of LECs under section 251(b)(5). We decline to adopt the alternative of finding that a CMRS provider is a LEC for the reasons set forth in Section X.A. We also determine that CMRS providers are entitled to request reciprocal compensation under section 251(b)(5), and that certain CMRS providers are also entitled to request interconnection under section 251(c)(2). As discussed in the following section concerning obligations under section 251(b), these decisions may permit small entity CMRS providers the opportunity to considerably expand their businesses.

Summary Analysis of Section XI
OBLIGATIONS IMPOSED ON LECS BY 251(b)

[3273] 47 U.S.C. § 160.

A Reciprocal Compensation for Transport and Termination of Telecommunications

1412. *Summary of Projected Reporting, Recordkeeping, and Other Compliance Requirements.* All local exchange carriers, including small incumbent LECs and perhaps some small entities offering competing local exchange services, have a duty to establish reciprocal compensation for the transport and termination of local telecommunications traffic, as defined by state commissions. As such, small incumbent LECs and small entities offering competitive local exchange services may be required to measure the exchange of traffic, and to bill and collect payment from other carriers. (Section XI.A - Reciprocal Compensation for Transport and Termination of Telecommunications.) Reciprocal compensation for the transport and termination of traffic may be based on the incumbent LEC's cost studies, which may require small incumbent LECs to use economic skills to perform cost studies. To the extent that a competing provider of local exchange services, which may include a small entity, believes its costs for the transportation and termination of traffic differ from those of the incumbent LEC, it would also be required to provide a forward-looking, economic cost study. (*Id.*)

1413. If a CMRS provider entered into an agreement with an incumbent LEC prior to August 8, 1996 that does not provide for mutual compensation, the CMRS provider may demand to renegotiate the agreement. This may impose the burden of re-negotiation on small incumbent LECs, which may require legal, accounting, and economic skills. In addition, pending the successful completion of negotiation or arbitration, symmetrical reciprocal compensation shall apply, which may have the effect of raising the amount small incumbent LECs currently pay CMRS providers to terminate LEC-originated traffic. This may have the effect of increasing small incumbent LECs' costs. Finally, a state commission may impose bill-and-keep arrangements between carriers if the state commission determines that the amount of local telecommunications traffic from one network to the other is approximately equal to the amount of local telecommunications traffic flowing in the opposite directions, and is expected to remain thus. This could have the effect of reducing small incumbent LECs' revenues and decreasing the expenses of small entities. It also might place a burden on small entities and small incumbent LECs of establishing that traffic volumes are imbalanced, which might require accounting, economic, and legal skills.

1414. We require paging companies seeking to recover fees for terminating local calls to demonstrate to the state the costs of terminating such calls. (Section XI.A. - Reciprocal Compensation for Transport and Termination of Traffic.) Consequently, small entity paging companies and possibly small incumbent LECs may be required to use legal, economic, and possibly accounting skills.

1415. *Steps Taken to Minimize Significant Economic Impact on Small Entities and Small Incumbent LECs, and Alternatives Considered.* Our adoption of national default price ceilings and ranges for transportation and termination of local traffic being arbitrated by the states should

provide all parties, including small incumbent LECs and many new entrant small entities, with a clear understanding of the terms and conditions that will govern should they fail to reach an agreement. This should minimize regulatory burdens and economic impacts for those companies, in part by reducing the transaction costs of arbitration. (Section XI.A.3.c.(4) - Default Proxies.) Permitting CMRS providers with non-reciprocal agreements to renegotiate their agreements, and imposing symmetrical reciprocal compensation pending completion of negotiation or arbitration, will provide all parties with certainty as to applicable rates as of the date of this order, and minimize litigation and regulatory costs. We believe this decision is consistent with the pro-competitive goals of the 1996 Act.

1416. We define transport and termination as separate functions -- each with its own cost calculation for the purposes of sections 251 and 252. This definition may permit interconnecting carriers, including small entities, to obtain transport and termination services at lower rates and avoid paying above-cost rates or rates for unneeded services. (Section XI.A.2 - Definition of Transport and Termination of Telecommunications.) We also conclude that a LEC may not charge a CMRS provider or other carrier, which may be a small entity, for receiving and terminating LEC-originated traffic. (Section XI.A.4 - Symmetry.) We do not permit interexchange carriers to use transport and termination services to avoid the obligation to pay access charges for terminating interexchange traffic with incumbent LECs. (Section XI.A.2 - Definition of Transport and Termination of Telecommunications.)

1417. Our decision to permit new entrants to base reciprocal compensation arrangements on incumbent LECs' cost studies may reduce barriers to entry by permitting competing LECs to avoid performing their own forward-looking, economic cost studies, which may be expected to reduce the overall burdens and minimize the economic impact of regulation on these small entities. (Section XI.A.4 - Symmetry.) The ability of state commissions to impose bill and keep arrangements where the costs of terminating traffic are nearly symmetrical, traffic volume is roughly balanced, and both are expected to remain so, may allow small entities and small incumbent LECs to avoid the cost of measuring traffic exchange. (Section XI.A.5 - Bill and Keep.) For the reasons set forth in Section XI.A.5 above, we reject the proposed alternative of permitting states to adopt bill-and-keep arrangements for the transport and termination of traffic where the cost of terminating traffic is not nearly symmetrical.

1418. By requiring that rates for transport and termination be cost based, we believe that all parties in telecommunications markets, including small incumbent LECs and small entities, may benefit from increased opportunities to compete effectively in local exchange markets. (Section XI.A.3 - Pricing Methodology.) In addition, we conclude that termination rates for LECs, including small incumbent LECs, should include an allocation of forward-looking common costs, but not an element for the recovery of lost contributions. These decisions may be expected to minimize the economic impact of our decisions on small incumbent LECs and small entities.

1419. This Order eliminates certain charges paging companies may now be assessed by LECs and enables paging companies to claim new revenues from LECs for terminating paging calls. (Section XI.A - Reciprocal Compensation for Transport and Termination of Traffic.) Paging companies, including small entities, may thereby incur lower costs. Such entities also may increase their revenues, depending on the outcome of any proceedings concerning their termination costs. For the reasons set forth in Section XI.A.3 above, we cannot conclude, at this time, that a LEC's forward looking costs may be used as a reasonable proxy for the costs of call termination by paging providers. We further conclude that the default price for termination of traffic from the end office that we adopt in this proceeding in Section XI.A.3 above does not apply to termination of traffic by paging providers. This default price is based on estimates in the record of the costs to LECs of termination from the end office or end-office switching.

B. Access to Rights-of-Way

1420. *Summary of Projected Reporting, Recordkeeping, and Other Compliance Requirements.* Small incumbent LECs that meet the definition of a utility[3276] and own poles, ducts, conduits and rights-of-way where access was not previously mandated are now required to provide access to requesting telecommunications carriers (other than incumbent LECs and cable television systems) which may require the use of legal, engineering, and accounting resources for evaluation and processing of attachment requests. (Section XI.B.2 - Section 224(f): Non-discriminatory Access.) This may also require small incumbent LECs and small entities to employ technical personnel to modify pole attachment arrangements.

1421. A complaint of unjustified denial of access must be supported by a written request for access, the utility's response, and information supporting the complainant's position. This will likely impose some recordkeeping requirements on small incumbent LECs and small entities seeking access to rights-of-way. Our requirements may also impose administrative requirements, including legal and engineering expertise, on small governmental jurisdictions[3277] that resolve disputes arising under section 224 of the Communications Act. (Section XI.B.5 - Dispute Resolution.) In addition, small governmental jurisdictions that have established rules and regulations for access to poles, ducts and conduits specifically, and interconnection generally, are also likely to have some level of reporting and recordkeeping requirements for competing telecommunications carriers that use the poles, some of which may be small entities. (Section XI.B.6 - Reverse Preemption.)

[3276] The Act defines "utility" as "any person who is a local exchange carrier or an electric, gas, water, steam, or other public utility, and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communication." 47 U.S.C. § 224(a)(1).

[3277] Under the Regulatory Flexibility Act, a "small governmental jurisdiction" is one type of "small entity," and is defined as the "governments of cities, counties, towns, townships, villages, school districts, or special districts with a population of less than fifty thousand . . . ." 5 U.S.C. § 601(5).

1422. *Steps Taken to Minimize Significant Economic Impact on Small Entities and Small Incumbent LECs, and Alternatives Considered.* In placing the burden of proof on the denying utility with respect to the propriety of a denial of access, we recognize that new entrants, which may be small entities, are not likely to have access to such information without cooperation from the utilities. Complaints should not be dismissed where the petitioner was unable to obtain a written response from the denying utility, or where the utility also denied the petitioner any relevant information needed to establish a prima facie case. These provisions should allow an entrant to pursue a claim without the need for expensive discovery, and should not preclude or discourage entities with limited resources from seeking redress where access is denied. (Section XI.B.5 - Dispute Resolution.) For the reasons set forth in Section XI.B.5, we reject the recommendation that an applicant be allowed to seek injunctive relief in federal court and select federal jurisdiction for enforcement or appeal of any matter regarding pole attachments. Our conclusion that state and local pole attachment requirements are presumed reasonable may minimize burdens on small governmental jurisdictions by preserving existing rules and procedures, and the local government's expertise with its own rules. (Section XI.B.2.c.2. - Specific Rules.) In reaching this result, we reject the alternative of invalidating such state regulations in favor of federal rules for the reasons stated in Section XI.B.2. Our determination not to prescribe numerous specific rules in this area recognizes the varying technologies and facilities deployed by incumbent LECs, including small incumbent LECs. For example, we recognize that utilities, including small incumbent LECs, normally have their own operating standards that dictate conditions of access. Thus, we leave in place such conditions of access. For the reasons set forth in Section XI.B., we reject the alternative of prescribing a comprehensive set of substantive engineering standards governing access to rights-of-way.

1423. When an attaching entity modifies poles for its use, it will be entitled to recover a share of its expenses from any later-attaching entities. (Section XI.B.4 - Modifications.) This should permit attaching entities that modify poles, some of which may be small entities, to bear only their proportionate costs and prevent them from effectively subsidizing their later-entering competitors. The requirement that utilities provide attaching entities with 60 days' notice prior to commencing modifications to any pole, duct or conduit should provide attaching entities, some of which may be small entities, with sufficient time to evaluate the impact of the proposed modification on their interests and to plan and coordinate any modifications to their own attachments. (*Id.*)

C. Imposing Additional Obligations on LECs

1424. *Summary of Projected Reporting, Recordkeeping and Other Compliance Requirements.* Our decisions in this section of the Order do not subject any small entities to reporting, recordkeeping or other compliance requirements.

1425. *Steps Taken to Minimize Significant Economic Impact on Small Entities and Small Incumbent LECs, and Alternatives Considered.* The determination that the 1996 Act does not

permit the particular obligations for incumbent LECs set forth in section 251(c) to be imposed on non-incumbent carriers, absent a finding by the Commission under section 251(h)(2), should limit potential burdens on new entrants, including small entities. (Section XI.C - Imposing Obligations on LECs.)

Summary Analysis of Section XII
EXEMPTIONS, SUSPENSIONS AND MODIFICATIONS OF SECTION 251 REQUIREMENTS

1426. *Summary of Projected Reporting, Recordkeeping and Other Compliance Requirements.* Section 251(f)(1) grants rural telephone companies, which may be small incumbent LECs, an exemption from the requirements of section 251(c) (which only apply to incumbent LECs) until the rural telephone company has received a bona fide request for interconnection, services, or network elements, and the state determines that the exemption should be terminated. Section 251(f)(2) provides that LECs with fewer than two percent of the nation's subscriber lines may petition a state commission for a suspension or modification of any requirements of sections 251(b) and 251(c). The latter provision, section 251(f)(2), is available to all LECs including competitive LECs, which may be small entities.

1427. After a carrier has made a bona fide request under Section 251, a rural telephone company, which may be a small incumbent LEC, seeking to retain its exemption under section 251(f)(1) must prove to the state commission that it should retain its exemption. To remove the exemption, a state commission must find that the bona fide interconnection request is not unduly economically burdensome, is technically feasible, and is consistent with section 254. The parties involved in such a proceeding may need to use legal, accounting, economic and/or engineering services. A small incumbent LEC or a competitive LEC, which may be a small entity, seeking under 251(f)(2) to modify or suspend the national interconnection requirements imposed by section 251(b) or 251(c) bears the burden of proving that interconnection would: (1) create a significant adverse economic impact on telecommunications users; (2) be unduly economically burdensome; or (3) be technically infeasible.

1428. *Steps Taken to Minimize Significant Economic Impact on Small Entities and Small Incumbent LECs, and Alternatives Considered.* As set forth in Section XII above, the determination whether a section 251(f) exemption, suspension, or modification should be continued or granted lies primarily with the relevant state commission. By largely leaving this determination to the states, our decisions permit this fact-specific inquiry to be administered in a manner that minimizes regulatory burdens and the economic impact on small entities and small incumbent LECs. However, to further minimize regulatory burdens and minimize the economic impact of our decision, we adopt several rules as set forth in Section XII above, which may facilitate the efficient resolution of such inquiries, provide guidance, and minimize uncertainty. As set forth in Section XII above, we find that the rural LEC or smaller LEC must prove to the state commission that the financial harm shown to justify an exemption, suspension, or

modification would be greater than the harm that might typically be expected as a result of competition. Finally, we conclude that section 251(f) adequately provides for varying treatment for smaller or rural LECs where such variances are justified. As a result, we expect that section 251(f) will significantly minimize regulatory burdens and economic impacts from the rules adopted in this Order.

Summary Analysis of Section XIII
ADVANCED TELECOMMUNICATIONS CAPABILITIES

1429. *Summary of Projected Reporting, Recordkeeping and Other Compliance Requirements.* Our decision to defer consideration of rules in this section of the Order does not subject any small entities or small incumbent LECs to reporting, recordkeeping or other compliance requirements.

1430. *Steps Taken to Minimize Significant Economic Impact on Small Entities and Small Incumbent LECs, and Alternatives Considered.* We do not anticipate that our decision to defer consideration of rules in this section of the Order will have any economic impact on small entities or small incumbent LECs.

Summary Analysis of Section XIV
PROVISIONS OF SECTION 252

A. Section 252(e)(5)

1431. *Summary of Projected Reporting, Recordkeeping, and Other Compliance Requirements.* Pursuant to section 252(b)(1), a party to negotiation may petition a state commission to arbitrate any open issues. Small entities and small incumbent LECs negotiating interconnection agreements may, therefore, participate in state arbitration in order to obtain an interconnection agreement, which may impose significant legal costs. (Section XIV.A - Section 252(e)(5).) Section 252(e)(5) requires the Commission to assume the state's responsibility under section 252 if the state "fails to act to carry out its responsibility" under the section. We require an aggrieved party, which may be a small entity or a small incumbent LEC, to notify the FCC that a state commission has failed to act under section 252 by filing a detailed written petition, backed by affidavit. As set forth above in Section XIV.A, if the Commission, following a notice and comment period, determines that the state has failed to act, the Commission will assume authority under section 252(e)(5) and mediate or arbitrate the dispute. This process may also entail significant legal expertise.

1432. *Steps Taken to Minimize Significant Economic Impact on Small Entities and Small Incumbent LECs, and Alternatives Considered.* In this Order, the Commission adopts a minimum set of rules that will provide notice of the standards and procedures that the Commission will use if it has to assume the responsibility of a state commission under section 252(e)(5). These rules

should benefit small entities and small incumbent LECs by limiting uncertainty and minimizing transaction costs associated with the arbitration process. (Section XIV.A - 252(e)(5).)

1433. The Commission concludes that, if it arbitrates agreements, it will use a "final offer" arbitration method, whereby each party to the arbitration proposes its best and final offer, and the arbitrator chooses between the proposals. The arbitrator may choose either proposal in its entirety, or could choose different parties' proposals on an issue-by-issue basis. This method of arbitration should minimize the economic impact on small entities and small incumbent LECs by reducing the transaction costs associated with arbitration. Our rules should also encourage parties, to negotiate after offers are submitted which should provide additional flexibility for parties including small entities and small incumbent LECs, to agree to a resolution tailored to their interests. (Section XIV.A - 252(e)(5).)

1434. For the reasons set forth above in Section XIV.A, we reject the alternative of adopting national rules governing state arbitration procedures. We believe the states are in a better position to develop mediation and arbitration rules that support the objectives of the 1996 Act. States may develop specific measures that best address the concerns of small entities and small incumbent LECs participating in mediation or arbitration.

1435. As set forth above in Section XIV.A, we reject the suggestion that the Commission return jurisdiction over an arbitration to the state commission. We further reject the argument that, once the Commission has mediated or arbitrated an agreement, the agreement must be submitted to the state commission for approval under state law. We decline to adopt the alternative suggested by some parties that, if the Commission steps into the state commission role, it is bound by state laws and standards that would have applied to the state commission. (Section XIV.A - 252(e)(5)).

1436. As explained above in Section XIV.A, we also reject the alternative that an arbitrated agreement not be binding on the parties. Finally, we reject the alternative of opening the arbitration process to all third parties, which should minimize the costs involved in such proceedings.

B. Requirements of Section 252(i)

1437. *Summary of Projected Reporting, Recordkeeping and Other Compliance Requirements.* Our decisions in this section of the Order do not subject any small entities to reporting, recordkeeping or other compliance requirements. Incumbent LECs, including small incumbent LECs, are required to file with state commissions all interconnection agreements entered into with other carriers, including adjacent incumbent LECs. Incumbent LECs must also permit third parties to obtain any individual interconnection, service or network element arrangement on the same terms and conditions as those contained in any agreement approved under section 252. Moreover, incumbent LECs must prove with specificity that terms and

conditions contained in filed agreements are legitimately related to the purchase of the individual element or service being sought. Incumbent LECs must provide "most favored nation" status with regard to subsequent carriers regardless of whether they include "most favored nation" clauses in their agreements. Complying with these requirements may require small incumbent LECs and requesting small entities to use legal and negotiation skills.

1438. *Steps Taken to Minimize Significant Economic Impact on Small Entities and Small Incumbent LECs, and Alternatives Considered.* Our decision to adopt national standards to implement section 252(i) should minimize the economic impact of our decision on both small entities and small incumbent LECs by expediting the resolution of disputes, thereby reducing transaction costs associated with interconnection. Our decision that section 252(i) permits requesting carriers to choose among individual provisions contained in publicly-filed interconnection agreements should minimize the economic impact for small new entrants by permitting them to obtain the provisions they desire without having to adopt entire agreements that would not reflect their costs or the specific technical characteristics of their networks. (Section XIV.B - Requirements of Section 252(i).) Moreover, small entities may be able to obtain the same terms and conditions of agreements reached by larger carriers that possess greater bargaining power without having to incur the costs of negotiation and/or arbitration.

1439. We also determine that publicly-filed agreements need only be made available to carriers who cause incumbent LECs to incur no greater costs than did the original carrier, which should minimize the economic impact on small incumbent LECs. We also minimize the regulatory burden for small entities and small incumbent LECs by finding that a new entrant seeking interconnection, network elements, or services pursuant to section 252(i) need not make such requests pursuant to the procedures for initial section 251 requests, but shall be permitted to obtain access to agreements on an expedited basis.

1440. As set forth above, we conclude that section 252(i) permits differential treatment of carriers based on differences in the costs of serving those carriers, but does not permit incumbent LECs to limit the availability of interconnection, services, or network elements only to those requesting carriers serving a comparable class of subscribers or providing the same service as the original party to the agreement. (Section XIV.B. - Requirements of Section 252(i).) These decisions should minimize the impact on small entities by preventing discrimination and enabling them to obtain the same terms and conditions as larger carriers that possess greater bargaining power. For the reasons set forth in Section XIV.B., we reject the interpretation favored by commenters arguing that new entrants should not be able to choose among provisions of interconnection agreements filed with state commissions.

E. Report to Congress

1441. The Commission shall send a copy of this FRFA, along with this Order, in a report to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996, 5

U.S.C. § 801(a)(1)(A). A copy of this FRFA will also be published in the Federal Register.

XVI. ORDERING CLAUSES

1442. Accordingly, IT IS ORDERED that, pursuant to Sections 1-4, 201-209, 214, 218, 224, 251, 252, and 303(r) of the Communications Act of 1934, as amended, and Section 601 of the Telecommunications Act of 1996, 47 U.S.C. §§ 151-154, 201-209, 214, 218, 224, 251, 252, 303(r), the REPORT AND ORDER IS ADOPTED, effective 30 days after publication of a summary in the Federal Register. The collections of information contained within are contingent upon approval by the Office of Management and Budget.

1443. IT IS FURTHER ORDERED that Part 51 of the Commission's rules, 47 C.F.R. § 51 is ADDED as set forth in Appendix B hereto.

1444. IT IS FURTHER ORDERED that, to the extent issues from CC Docket No. 95-185, *In the Matter of Interconnection Between Local Exchange Carriers and Commercial Mobile Service Providers*, are resolved here, we incorporate the relevant portions of the record in that docket.

1445. IT IS FURTHER ORDERED that, to the extent issues from CC Docket No. 91-346, *In the Matter of Intelligent Networks*, are resolved here, we incorporate the relevant portions of the record in that docket.

1446. IT IS FURTHER ORDERED, in light of the United States Court of Appeals for the District of Columbia Circuit in *Pacific Bell v. FCC*, 81 F.3d 1147 (D.C. Cir. 1996) (table) and the Telecommunications Act of 1996, that the rules and policies adopted in *Expanded Interconnection with Local Telephone Company Facilities*, CC Docket No. 91-141, 9 FCC Rcd 5154 (1994), shall remain in effect.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

List of Commenters in CC Docket No. 96-98

360° Communications Company (360 Communications)
Ad Hoc Coalition of Corporate Telecommunications Managers
Ad Hoc Telecommunications Users Committee
AirTouch Communications, Inc. (AirTouch)
Alabama Public Service Commission (Alabama Commission)
Alaska Telephone Association (Alaska Tel. Ass'n)
Alaska Public Utilities Commission (Alaska Commission)
Alliance for Public Technology
Allied Association Partners, LP & Geld Information Systems (Allied Ass'n)
ALLTEL Telephone Services Corporation (ALLTEL)
American Communications Services, Inc. (ACSI)
American Foundation for the Blind
American Mobile Telecommunications Association, Inc. (American Mobile Telecomm. Ass'n)
American Network Exchange, Inc. & U.S. Long Distance, Inc. (American Network Exchange)
American Personal Communications
American Petroleum Institute
American Public Communications Council
American Public Power Association (APPA)
America's Carriers Telecommunication Association (ACTA)
Ameritech
Anchorage Telephone Utility (Anchorage Tel. Utility)
Arch Communications Group, Inc. (Arch)
Arizona Corporation Commission (Arizona Commission)
Association for Study of Afro-American Life and History, Inc. (ASALH)
Association for Local Telecommunications Services (ALTS)
Association of Telemessaging Services International
AT&T Corp. (AT&T)
Attorneys General of Connecticut, Delaware, Illinois, Iowa, Massachusetts, Michigan, Minnesota, Missouri, New York, North Dakota, Pennsylvania, West Virginia and Wisconsin (Attorneys General)
Bay Springs Telephone Co., Crockett Telephone Co., National Telephone Company of Alabama, Peoples Telephone Company, Roanoke Telephone Co. & West Tennessee Telephone Company (Bay Springs, *et al.*)
Black Data Processing Associates
Black Data Processors Association (Black Data Processors Ass'n)
Bell Atlantic Telephone Companies (Bell Atlantic)
Bell Atlantic NYNEX Mobile, Inc. (Bell Atlantic NYNEX Mobile)
BellSouth Corporation, Bell Enterprises, Inc., Bellsouth Telecommunications, Inc. (BellSouth)
Bogue, Kansas
Buckeye Cablevision, Inc. (Buckeye Cablevision)

Cable & Wireless, Inc. (Cable & Wireless)
Cellular Telecommunications Industry Association (CTIA)
Celpage, Inc. (Celpage)
Centennial Cellular Corp.
Chrysler Minority Dealers Association (Chrysler Minority Dealers Ass'n)
Cincinnati Bell Telephone Company (Cincinnati Bell)
Citizens Utilities Company (Citizens Utilities)
Classic Telephone, Inc. (Classic Tel.)
Colorado Independent Telephone Association (Colorado Independent Tel. Ass'n)
Colorado Public Utilities Commission (Colorado Commission)
COMAV, Corp. (COMAV)
Comcast Cellular Communications, Inc. (Comcast Cellular)
Comcast Corporation (Comcast)
Communications and Energy Dispute Resolution Associates (CEDRA)
Competition Policy Institute
Competitive Telecommunications Association (CompTel)
Connecticut Department of Public Utility Control (Connecticut Commission)
Consumer Federation of America & Consumers Union (CFA/CU)
Consumer Project on Technology on Interconnection & Unbundling (Consumer Project)
Continental Cablevision, Inc. (Continental)
Cox Communications, Inc. (Cox)
Defense, Secretary of
DeSoto County, Mississippi Economic Development Council
District of Columbia Public Service Commission (District of Columbia Commission)
Economides, Nicholas (N. Economides)
Ericsson Corporation, The (Ericsson)
Excel Telecommunications, Inc. (Excel)
Florida Public Service Commission (Florida Commission)
Fred Williamson & Associates, Inc. (F. Williamson)
Frontier Corporation (Frontier)
General Communication, Inc. (GCI)
General ServicesAdministration/Department of Defense (GSA/DOD)
Georgia Public Service Commission (Georgia Commission)
Greater Washington Urban League
GST Telecom, Inc. (GST)
GTE Service Corporation (GTE)
Guam Telephone Authority
GVNW Inc./Management (GVNW)
Hart Engineers/Robert A. Hart, IV (Hart Engineers)
Hawaii Public Utilities Commission (Hawaii Commission)
Home Telephone Company, Inc. (Home Tel.)
Hyperion Telecommunications, Inc. (Hyperion)
Idaho Public Utilities Commission (Idaho Commission)
Illinois Commerce Commission (Illinois Commission)

Illinois Independent Telephone Association (Illinois Ind. Tel. Ass'n)
Independent Cable & Telecommunications Association (Ind. Cable & Telecomm. Ass'n)
Independent Data Communications Manufacturers Association (IDCMA)
Indiana Utility Regulatory Commission Staff (Indiana Commission Staff)
Information Technology Industry Council (ITIC)
Intelcom Group (U.S.A.), Inc. (Intelcom)
Intermedia Communications, Inc. (Intermedia)
International Communications Association (Intl. Comm. Ass'n)
Iowa Utilities Board (Iowa Commission)
John Staurulakis, Inc. (J. Staurulakis)
Joint Consumer Advocates
Jones Intercable, Inc. (Jones Intercable)
Justice, U. S. Department of (DoJ)
Kansas Corporation Commission (Kansas Commission)
Kentucky Public Service Commission (Kentucky Commission)
Koch, Richard N. (R. Koch)
LCI International Telecom Corp. (LCI)
LDDS Worldcom (LDDS)
Lincoln Telephone & Telegraph Company (Lincoln Tel.)
Louisiana Public Service Commission (Louisiana Commission)
Lucent Technologies, Inc. (Lucent)
Margaretville Telephone Co., Inc. (Margaretville Tel.)
Maryland Public Service Commission (Maryland Commission)
Massachusetts Assistive Technology Partnership Center World Institute on Disability, Alliance for Technology Access, Trace Research and Development Center, CPB/WGBH National Center For Accessible Media (Mass. Assistive Tech. Partnership, *et al.*)
Massachusetts, Commonwealth of Department of Public Utilities (Mass. Commission)
Massachusetts, Commonwealth of, Office of Attorney General (Mass. Attorney General)
Matanuska Telephone Association, Inc. (Matanuska Tel.)
MCI
Metricom, Inc. (Metricom)
MFS
Michigan Exchange Carriers Association (MECA)
Michigan, Illinois, and Texas Communities, *et al.*
Michigan Public Service Commission Staff (Michigan Commission Staff)
Minnesota Independent Coalition (Minnesota Independent Coalition)
Minnesota Public Utilities Commission (Minnesota Commission)
Missouri Public Service Commission (Missouri Commission)
Missouri Public Service Commissioner, Harold Crumpton (Missouri Commissioner)
Mobilemedia Communications, Inc. (Mobilemedia)
Motorola Satellite Communications, Inc. and U.S. Leo Services, Inc. (Motorola)
Municipal Utilities
National Association of the Deaf
National Association of Development Organizations, Gray Panthers, United Seniors Health

Cooperative, United Homeowners Association, National Hispanic Council on Aging, National Trust/Trustnet, National Association of Commissions for Women, National Council of Senior Citizens (NADO, *et al.*)
National Association of Regulatory Utility Commissioners (NARUC)
National Association of State Utility Consumer Advocates (National Ass'n of State Utility Advocates)
National Bar Association (National Bar Ass'n)
National Cable Television Association, Inc. (NCTA)
National Exchange Carrier Association, Inc. (NECA)
National League of Cities & National Association of Telecommunications Officers and Advisors (NLC/NATOA)
National Private Telecommunications Association
National Telecommunications & Information Administration (NTIA)
National Wireless Resellers Association (National Wireless Resellers Ass'n)
Nebraska Rural Development Commission
Network Reliability Council, Secretariat of Second (Network Reliability Council)
New Hampshire Public Utilities Commission, New Mexico State Corporation Commission, Utah Division of Public Utilities, Vermont Public Service Board, and Vermont Department of Public Service (New Hampshire Commission, *et al.*)
New Jersey Cable Telecommunications Association, South Carolina Cable Television Association & Texas Cable Telecommunications Association (New Jersey Cable Ass'n, *et al.*)
New Jersey, Staff of Board of Public Utilities (New Jersey Commission Staff)
New York State Consumer Protection Board (New York Consumer Protection Board)
New York State Department of Public Service (New York Commission)
Nextel Communications, Inc. (Nextel)
NEXTLINK Communications, L.L.C. (NEXTLINK)
North Carolina Utility Commission Public Staff (North Carolina Commission Staff)
North Dakota Public Service Commission (North Dakota Commission)
Northern Telecom, Inc. (Nortel)
NYNEX Telephone Companies (NYNEX)
Ohio Public Utilities Commission (Ohio Commission)
Office of the Ohio Consumers' Counsel (Ohio Consumers' Counsel)
Oklahoma Corporation Commission (Oklahoma Commission)
Omnipoint Corporation (Omnipoint)
Optel, Inc. (Optel)
Oregon Public Utility Commission (Oregon Commission)
Pacific Telesis Group (PacTel)
Paging Network, Inc. (PageNet)
Pennsylvania Public Utility Commission (Pennsylvania Commission)
People of the State of California and the Public Utility Commission of the State of California (California Commission)
Personal Communications Industry Association (PCIA)
ProNet Inc. (ProNet)

Puerto Rico Telephone Company (Puerto Rico Tel.)
Roseville Telephone Company (Roseville Tel.)
Rural Telephone Coalition (Rural Tel. Coalition)
SBC Communications Inc. (SBC)
Scherers Communications Group, Inc. (SCG)
Small Business Administration, U.S. (SBA)
Small Cable Business Association (SCBA)
SDN Users Association
South Carolina Public Service Commission (South Carolina Commission)
Southern New England Telephone Company (SNET)
Southwestern Bell Telephone Company (SWBT)
Sprint Corporation (Sprint)
Sprint Spectrum & American Personal Communications (Sprint/APC)
State of Maine Public Utilities Commission, State of Montana Public Service Commission, State of Nebraska Public Service Commission, State of New Hampshire Public Utilities Commission, State of New Mexico State Corporation Commission, State of Utah Public Service Commission and Division of Public Utilities, State of Vermont Department of Public Service and Public Service Board, and Public Utilities Commission of South Dakota (Maine Commission, *et al.*)
TCA, Inc. (TCA)
TDS Telecommunications Corporation (TDS)
Telecommunication Industries Analysis Project
Telecommunications Carriers for Competition (TCC)
Tele-Communications, Inc. (TCI)
Telecommunications Industry Association (TIA)
Telecommunications Ratepayers Association for Cost-Based and Equitable Rates (TRACER)
Telecommunications Resellers Association (Telecomm. Resellers Ass'n)
Telefonica Larga Distancia de Puerto Rico, Inc. (TLD)
Teleport Communications Group, Inc. (Teleport)
Texas Office of Public Utility Counsel (Texas Public Utility Counsel)
Texas, Public Utilities Commission (Texas Commission)
Texas Statewide Telephone Cooperative, Inc.
Texas Telephone Association (Texas Tel. Ass'n)
Time Warner Communications Holdings, Inc. (Time Warner)
Unicom, Inc. (Unicom)
United Calling Network, Inc. (United Calling Network)
United Cerebral Palsy Association
United States Telephone Association (USTA)
USTN Services, Inc. (USTN)
U.S. Network Corporation (U.S. Network)
U S West, Inc. (U S West)
Utah Division of Public Utilities
UTC

Utilex, Inc. (Utilex)
Vanguard Cellular Systems, Inc. (Vanguard)
Vartec Telecom, Inc., Transtel, Telephone Express, CGI, & CommuniGroup Inc. of Mississippi (Vartec, *et al.*)
Virginia State Corporation Commission Staff (Virginia Commission Staff)
Washington Independent Telephone Association (Wash. Ind. Tel. Ass'n)
Washington Utilities and Transportation Commission (Washington Commission)
Western Alliance
WinStar Communications, Inc. (WinStar)
Wisconsin, Public Service Commission (Wisconsin Commission)
Wyoming Public Service Commission (Wyoming Commission)

List Of Commenters in CC Docket No. 95-185

360 Degree Communications Co. (3o0 Degrees)
AirTouch Communications, Inc. (Airtouch)
Alaska 3 Cellular Corporation (Alaska CellularOne)
Alaska Telephone Association (ATA)
Alliance of Wireless Service Providers (Alliance)
Allied Personal Communications Industry Association of California (Allied)
ALLTEL Corporation (ALLTEL)
American Mobil Telecommunications Association (AMTA)
America's Carriers Telecommunications Association (ACTA)
American Personal Communications/Sprint Spectrum (APC/Sprint)
Ameritech
Anchorage Telephone Utility (ATU)
Arch Communications Group, Inc. (Arch)
AT&T Corporation (AT&T)
Bell Atlantic
Bell Atlantic Nynex Mobile (Bell Atlantic-NYNEX)
BellSouth Corporation (BellSouth)
State of California & the Public Utilities Commission (CPUC)
Cellular Communications of Puerto Rico, Inc. (CCPR)
Cellular Mobile Systems of St. Cloud G.P. (CMS)
Cellular Resellers Association (Cellular Resellers)
Cellular Telecommunications Industry Association (CTIA)
Celpage, Inc. (Celpage)
Centennial Cellular Corporation (Centennial)
Century Cellunet, Inc. (Century Cellunet)
Cincinnati Bell
CMT Partners (CMT)
Comcast Corporation (Comcast)
Competitive Telecommunications Association (CompTel)
Concord Telephone Company (Concord)
Connecticut Department of Public Utility (Connecticut)
Cox Enterprises, Inc. (Cox)
Florida Cellular RSA L.P. (Florida Cellular)
Frontier Corporation (Frontier)
GO Communications Corp. (GO)
General Services Administration (GSA)
GTE Services Corporation (GTE)
GVNW Inc., Management (GVNW)
Hart Engineers and 21st Century Telesis, Inc. (Hart Engineers)
Home Telephone Company, Inc. (HomeTel)
ICO Global Communications (ICO)
Illinois Commerce Commission (Illinois)

Illinois Independent Telephone Association (Illinois Ind. Tel. Assoc.)
Illinois Telephone Association (Illinois Telephone Assoc.)
John Staurulakis, Inc. (JSI)
LDDS WorldCom (LDDS WorldCom)
MCI Telecommunications Corp. (MCI)
MFS Communications Company, Inc. (MFS)
Mercury Cellular & Paging (Mercury)
Mountain Solutions
National Association of Regulatory Utility Commissioners (NARUC)
National Exchange Carrier Association (NECA)
National Telephone Cooperative Association (NTCA)
New Par
New York State Department of Public Service (New York)
Nextel Communications, Inc. (Nextel)
North Carolina 4 Cellular L.P. (North Carolina Cellular)
NYNEX Telephone Companies (NYNEX)
Public Utilities Commission of Ohio (Ohio)
Omnipoint Corporation (Omnipoint)
OPASTCO
Pacific Bell, Pacific Bell Mobile Services, Nevada Bell (Pacific Bell)
Paging Network, Inc. (PageNet)
Personal Communications Industry Association (PCIA)
Point Communications Company (Point)
Poka Lambro Telephone Cooperative (Poka Lambro)
Puerto Rico Telephone Company (PRTC)
Rural Cellular Association (RCA)
Rural Cellular Corporation (RCC)
SBC Communications, Inc. (SBC)
Smithville Telephone Company (Smithville)
Southeast Telephone Company (Southeast Telephone)
Sprint Corporation (Sprint)
Sprint Spectrum and American Personal Communications (Sprint/APC)
Telecommunications Resellers Association (TRA)
Teleport Communications Group (Teleport)
Time Warner Communications Holdings, Inc. (Time Warner)
Telecommunications Ratepayers Association for Cost-Based and Equitable Rates (TRACER)
Union Telephone Company (Union)
United States Telephone Association (USTA)
US West, Inc. (US West)
Vanguard Cellular Systems, Inc. (Vanguard)
Western Radio Services Co., Inc. (Western)
Western Wireless Corporation (Western Wireless)
Westlink Company (Westlink)

List of Commenters in CC Docket No. 91-346

Ad Hoc Telecommunications Users Committee (Ad Hoc)
Allnet Communication Services, Inc. (Allnet)
American Telephone and Telegraph Company (AT&T)
Ameritech Operating Companies (Ameritech)
Bell Atlantic Telephone Companies (Bell Atlantic)
BellSouth Corporation (BellSouth)
Cincinnati Bell Telephone (Cincinnati Bell)
Ericsson Corporation (Ericsson)
General Services Administration (GSA)
Geonet
GTE Service Corporation (GTE)
Information Technology Association of America (ITAA)
Joint Filers (includes Bell Atlantic, BellSouth, GTE, Lincoln, Pacific Bell, Rochester, SNET, and US WEST)
MCI Telecommunications Corporation (MCI)
National Communications System (NCS)
Nextel Communications, Inc. (Nextel)
North American Telecommunications Association (NATA)
Northern Telecom Inc. (Northern Telecom)
NYNEX Telephone Companies (NYNEX)
Pacific Bell and Nevada Bell (Pacific Bell)
Pacific Telesis Corporation (Pactel)
Services-oriented Open Network Technologies, Inc. (SONetech)
Siemens Stromberg-Carlson (Siemens)
Southern New England Telephone Company (SNET)
Southwestern Bell Corporation (SWBT)
Sprint
Telecommunications Industry Association (TIA)
Teleport Communications Group (Teleport)
Teloquent Communications Corporation (Teloquent)
United and Central Telephone Companies (United and Central)
United States Telephone Association (USTA)
US WEST Communications, Inc. (US WEST)

APPENDIX B - Final Rules

AMENDMENTS TO THE CODE OF FEDERAL REGULATIONS

1. Part 1 of Title 47 of the Code of Federal Regulations (C.F.R.) is amended as follows:

PART 1 -- PRACTICE AND PROCEDURE

2. The table of contents of part 1 is revised to read as follows:

* * * * *

Subpart J - Pole Attachment Complaint Procedures

1.1401	**Purpose.**
1.1402	**Definitions.**
1.1403	**Duty to provide access; modifications; notice of removal, increase or modification; petition for temporary stay.**
1.1404	**Complaint.**
1.1405	**File numbers.**
1.1406	**Dismissal of complaints.**
1.1407	**Response and reply.**
1.1408	**Number of copies and form of pleadings.**
1.1409	**Commission consideration of the complaint.**
1.1410	**Remedies.**
1.1411	**Meetings and hearings.**
1.1412	**Enforcement.**
1.1413	**Forfeiture.**
1.1414	**State certification.**
1.1415	**Other orders.**
1.1416	**Imputation of rates; modification costs.**

* * * * *

3. The authority citation for part 1 is revised to read as follows:

AUTHORITY: 47 U.S.C. 151, 154, 251, 252, 303, and 309(j) unless otherwise noted.

4. Section 1.1401 is revised to read as follows:

§ 1.1401 Purpose.

The rules and regulations contained in subpart J of this part provide complaint and enforcement procedures to ensure that telecommunications carriers and cable system operators have nondiscriminatory access to utility poles, ducts, conduits, and rights-of-way on rates, terms,

and conditions that are just and reasonable.

5. Section 1.1402 is amended by revising paragraph (d) to read as follows:

§ 1.1402 Definitions.

• • • • •

(d) The term *complaint* means a filing by a cable television system operator, a cable television system association, a utility, an association of utilities, a telecommunications carrier, or an association of telecommunications carriers alleging that it has been denied access to a utility pole, duct, conduit, or right-of-way in violation of this subpart and/or that a rate, term, or condition for a pole attachment is not just and reasonable.

• • • • •

6. Section 1.1403 is amended by retitling the section, by amending paragraphs (a) and (b) and redesignating them as paragraphs (c) and (d), respectively, and by adding new paragraphs (a) and (b) to read as follows:

§ 1.1403 Duty to provide access; modifications; notice of removal, increase or modification; petition for temporary stay.

(a) A utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it. Notwithstanding this obligation, a utility may deny a cable television system or any telecommunications carrier access to its poles, ducts, conduits, or rights-of-way, on a non-discriminatory basis where there is insufficient capacity or for reasons of safety, reliability and generally applicable engineering purposes.

(b) Requests for access to a utility's poles, ducts, conduits or rights-of-way by a telecommunications carrier or cable operator must be in writing. If access is not granted within 45 days of the request for access, the utility must confirm the denial in writing by the 45th day. The utility's denial of access shall be specific, shall include all relevant evidence and information supporting its denial, and shall explain how such evidence and information relate to a denial of access for reasons of lack of capacity, safety, reliability or engineering standards.

(c) A utility shall provide a cable television system operator or telecommunications carrier no less than 60 days written notice prior to: (1) removal of facilities or termination of any service to those facilities, such removal or termination arising out of a rate, term or condition of the cable television system operator's of telecommunications carrier's pole attachment agreement, or (2) any increase in pole attachment rates; or (3) any modification of facilities other than routine maintenance or modification in response to emergencies.

(d) A cable television system operator or telecommunications carrier may file a

"Petition for Temporary Stay" of the action contained in a notice received pursuant to paragraph (c) of this section within 15 days of receipt of such notice. Such submission shall not be considered unless it includes, in concise terms, the relief sought, the reasons for such relief, including a showing of irreparable harm and likely cessation of cable television service or telecommunication service, a copy of the notice, and certification of service as required by § 1.1404(b) of this subpart. The named respondent may file an answer within 7 days of the date the Petition for Temporary Stay was filed. No further filings under this section will be considered unless requested or authorized by the Commission and no extensions of time will be granted unless justified pursuant to § 1.46.

7. Section 1.1404 is amended by revising paragraphs (b) and (c) and by adding new paragraph (k) to read as follows:

§ 1.1404 Complaint.

* * * * *

(b) The complaint shall be accompanied by a certification of service on the named respondent, and each of the Federal, State, and local governmental agencies that regulate any aspect of the services provided by the complainant or respondent.

(c) In a case where it is claimed that a rate, term, or condition is unjust or unreasonable, the complaint shall contain a statement that the State has not certified to the Commission that it regulates the rates, terms and conditions for pole attachments. The complaint shall include a statement that the utility is not owned by any railroad, any person who is cooperatively organized or any person owned by the Federal Government or any State.

* * * * *

(k) In a case where a cable television system operator or telecommunications carrier claims that it has been denied access to a pole, duct, conduit or right-of-way despite a request made pursuant to section 47 U.S.C. § 224(f), the complaint shall be filed within 30 days of such denial. In addition to meeting the other requirements of this section, the complaint shall include the data and information necessary to support the claim, including:

(1) The reasons given for the denial of access to the utility's poles, ducts, conduits and rights-of-way;

(2) The basis for the complainant's claim that the denial of access is improper;

(3) The remedy sought by the complainant;

(4) A copy of the written request to the utility for access to its poles, ducts, conduits or rights-of-way;

(5) A copy of the utility's response to the written request including all information given by the utility to support its denial of access. A complaint alleging improper denial of access will not be dismissed if the complainant is unable to obtain a utility's written response, or if the utility denies the complainant any other information needed to establish a

prima facie case.

8. Section 1.1409 is amended by revising paragraphs (b) and (d) to read as follows:

§ 1.1409 Commission consideration of the complaint.

* * * * *

(b) The complainant shall have the burden of establishing a *prima facie* case that the rate, term, or condition is not just and reasonable or that the denial of access violates 47 U.S.C. § 224(f). If, however, a utility argues that the proposed rate is lower than its incremental costs, the utility has the burden of establishing that such rate is below the statutory minimum just and reasonable rate. In a case involving a denial of access, the utility shall have the burden of proving that the denial was lawful, once a *prima facie* case is established by the complainant.

* * * * *

(d) The Commission shall deny the complaint if it determines that the complainant has not established a *prima facie* case, or that the rate, term or condition is just and reasonable, or that the denial of access was lawful.

* * * * *

9. Section 1.1416 is amended by retitling the section and by amending paragraph (b) to read as follows:

§ 1.1416 Imputation of rates; modification costs.

* * * * *

(b) The costs of modifying a facility shall be borne by all parties that obtain access to the facility as a result of the modification and by all parties that directly benefit from the modification. Each party described in the preceding sentence shall share proportionately in the cost of the modification. A party with a preexisting attachment to the modified facility shall be deemed to directly benefit from a modification if, after receiving notification of such modification as provided in subpart J of this part, it adds to or modifies its attachment. Notwithstanding the foregoing, a party with a preexisting attachment to a pole, conduit, duct or right-of-way shall not be required to bear any of the costs of rearranging or replacing its attachment if such rearrangement or replacement is necessitated solely as a result of an additional attachment or the modification of an existing attachment sought by another party. If a party makes an attachment to the facility after the completion of the modification, such party shall share proportionately in the cost of the modification if such modification rendered possible the added attachment.

10. Part 20 of Title 47 of the Code of Federal Regulations (C.F.R.) is amended as follows:

PART 20 -- COMMERCIAL MOBILE RADIO SERVICES

11. The authority citation for part 20 is revised to read as follows:

AUTHORITY: Secs. 4, 251-2, 303, and 332, 48 Stat. 1066, 1062, as amended; 47 U.S.C. 154, 251-4, 303, and 332 unless otherwise noted.

12. Section 20.11 is amended by adding paragraph (c) to read as follows:

§ 20.11 Interconnection to facilities of local exchange carriers.

* * * * *

(c) Local exchange carriers and commercial mobile radio service providers shall also comply with applicable provisions of part 51 of this chapter.

13. Part 51 of Title 47 of the Code of Federal Regulations (C.F.R.) is added to read as follows:

PART 51 -- INTERCONNECTION

Subpart A - General information

Sec.

51.1 Basis and purpose.
51.3 Applicability to negotiated agreements.
51.5 Terms and definitions.

Subpart B - Telecommunications carriers

51.100 General duty.

Subpart C - Obligations of all local exchange carriers

51.201 Resale.
51.203 Number portability.
51.219 Access to rights of way.
51.221 Reciprocal compensation.
51.223 Application of additional requirements.

Subpart D - Additional obligations of incumbent local exchange carriers

51.301 Duty to negotiate.
51.303 Preexisting agreements.
51.305 Interconnection.

51.307 Duty to provide access on an unbundled basis to network elements.
51.309 Use of unbundled network elements.
51.311 Nondiscriminatory access to unbundled network elements.
51.313 Just, reasonable and nondiscriminatory terms and conditions for the provision of unbundled network elements.
51.315 Combination of unbundled network elements.
51.317 Standards for identifying network elements to be made available.
51.319 Specific unbundling requirements.
51.321 Methods of obtaining interconnection and access to unbundled elements under section 251 of the Act.
51.323 Standards for physical collocation and virtual collocation.

Subpart E - Exemptions, suspensions, and modifications of requirements of section251 of the Act.

51.401 State authority.
51.403 Carriers eligible for suspension or modification under section 251(f)(2) of the Act.
51.405 Burden of proof.

Subpart F - Pricing of interconnection and unbundled elements

51.501 Scope.
51.503 General pricing standard.
51.505 Forward-looking economic cost.
51.507 General rate structure standard.
51.509 Rate structure standards for specific elements.
51.511 Forward-looking economic cost per unit.
51.513 Proxies for forward-looking economic cost.
51.515 Application of access charges.

Subpart G - Resale

51.601 Scope of resale rules.
51.603 Resale obligation of all local exchange carriers.
51.605 Additional obligations of incumbent local exchange carriers.
51.607 Wholesale pricing standard.
51.609 Determination of avoided retail costs.
51.611 Interim wholesale rates.
51.613 Restrictions on resale.
51.615 Withdrawal of services.
51.617 Assessment of end user common line charge on resellers.

Subpart H - Reciprocal compensation for transport and termination of local telecommunications traffic

51.701 Scope of transport and termination pricing rules.
51.703 Reciprocal compensation obligation of LECs.
51.705 Incumbent LECs' rates for transport and termination.
51.707 Default proxies for incumbent LECs' transport and termination rates.
51.709 Rate structure for transport and termination.
51.711 Symmetrical reciprocal compensation.
51.713 Bill-and-keep arrangements for reciprocal compensation.
51.715 Interim transport and termination pricing.
51.717 Renegotiation of existing non-reciprocal arrangements.

Subpart I - Procedures for implementation of section 252 of the Act.

51.801 Commission action upon a state commission's failure to act to carry out its responsibility under section 252 of the Act.
51.803 Procedures for Commission notification of a state commission's failure to act.
51.805 The Commission's authority over proceedings and matters.
51.807 Arbitration and mediation of agreements by the Commission pursuant to section 252(e)(5) of the Act.
51.809 Availability of provisions of agreements to other telecommunications carriers under section 252(i) of the Act.

AUTHORITY: Sections 1-5, 7, 201-05, 218, 225-27, 251-54, 271, 48 Stat. 1070, as amended, 1077; 47 U.S.C. 151-55, 157, 201-05, 218, 225-27, 251-54, 271, unless otherwise noted.

Subpart A - General Information.

§ 51.1 Basis and purpose.

(a) *Basis*. These rules are issued pursuant to the Communications Act of 1934, as amended.

(b) *Purpose*. The purpose of these rules is to implement sections 251 and 252 of the Communications Act of 1934, as amended, 47 U.S.C. 251 and 252.

§ 51.3 Applicability to negotiated agreements.

To the extent provided in section 252(e)(2)(A) of the Act, a state commission shall have authority to approve an interconnection agreement adopted by negotiation even if the terms of the agreement do not comply with the requirements of this part.

§ 51.5 Terms and definitions.

Terms used in this part have the following meanings:

Act. The Communications Act of 1934, as amended.

Advanced intelligent network. "Advanced Intelligent Network" is a telecommunications network architecture in which call processing, call routing, and network management are provided by means of centralized databases located at points in an incumbent local exchange carrier's network.

Arbitration, final offer. "Final offer arbitration" is a procedure under which each party submits a final offer concerning the issues subject to arbitration, and the arbitrator selects, without modification, one of the final offers by the parties to the arbitration or portions of both such offers. "Entire package final offer arbitration," is a procedure under which the arbitrator must select, without modification, the entire proposal submitted by one of the parties to the arbitration. "Issue-by-issue final offer arbitration," is a procedure under which the arbitrator must select, without modification, on an issue-by-issue basis, one of the proposals submitted by the parties to the arbitration.

Billing. "Billing" involves the provision of appropriate usage data by one telecommunications carrier to another to facilitate customer billing with attendant acknowledgements and status reports. It also involves the exchange of information between telecommunications carriers to process claims and adjustments.

Commercial Mobile Radio Service (CMRS). "CMRS" has the same meaning as that term is defined in § 20.3 of this chapter.

Commission. "Commission" refers to the Federal Communications Commission.

Directory assistance service. "Directory assistance service" includes, but is not limited to, making available to customers, upon request, information contained in directory listings.

Directory listings. "Directory listings" are any information: (1) identifying the listed names of subscribers of a telecommunications carrier and such subscriber's telephone numbers, addresses, or primary advertising classifications (as such classifications are assigned at the time of the establishment of such service), or any combination of such listed names, numbers, addresses or classifications; and (2) that the telecommunications carrier or an affiliate has published, caused to be published, or accepted for publication in any directory format.

Downstream database. A "downstream database" is a database owned and operated by an individual carrier for the purpose of providing number portability in conjunction with other functions and services.

Equipment necessary for interconnection or access to unbundled network elements. For

purposes of section 251(c)(2) of the Act, the equipment used to interconnect with an incumbent local exchange carrier's network for the transmission and routing of telephone exchange service, exchange access service, or both. For the purposes of section 251(c)(3) of the Act, the equipment used to gain access to an incumbent local exchange carrier's unbundled network elements for the provision of a telecommunications service.

Incumbent Local Exchange Carrier (Incumbent LEC). With respect to an area, the local exchange carrier that: (1) on February 8, 1996, provided telephone exchange service in such area; and (2) (i) on February 8, 1996, was deemed to be a member of the exchange carrier association pursuant to § 69.601(b) of this chapter; or (ii) is a person or entity that, on or after February 8, 1996, became a successor or assign of a member described in clause (i) of this paragraph.

Interconnection. "Interconnection" is the linking of two networks for the mutual exchange of traffic. This term does not include the transport and termination of traffic.

Local Exchange Carrier (LEC). A "LEC" is any person that is engaged in the provision of telephone exchange service or exchange access. Such term does not include a person insofar as such person is engaged in the provision of a commercial mobile service under section 332(c) of the Act, except to the extent that the Commission finds that such service should be included in the definition of the such term.

Maintenance and repair. "Maintenance and repair" involves the exchange of information between telecommunications carriers where one initiates a request for maintenance or repair of existing products and services or unbundled network elements or combination thereof from the other with attendant acknowledgements and status reports.

Meet point. A "meet point" is a point of interconnection between two networks, designated by two telecommunications carriers, at which one carrier's responsibility for service begins and the other carrier's responsibility ends.

Meet point interconnection arrangement. A "meet point interconnection arrangement" is an arrangement by which each telecommunications carrier builds and maintains its network to a meet point.

Network element. A "network element" is a facility or equipment used in the provision of a telecommunications service. Such term also includes, but is not limited to, features, functions, and capabilities that are provided by means of such facility or equipment, including but not limited to, subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service.

Operator services. "Operator services" are any automatic or live assistance to a consumer to arrange for billing or completion of a telephone call. Such services include, but are not limited to, busy line verification, emergency interrupt, and operator-assisted directory assistance services.

Physical collocation. "Physical collocation" is an offering by an incumbent LEC that enables a requesting telecommunications carrier to:

(1) place its own equipment to be used for interconnection or access to unbundled network elements within or upon an incumbent LEC's premises;

(2) use such equipment to interconnect with an incumbent LEC's network facilities for the transmission and routing of telephone exchange service, exchange access service, or both, or to gain access to an incumbent LEC's unbundled network elements for the provision of a telecommunications service;

(3) enter those premises, subject to reasonable terms and conditions, to install, maintain, and repair equipment necessary for interconnection or access to unbundled elements; and

(4) obtain reasonable amounts of space in an incumbent LEC's premises, as provided in this part, for the equipment necessary for interconnection or access to unbundled elements, allocated on a first-come, first-served basis.

Premises. "Premises" refers to an incumbent LEC's central offices and serving wire centers, as well as all buildings or similar structures owned or leased by an incumbent LEC that house its network facilities, and all structures that house incumbent LEC facilities on public rights-of-way, including but not limited to vaults containing loop concentrators or similar structures.

Pre-ordering and ordering. "Pre-ordering and ordering" includes the exchange of information between telecommunications carriers about current or proposed customer products and services or unbundled network elements or some combination thereof.

Provisioning. "Provisioning" involves the exchange of information between telecommunications carriers where one executes a request for a set of products and services or unbundled network elements or combination thereof from the other with attendant acknowledgements and status reports.

Rural telephone company. A "rural telephone company" is a LEC operating entity to the extent that such entity:

(1) provides common carrier service to any local exchange carrier study area that does not include either:

(i) any incorporated place of 10,000 inhabitants or more, or any part thereof, based on the most recently available population statistics of the Bureau of the Census; or

(ii) any territory, incorporated or unincorporated, included in an urbanized area, as defined by the Bureau of the Census as of August 10, 1993;

(2) provides telephone exchange service, including exchange access, to fewer than 50,000 access lines;

(3) provides telephone exchange service to any local exchange carrier study area with fewer than 100,000 access lines; or

(4) has less than 15 percent of its access lines in communities of more than 50,000

on February 8, 1996.

Service control point. A "service control point" is a computer database in the public switched network which contains information and call processing instructions needed to process and complete a telephone call.

Service creation environment. A "service creation environment" is a computer containing generic call processing software that can be programmed to create new advanced intelligent network call processing services.

Signal transfer point. A "signal transfer point" is a packet switch that acts as a routing hub for a signaling network and transfers messages between various points in and among signaling networks.

State commission. A "state commission" means the commission, board, or official (by whatever name designated) which under the laws of any State has regulatory jurisdiction with respect to intrastate operations of carriers. As referenced in this part, this term may include the Commission if it assumes the responsibility of the state commission, pursuant to section 252(e)(5) of the Act. This term shall also include any person or persons to whom the state commission has delegated its authority under section 251 and 252 of the Act.

State proceeding. A "state proceeding" is any administrative proceeding in which a state commission may approve or prescribe rates, terms, and conditions including, but not limited to, compulsory arbitration pursuant to section 252(b) of the Act, review of a Bell operating company statement of generally available terms pursuant section 252(f) of the Act, and a proceeding to determine whether to approve or reject an agreement adopted by arbitration pursuant to section 252(e) of the Act.

Technically feasible. Interconnection, access to unbundled network elements, collocation, and other methods of achieving interconnection or access to unbundled network elements at a point in the network shall be deemed technically feasible absent technical or operational concerns that prevent the fulfillment of a request by a telecommunications carrier for such interconnection, access, or methods. A determination of technical feasibility does not include consideration of economic, accounting, billing, space, or site concerns, except that space and site concerns may be considered in circumstances where there is no possibility of expanding the space available. The fact that an incumbent LEC must modify its facilities or equipment to respond to such request does not determine whether satisfying such request is technically feasible. An incumbent LEC that claims that it cannot satisfy such request because of adverse network reliability impacts must prove to the state commission by clear and convincing evidence that such interconnection, access, or methods would result in specific and significant adverse network reliability impacts.

Telecommunications carrier. A "telecommunications carrier" is any provider of telecommunications services, except that such term does not include aggregators of telecommunications services (as defined in section 226 of the Act). A telecommunications carrier shall be treated as a common carrier under the Act only to the extent that it is engaged in

providing telecommunications services, except that the Commission shall determine whether the provision of fixed and mobile satellite service shall be treated as common carriage. This definition includes CMRS providers, interexchange carriers (IXCs) and, to the extent they are acting as telecommunications carriers, companies that provide both telecommunications and information services. Private Mobile Radio Service providers are telecommunications carriers to the extent they provide domestic or international telecommunications for a fee directly to the public.

Virtual collocation. "Virtual collocation" is an offering by an incumbent LEC that enables a requesting telecommunications carrier to:

(1) designate or specify equipment to be used for interconnection or access to unbundled network elements to be located within or upon an incumbent LEC's premises, and dedicated to such telecommunications carrier's use;

(2) use such equipment to interconnect with an incumbent LEC's network facilities for the transmission and routing of telephone exchange service, exchange access service, or both, or for access to an incumbent LEC's unbundled network elements for the provision of a telecommunications service; and

(3) electronically monitor and control its communications channels terminating in such equipment.

Subpart B - Telecommunications Carriers.

§ 51.100 General duty.

(a) Each telecommunications carrier has the duty:

(1) to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers; and

(2) to not install network features, functions, or capabilities that do not comply with the guidelines and standards as provided in the Commission's rules or section 255 or 256 of the Act.

(b) A telecommunication carrier that has interconnected or gained access under sections 251(a)(1), 251(c)(2), or 251(c)(3) of the Act, may offer information services through the same arrangement, so long as it is offering telecommunications services through the same arrangement as well.

Subpart C - Obligations of All Local Exchange Carriers.

§ 51.201 Resale.

The rules governing resale of services by an incumbent LEC are set forth in subpart G of this part.

§ 51.203 Number portability.

The rules governing number portability are set forth in part 52, subpart C of this chapter.

§ 51.219 Access to rights of way.

The rules governing access to rights of way are set forth in part 1, subpart J of this chapter.

§ 51.221 Reciprocal compensation.

The rules governing reciprocal compensation are set forth in subpart H of this part.

§ 51.223 Application of additional requirements.

(a) A state may not impose the obligations set forth in section 251(c) of the Act on a LEC that is not classified as an incumbent LEC as defined in section 251(h)(1) of the Act, unless the Commission issues an order declaring that such LECs or classes or categories of LECs should be treated as incumbent LECs.

(b) A state commission, or any other interested party, may request that the Commission issue an order declaring that a particular LEC be treated as an incumbent LEC, or that a class or category of LECs be treated as incumbent LECs, pursuant to section 251(h)(2) of the Act.

Subpart D - Additional Obligations of Incumbent Local Exchange Carriers.

§ 51.301 Duty to negotiate.

(a) An incumbent LEC shall negotiate in good faith the terms and conditions of agreements to fulfill the duties established by sections 251(b) and (c) of the Act.

(b) A requesting telecommunications carrier shall negotiate in good faith the terms and conditions of agreements described in paragraph (a) of this section.

(c) If proven to the Commission, an appropriate state commission, or a court of competent jurisdiction, the following actions or practices, among others, violate the duty to negotiate in good faith:

(1) demanding that another party sign a nondisclosure agreement that precludes such party from providing information requested by the Commission, or a state commission, or in support of a request for arbitration under section 252(b)(2)(B) of the Act;

(2) demanding that a requesting telecommunications carrier attest that an agreement complies with all provisions of the Act, federal regulations, or state law;

(3) refusing to include in an arbitrated or negotiated agreement a provision that permits the agreement to be amended in the future to take into account changes in Commission or state rules;

(4) conditioning negotiation on a requesting telecommunications carrier first obtaining state certifications;

(5) intentionally misleading or coercing another party into reaching an agreement that it would not otherwise have made;

(6) intentionally obstructing or delaying negotiations or resolutions of disputes;

(7) refusing throughout the negotiation process to designate a representative with authority to make binding representations, if such refusal significantly delays resolution of issues; and

(8) refusing to provide information necessary to reach agreement. Such refusal includes, but is not limited to:

(i) refusal by an incumbent LEC to furnish information about its network that a requesting telecommunications carrier reasonably requires to identify the network elements that it needs in order to serve a particular customer; and

(ii) refusal by a requesting telecommunications carrier to furnish cost data that would be relevant to setting rates if the parties were in arbitration.

§ 51.303 Preexisting agreements.

(a) All interconnection agreements between an incumbent LEC and a telecommunications carrier, including those negotiated before February 8, 1996, shall be submitted by the parties to the appropriate state commission for approval pursuant to section 252(e) of the Act.

(b) Interconnection agreements negotiated before February 8, 1996, between Class A carriers, as defined by § 32.11(a)(1) of this chapter, shall be filed by the parties with the appropriate state commission no later than June 30, 1997, or such earlier date as the state commission may require.

(c) If a state commission approves a preexisting agreement, it shall be made available to other parties in accordance with section 252(i) of the Act and § 51.809 of this part. A state commission may reject a preexisting agreement on the grounds that it is inconsistent with the public interest, or for other reasons set forth in section 252(e)(2)(A) of the Act.

§ 51.305 Interconnection.

(a) An incumbent LEC shall provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the incumbent LEC's network:

(1) for the transmission and routing of telephone exchange traffic, exchange access traffic, or both;

(2) at any technically feasible point within the incumbent LEC's network including, at a minimum:

(i) the line-side of a local switch;

(ii) the trunk-side of a local switch;

(iii) the trunk interconnection points for a tandem switch;

(iv) central office cross-connect points;

(v) out-of-band signaling transfer points necessary to exchange traffic at these points and access call-related databases; and

(vi) the points of access to unbundled network elements as described in § 51.319 of this part;

(3) that is at a level of quality that is equal to that which the incumbent LEC provides itself, a subsidiary, an affiliate, or any other party, except as provided in paragraph (4) of this section. At a minimum, this requires an incumbent LEC to design interconnection facilities to meet the same technical criteria and service standards that are used within the incumbent LEC's network. This obligation is not limited to a consideration of service quality as perceived by end users, and includes, but is not limited to, service quality as perceived by the requesting telecommunications carrier;

(4) that, if so requested by a telecommunications carrier and to the extent technically feasible, is superior in quality to that provided by the incumbent LEC to itself or to any subsidiary, affiliate, or any other party to which the incumbent LEC provides interconnection. Nothing in this section prohibits an incumbent LEC from providing interconnection that is lesser in quality at the sole request of the requesting telecommunications carrier; and

(5) on terms and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of any agreement, the requirements of sections 251 and 252 of the Act, and the Commission's rules including, but not limited to, offering such terms and conditions equally to all requesting telecommunications carriers, and offering such terms and conditions that are no less favorable than the terms and conditions upon which the incumbent LEC provides such interconnection to itself. This includes, but is not limited to, the time within which the incumbent LEC provides such interconnection.

(b) A carrier that requests interconnection solely for the purpose of originating or terminating its interexchange traffic on an incumbent LEC's network and not for the purpose of providing to others telephone exchange service, exchange access service, or both, is not entitled to receive interconnection pursuant to section 251(c)(2) of the Act.

(c) Previous successful interconnection at a particular point in a network, using particular facilities, constitutes substantial evidence that interconnection is technically feasible at that point, or at substantially similar points, in networks employing substantially similar

facilities. Adherence to the same interface or protocol standards shall constitute evidence of the substantial similarity of network facilities.

(d) Previous successful interconnection at a particular point in a network at a particular level of quality constitutes substantial evidence that interconnection is technically feasible at that point, or at substantially similar points, at that level of quality.

(e) An incumbent LEC that denies a request for interconnection at a particular point must prove to the state commission that interconnection at that point is not technically feasible.

(f) If technically feasible, an incumbent LEC shall provide two-way trunking upon request.

§ 51.307 Duty to provide access on an unbundled basis to network elements.

(a) An incumbent LEC shall provide, to a requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on terms and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of any agreement, the requirements of sections 251 and 252 of the Act, and the Commission's rules.

(b) The duty to provide access to unbundled network elements pursuant to section 251(c)(3) of the Act includes a duty to provide a connection to an unbundled network element independent of any duty to provide interconnection pursuant to this part and section 251(c)(2) of the Act.

(c) An incumbent LEC shall provide a requesting telecommunications carrier access to an unbundled network element, along with all of the unbundled network element's features, functions, and capabilities, in a manner that allows the requesting telecommunications carrier to provide any telecommunications service that can be offered by means of that network element.

(d) An incumbent LEC shall provide a requesting telecommunications carrier access to the facility or functionality of a requested network element separate from access to the facility or functionality of other network elements, for a separate charge.

§ 51.309 Use of unbundled network elements.

(a) An incumbent LEC shall not impose limitations, restrictions, or requirements on requests for, or the use of, unbundled network elements that would impair the ability of a requesting telecommunications carrier to offer a telecommunications service in the manner the requesting telecommunications carrier intends.

(b) A telecommunications carrier purchasing access to an unbundled network element may use such network element to provide exchange access services to itself in order to provide

interexchange services to subscribers.

(c) A telecommunications carrier purchasing access to an unbundled network facility is entitled to exclusive use of that facility for a period of time, or when purchasing access to a feature, function, or capability of a facility, a telecommunications carrier is entitled to use of that feature, function, or capability for a period of time. A telecommunications carrier's purchase of access to an unbundled network element does not relieve the incumbent LEC of the duty to maintain, repair, or replace the unbundled network element.

§ 51.311 Nondiscriminatory access to unbundled network elements.

(a) The quality of an unbundled network element, as well as the quality of the access to the unbundled network element, that an incumbent LEC provides to a requesting telecommunications carrier shall be the same for all telecommunications carriers requesting access to that network element, except as provided in paragraph (c) of this section.

(b) Except as provided in paragraph (c) of this section, to the extent technically feasible, the quality of an unbundled network element, as well as the quality of the access to such unbundled network element, that an incumbent LEC provides to a requesting telecommunications carrier shall be at least equal in quality to that which the incumbent LEC provides to itself. If an incumbent LEC fails to meet this requirement, the incumbent LEC must prove to the state commission that it is not technically feasible to provide the requested unbundled network element, or to provide access to the requested unbundled network element, at a level of quality that is equal to that which the incumbent LEC provides to itself.

(c) To the extent technically feasible, the quality of an unbundled network element, as well as the quality of the access to such unbundled network element, that an incumbent LEC provides to a requesting telecommunications carrier shall, upon request, be superior in quality to that which the incumbent LEC provides to itself. If an incumbent LEC fails to meet this requirement, the incumbent LEC must prove to the state commission that it is not technically feasible to provide the requested unbundled network element or access to such unbundled network element at the requested level of quality that is superior to that which the incumbent LEC provides to itself. Nothing in this section prohibits an incumbent LEC from providing interconnection that is lesser in quality at the sole request of the requesting telecommunications carrier.

(d) Previous successful access to an unbundled element at a particular point in a network, using particular facilities, is substantial evidence that access is technically feasible at that point, or at substantially similar points, in networks employing substantially similar facilities. Adherence to the same interface or protocol standards shall constitute evidence of the substantial similarity of network facilities.

(e) Previous successful provision of access to an unbundled element at a particular point in a network at a particular level of quality is substantial evidence that access is technically feasible at that point, or at substantially similar points, at that level of quality.

§ 51.313 Just, reasonable and nondiscriminatory terms and conditions for the provision of unbundled network elements.

(a) The terms and conditions pursuant to which an incumbent LEC provides access to unbundled network elements shall be offered equally to all requesting telecommunications carriers.

(b) Where applicable, the terms and conditions pursuant to which an incumbent LEC offers to provide access to unbundled network elements, including but not limited to, the time within which the incumbent LEC provisions such access to unbundled network elements, shall, at a minimum, be no less favorable to the requesting carrier than the terms and conditions under which the incumbent LEC provides such elements to itself.

(c) An incumbent LEC must provide a carrier purchasing access to unbundled network elements with the pre-ordering, ordering, provisioning, maintenance and repair, and billing functions of the incumbent LEC's operations support systems.

§ 51.315 Combination of unbundled network elements.

(a) An incumbent LEC shall provide unbundled network elements in a manner that allows requesting telecommunications carriers to combine such network elements in order to provide a telecommunications service.

(b) Except upon request, an incumbent LEC shall not separate requested network elements that the incumbent LEC currently combines.

(c) Upon request, an incumbent LEC shall perform the functions necessary to combine unbundled network elements in any manner, even if those elements are not ordinarily combined in the incumbent LEC's network, provided that such combination is:

(1) technically feasible; and

(2) would not impair the ability of other carriers to obtain access to unbundled network elements or to interconnect with the incumbent LEC's network.

(d) Upon request, an incumbent LEC shall perform the functions necessary to combine unbundled network elements with elements possessed by the requesting telecommunications carrier in any technically feasible manner.

(e) An incumbent LEC that denies a request to combine elements pursuant to paragraph (c)(1) or paragraph (d) of this section must prove to the state commission that the requested combination is not technically feasible.

(f) An incumbent LEC that denies a request to combine elements pursuant to paragraph (c)(2) of this section must prove to the state commission that the requested combination would impair the ability of other carriers to obtain access to unbundled network elements or to interconnect with the incumbent LEC's network.

§ 51.317 Standards for identifying network elements to be made available.

(a) In determining what network elements should be made available for purposes of section 251(c)(3) of the Act beyond those identified in § 51.319 of this part, a state commission shall first determine whether it is technically feasible for the incumbent LEC to provide access to a network element on an unbundled basis.

(b) If the state commission determines that it is technically feasible for the incumbent LEC to provide access to the network element on an unbundled basis, the state commission may decline to require unbundling of the network element only if:

(1) the state commission concludes that:

(i) the network element is proprietary, or contains proprietary information that will be revealed if the network element is provided on an unbundled basis; and

(ii) a requesting telecommunications carrier could offer the same proposed telecommunications service through the use of other, nonproprietary unbundled network elements within the incumbent LEC's network; or

(2) the state commission concludes that the failure of the incumbent LEC to provide access to the network element would not decrease the quality of, and would not increase the financial or administrative cost of, the telecommunications service a requesting telecommunications carrier seeks to offer, compared with providing that service over other unbundled network elements in the incumbent LEC's network.

§ 51.319 Specific unbundling requirements.

An incumbent LEC shall provide nondiscriminatory access in accordance with § 51.311 of this part and section 251(c)(3) of the Act to the following network elements on an unbundled basis to any requesting telecommunications carrier for the provision of a telecommunications service:

(a) *Local Loop*. The local loop network element is defined as a transmission facility between a distribution frame (or its equivalent) in an incumbent LEC central office and an end user customer premises;

(b) *Network Interface Device*.

(1) The network interface device network element is defined as a cross-connect device used to connect loop facilities to inside wiring.

(2) An incumbent LEC shall permit a requesting telecommunications carrier to connect its own local loops to the inside wiring of premises through the incumbent LEC's network interface device. The requesting telecommunications carrier shall establish this connection through an adjoining network interface device deployed by such telecommunications carrier;

(c) *Switching Capability*.

(1) Local Switching Capability.

(i) The local switching capability network element is defined as:

(A) line-side facilities, which include, but are not limited to, the connection between a loop termination at a main distribution frame and a switch line card;

(B) trunk-side facilities, which include, but are not limited to, the connection between trunk termination at a trunk-side cross-connect panel and a switch trunk card; and

(C) all features, functions, and capabilities of the switch, which include, but are not limited to:

(*1*) the basic switching function of connecting lines to lines, lines to trunks, trunks to lines, and trunks to trunks, as well as the same basic capabilities made available to the incumbent LEC's customers, such as a telephone number, white page listing, and dial tone; and

(*2*) all other features that the switch is capable of providing, including but not limited to custom calling, custom local area signaling service features, and Centrex, as well as any technically feasible customized routing functions provided by the switch.

(ii) An incumbent LEC shall transfer a customer's local service to a competing carrier within a time period no greater than the interval within which the incumbent LEC currently transfers end users between interexchange carriers, if such transfer requires only a change in the incumbent LEC's software;

(2) Tandem Switching Capability. The tandem switching capability network element is defined as:

(i) trunk-connect facilities, including but not limited to the connection between trunk termination at a cross-connect panel and a switch trunk card;

(ii) the basic switching function of connecting trunks to trunks; and

(iii) the functions that are centralized in tandem switches (as distinguished from separate end-office switches), including but not limited to call recording, the routing of calls to operator services, and signaling conversion features;

(d) *Interoffice Transmission Facilities*.

(1) Interoffice transmission facilities are defined as incumbent LEC transmission facilities dedicated to a particular customer or carrier, or shared by more than one customer or carrier, that provide telecommunications between wire centers owned by incumbent LECs or

requesting telecommunications carriers, or between switches owned by incumbent LECs or requesting telecommunications carriers.

(2) The incumbent LEC shall:

(i) provide a requesting telecommunications carrier exclusive use of interoffice transmission facilities dedicated to a particular customer or carrier, or use of the features, functions, and capabilities of interoffice transmission facilities shared by more than one customer or carrier;

(ii) provide all technically feasible transmission facilities, features, functions, and capabilities that the requesting telecommunications carrier could use to provide telecommunications services;

(iii) permit, to the extent technically feasible, a requesting telecommunications carrier to connect such interoffice facilities to equipment designated by the requesting telecommunications carrier, including, but not limited to, the requesting telecommunications carrier's collocated facilities; and

(iv) permit, to the extent technically feasible, a requesting telecommunications carrier to obtain the functionality provided by the incumbent LEC's digital cross-connect systems in the same manner that the incumbent LEC provides such functionality to interexchange carriers;

(e) *Signaling Networks and Call-Related Databases*.

(1) Signaling Networks.

(i) Signaling networks include, but are not limited to, signaling links and signaling transfer points.

(ii) When a requesting telecommunications carrier purchases unbundled switching capability from an incumbent LEC, the incumbent LEC shall provide access to its signaling network from that switch in the same manner in which it obtains such access itself.

(iii) An incumbent LEC shall provide a requesting telecommunications carrier with its own switching facilities access to the incumbent LEC's signaling network for each of the requesting telecommunications carrier's switches. This connection shall be made in the same manner as an incumbent LEC connects one of its own switches to a signal transfer point.

(iv) Under this paragraph, an incumbent LEC is not required to unbundle those signaling links that connect service control points to switching transfer points or to permit a requesting telecommunications carrier to link its own signal transfer points directly to the incumbent LEC's switch or call-related databases;

(2) Call-Related Databases.

(i) Call-related databases are defined as databases, other than operations support systems, that are used in signaling networks for billing and collection or the transmission, routing, or other provision of a telecommunications service.

(ii) For purposes of switch query and database response through a signaling network, an incumbent LEC shall provide access to its call-related databases, including, but not limited to, the Line Information Database, Toll Free Calling database, downstream number portability databases, and Advanced Intelligent Network databases, by means of physical access at the signaling transfer point linked to the unbundled database.

(iii) An incumbent LEC shall allow a requesting telecommunications carrier that has purchased an incumbent LEC's local switching capability to use the incumbent LEC's service control point element in the same manner, and via the same signaling links, as the incumbent LEC itself.

(iv) An incumbent LEC shall allow a requesting telecommunications carrier that has deployed its own switch, and has linked that switch to an incumbent LEC's signaling system, to gain access to the incumbent LEC's service control point in a manner that allows the requesting carrier to provide any call-related, database-supported services to customers served by the requesting telecommunications carrier's switch.

(v) A state commission shall consider whether mechanisms mediating access to an incumbent LEC's Advanced Intelligent Network service control points are necessary, and if so, whether they will adequately safeguard against intentional or unintentional misuse of the incumbent LEC's Advanced Intelligent Network facilities.

(vi) An incumbent LEC shall provide a requesting telecommunications carrier with access to call-related databases in a manner that complies with section 222 of the Act;

(3) Service Management Systems.

(A) A service management system is defined as a computer database or system not part of the public switched network that, among other things:

(1) interconnects to the service control point and sends to that service control point the information and call processing instructions needed for a network switch to process and complete a telephone call; and

(2) provides telecommunications carriers with the capability of entering and storing data regarding the processing and completing of a telephone call.

(B) An incumbent LEC shall provide a requesting telecommunications carrier with the information necessary to enter correctly, or format for entry, the information relevant for input into the particular incumbent LEC service management system.

(C) An incumbent LEC shall provide a requesting telecommunications carrier the same access to design, create, test, and deploy Advanced Intelligent Network-based services at the service management system, through a service creation environment, that the incumbent LEC provides to itself.

(D) A state commission shall consider whether mechanisms mediating access to Advanced Intelligent Network service management systems and service creation environments are necessary, and if so, whether they will adequately safeguard against intentional or unintentional misuse of the incumbent LEC's Advanced Intelligent Network facilities.

(E) An incumbent LEC shall provide a requesting telecommunications carrier access to service management systems in a manner that complies with section 222 of the Act;

(f) *Operations Support Systems Functions*.

(1) Operations support systems functions consist of pre-ordering, ordering, provisioning, maintenance and repair, and billing functions supported by an incumbent LEC's databases and information.

(2) An incumbent LEC that does not currently comply with this requirement shall do so as expeditiously as possible, but, in any event, no later than January 1, 1997; and

(g) *Operator Services and Directory Assistance*. An incumbent LEC shall provide access to operator service and directory assistance facilities where technically feasible.

§ 51.321 Methods of obtaining interconnection and access to unbundled elements under section 251 of the Act.

(a) Except as provided in paragraph (e) of this section, an incumbent LEC shall provide, on terms and conditions that are just, reasonable, and nondiscriminatory in accordance with the requirements of this part, any technically feasible method of obtaining interconnection or access to unbundled network elements at a particular point upon a request by a telecommunications carrier.

(b) Technically feasible methods of obtaining interconnection or access to unbundled network elements include, but are not limited to:

(1) physical collocation and virtual collocation at the premises of an incumbent LEC; and

(2) meet point interconnection arrangements.

(c) A previously successful method of obtaining interconnection or access to unbundled network elements at a particular premises or point on an incumbent LEC's network is substantial evidence that such method is technically feasible in the case of substantially similar network premises or points.

(d) An incumbent LEC that denies a request for a particular method of obtaining interconnection or access to unbundled network elements on the incumbent LEC's network must prove to the state commission that the requested method of obtaining interconnection or access to unbundled network elements at that point is not technically feasible.

(e) An incumbent LEC shall not be required to provide for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the incumbent LEC's premises if it demonstrates to the state commission that physical collocation is not practical for technical reasons or because of space limitations. In such cases, the incumbent LEC shall be required to provide virtual collocation, except at points where the incumbent LEC proves to the state commission that virtual collocation is not technically feasible. If virtual collocation is not technically feasible, the incumbent LEC shall provide other methods of interconnection and access to unbundled network elements to the extent technically feasible.

(f) An incumbent LEC shall submit to the state commission detailed floor plans or diagrams of any premises where the incumbent LEC claims that physical collocation is not practical because of space limitations.

(g) An incumbent LEC that is classified as a Class A company under § 32.11 of this chapter and that is not a National Exchange Carrier Association interstate tariff participant as provided in part 69, subpart G, shall continue to provide expanded interconnection service pursuant to interstate tariff in accordance with §§ 64.1401, 64.1402, 69.121 of this chapter, and the Commission's other requirements.

§ 51.323 Standards for physical collocation and virtual collocation.

(a) An incumbent LEC shall provide physical collocation and virtual collocation to requesting telecommunications carriers.

(b) An incumbent LEC shall permit the collocation of any type of equipment used for interconnection or access to unbundled network elements. Whenever an incumbent LEC objects to collocation of equipment by a requesting telecommunications carrier for purposes within the scope of section 251(c)(6) of the Act, the incumbent LEC shall prove to the state commission that the equipment will not be actually used by the telecommunications carrier for the purpose of obtaining interconnection or access to unbundled network elements. Equipment used for interconnection and access to unbundled network elements includes, but is not limited to:

(1) transmission equipment including, but not limited to, optical terminating equipment and multiplexers; and

(2) equipment being collocated to terminate basic transmission facilities pursuant to §§ 64.1401 and 64.1402 of this chapter as of August 1, 1996.

(c) Nothing in this section requires an incumbent LEC to permit collocation of switching equipment or equipment used to provide enhanced services.

(d) When an incumbent LEC provides physical collocation, virtual collocation, or both,

the incumbent LEC shall:

(1) provide an interconnection point or points, physically accessible by both the incumbent LEC and the collocating telecommunications carrier, at which the fiber optic cable carrying an interconnector's circuits can enter the incumbent LEC's premises, provided that the incumbent LEC shall designate interconnection points as close as reasonably possible to its premises;

(2) provide at least two such interconnection points at each incumbent LEC premises at which there are at least two entry points for the incumbent LEC's cable facilities, and at which space is available for new facilities in at least two of those entry points;

(3) permit interconnection of copper or coaxial cable if such interconnection is first approved by the state commission; and

(4) permit physical collocation of microwave transmission facilities except where such collocation is not practical for technical reasons or because of space limitations, in which case virtual collocation of such facilities is required where technically feasible.

(e) When providing virtual collocation, an incumbent LEC shall, at a minimum, install, maintain, and repair collocated equipment identified in paragraph (b) of this section within the same time periods and with failure rates that are no greater than those that apply to the performance of similar functions for comparable equipment of the incumbent LEC itself.

(f) An incumbent LEC shall allocate space for the collocation of the equipment identified in paragraph (b) of this section in accordance with the following requirements:

(1) an incumbent LEC shall make space available within or on its premises to requesting telecommunications carriers on a first-come, first-served basis, provided, however, that the incumbent LEC shall not be required to lease or construct additional space to provide for physical collocation when existing space has been exhausted;

(2) to the extent possible, an incumbent LEC shall make contiguous space available to requesting telecommunications carriers that seek to expand their existing collocation space;

(3) when planning renovations of existing facilities or constructing or leasing new facilities, an incumbent LEC shall take into account projected demand for collocation of equipment;

(4) an incumbent LEC may retain a limited amount of floor space for its own specific future uses, provided, however, that the incumbent LEC may not reserve space for future use on terms more favorable than those that apply to other telecommunications carriers seeking to reserve collocation space for their own future use;

(5) an incumbent LEC shall relinquish any space held for future use before denying a request for virtual collocation on the grounds of space limitations, unless the incumbent LEC proves to the state commission that virtual collocation at that point is not technically feasible; and

(6) an incumbent LEC may impose reasonable restrictions on the warehousing of unused space by collocating telecommunications carriers, provided, however, that the incumbent LEC shall not set maximum space limitations applicable to such carriers unless the incumbent LEC proves to the state commission that space constraints make such restrictions necessary.

(g) An incumbent LEC shall permit collocating telecommunications carriers to collocate equipment and connect such equipment to unbundled network transmission elements obtained from the incumbent LEC, and shall not require such telecommunications carriers to bring their own transmission facilities to the incumbent LEC's premises in which they seek to collocate equipment.

(h) An incumbent LEC shall permit a collocating telecommunications carrier to interconnect its network with that of another collocating telecommunications carrier at the incumbent LEC's premises and to connect its collocated equipment to the collocated equipment of another telecommunications carrier within the same premises provided that the collocated equipment is also used for interconnection with the incumbent LEC or for access to the incumbent LEC's unbundled network elements.

(1) An incumbent LEC shall provide the connection between the equipment in the collocated spaces of two or more telecommunications carriers, unless the incumbent LEC permits one or more of the collocating parties to provide this connection for themselves; and

(2) An incumbent LEC is not required to permit collocating telecommunications carriers to place their own connecting transmission facilities within the incumbent LEC's premises outside of the actual physical collocation space.

(i) An incumbent LEC may require reasonable security arrangements to separate a collocating telecommunications carrier's space from the incumbent LEC's facilities.

(j) An incumbent LEC shall permit a collocating telecommunications carrier to subcontract the construction of physical collocation arrangements with contractors approved by the incumbent LEC, provided, however, that the incumbent LEC shall not unreasonably withhold approval of contractors. Approval by an incumbent LEC shall be based on the same criteria it uses in approving contractors for its own purposes.

Subpart E - Exemptions, Suspensions, and Modifications of Requirements of Section 251 of the Act.

§ 51.401 State authority.

A state commission shall determine whether a telephone company is entitled, pursuant to section 251(f) of the Act, to exemption from, or suspension or modification of, the requirements of section 251 of the Act. Such determinations shall be made on a case-by-case basis.

§ 51.403 Carriers eligible for suspension or modification under section 251(f)(2) of the Act.

A LEC is not eligible for a suspension or modification of the requirements of section 251(b) or section 251(c) of the Act pursuant to section 251(f)(2) of the Act if such LEC, at the holding company level, has two percent or more of the subscriber lines installed in the aggregate nationwide.

§ 51.405 Burden of proof.

(a) Upon receipt of a bona fide request for interconnection, services, or access to unbundled network elements, a rural telephone company must prove to the state commission that the rural telephone company should be entitled, pursuant to section 251(f)(1) of the Act, to continued exemption from the requirements of section 251(c) of the Act.

(b) A LEC with fewer than two percent of the nation's subscriber lines installed in the aggregate nationwide must prove to the state commission, pursuant to section 251(f)(2) of the Act, that it is entitled to a suspension or modification of the application of a requirement or requirements of section 251(b) or 251(c) of the Act.

(c) In order to justify continued exemption under section 251(f)(1) of the Act once a bona fide request has been made, an incumbent LEC must offer evidence that the application of the requirements of section 251(c) of the Act would be likely to cause undue economic burden beyond the economic burden that is typically associated with efficient competitive entry.

(d) In order to justify a suspension or modification under section 251(f)(2) of the Act, a LEC must offer evidence that the application of section 251(b) or section 251(c) of the Act would be likely to cause undue economic burden beyond the economic burden that is typically associated with efficient competitive entry.

Subpart F - Pricing of Elements.

§ 51.501 Scope.

(a) The rules in this subpart apply to the pricing of network elements, interconnection, and methods of obtaining access to unbundled elements, including physical collocation and virtual collocation.

(b) As used in this subpart, the term "element" includes network elements, interconnection, and methods of obtaining interconnection and access to unbundled elements.

§ 51.503 General pricing standard.

(a) An incumbent LEC shall offer elements to requesting telecommunications carriers at rates, terms, and conditions that are just, reasonable, and nondiscriminatory.

(b) An incumbent LEC's rates for each element it offers shall comply with the rate structure rules set forth in §§ 51.507 and 51.509 of this part, and shall be established, at the election of the state commission--

(1) pursuant to the forward-looking economic cost-based pricing methodology set forth in §§ 51.505 and 51.511 of this part; or

(2) consistent with the proxy ceilings and ranges set forth in § 51.513 of this

part.

(c) The rates that an incumbent LEC assesses for elements shall not vary on the basis of the class of customers served by the requesting carrier, or on the type of services that the requesting carrier purchasing such elements uses them to provide.

§ 51.505 Forward-looking economic cost.

(a) *In general*. The forward-looking economic cost of an element equals the sum of:

(1) the total element long-run incremental cost of the element, as described in paragraph (b); and

(2) a reasonable allocation of forward-looking common costs, as described in paragraph (c).

(b) *Total element long-run incremental cost*. The total element long-run incremental cost of an element is the forward-looking cost over the long run of the total quantity of the facilities and functions that are directly attributable to, or reasonably identifiable as incremental to, such element, calculated taking as a given the incumbent LEC's provision of other elements.

(1) *Efficient network configuration*. The total element long-run incremental cost of an element should be measured based on the use of the most efficient telecommunications technology currently available and the lowest cost network configuration, given the existing location of the incumbent LEC's wire centers.

(2) *Forward-looking cost of capital*. The forward-looking cost of capital shall be used in calculating the total element long-run incremental cost of an element.

(3) *Depreciation rates*. The depreciation rates used in calculating forward-looking economic costs of elements shall be economic depreciation rates.

(c) *Reasonable allocation of forward-looking common costs*.

(1) *Forward-looking common costs*. Forward-looking common costs are economic costs efficiently incurred in providing a group of elements or services (which may include all elements or services provided by the incumbent LEC) that cannot be attributed directly to individual elements or services.

(2) *Reasonable allocation*.

(A) The sum of a reasonable allocation of forward-looking common costs and the total element long-run incremental cost of an element shall not exceed the stand-alone costs associated with the element. In this context, stand-alone costs are the total forward-looking costs, including corporate costs, that would be incurred to produce a given element if that element were provided by an efficient firm that produced nothing but the given element.

(B) The sum of the allocation of forward-looking common costs for all elements and services shall equal the total forward-looking common costs, exclusive of retail costs, attributable to operating the incumbent LEC's total network, so as to provide all the elements and services offered.

(d) *Factors that may not be considered*. The following factors shall not be considered in a calculation of the forward-looking economic cost of an element:

(1) *Embedded costs*. Embedded costs are the costs that the incumbent LEC incurred in the past and that are recorded in the incumbent LEC's books of accounts.

(2) *Retail costs*. Retail costs include the costs of marketing, billing, collection, and other costs associated with offering retail telecommunications services to subscribers who are not telecommunications carriers, described in § 51.609 of this part.

(3) *Opportunity costs*. Opportunity costs include the revenues that the incumbent LEC would have received for the sale of telecommunications services, in the absence of competition from telecommunications carrier that purchase elements.

(4) *Revenues to subsidize other services*. Revenues to subsidize other services include revenues associated with elements or telecommunications service offerings other than the element for which a rate is being established.

(e) *Cost study requirements*. An incumbent LEC must prove to the state commission that the rates for each element it offers do not exceed the forward-looking economic cost per unit of providing the element, using a cost study that complies with the methodology set forth in this section and § 51.511 of this part.

(1) A state commission may set a rate outside the proxy ranges or above the proxy ceilings described in § 51.513 of this part only if that commission has given full and fair effect to the economic cost based pricing methodology described in this section and § 51.511 of this part in a state proceeding that meets the requirements of paragraph (e)(2) of this section.

(2) Any state proceeding conducted pursuant to this section shall provide notice and an opportunity for comment to affected parties and shall result in the creation of a written factual record that is sufficient for purposes of review. The record of any state proceeding in which a state commission considers a cost study for purposes of establishing rates under this section shall include any such cost study.

§ 51.507 General rate structure standard.

(a) Element rates shall be structured consistently with the manner in which the costs of providing the elements are incurred.

(b) The costs of dedicated facilities shall be recovered through flat-rated charges.

(c) The costs of shared facilities shall be recovered in a manner that efficiently apportions costs among users. Costs of shared facilities may be apportioned either through usage-sensitive charges or capacity-based flat-rated charges, if the state commission finds that such rates reasonably reflect the costs imposed by the various users.

(d) Recurring costs shall be recovered through recurring charges, unless an incumbent LEC proves to a state commission that such recurring costs are de minimis. Recurring costs shall be considered de minimis when the costs of administering the recurring charge would be excessive in relation to the amount of the recurring costs.

(e) State commissions may, where reasonable, require incumbent LECs to recover nonrecurring costs through recurring charges over a reasonable period of time. Nonrecurring

charges shall be allocated efficiently among requesting telecommunications carriers, and shall not permit an incumbent LEC to recover more than the total forward-looking economic cost of providing the applicable element.

(f) State commissions shall establish different rates for elements in at least three defined geographic areas within the state to reflect geographic cost differences.

(1) To establish geographically-deaveraged rates, state commissions may use existing density-related zone pricing plans described in § 69.123 of this chapter, or other such cost-related zone plans established pursuant to state law.

(2) In states not using such existing plans, state commissions must create a minimum of three cost-related rate zones.

§ 51.509 Rate structure standards for specific elements.

In addition to the general rules set forth in § 51.507 of this part, rates for specific elements shall comply with the following rate structure rules.

(a) *Local loops*. Loop costs shall be recovered through flat-rated charges.

(b) *Local switching*. Local switching costs shall be recovered through a combination of a flat-rated charge for line ports and one or more flat-rated or per-minute usage charges for the switching matrix and for trunk ports.

(c) *Dedicated transmission links*. Dedicated transmission link costs shall be recovered through flat-rated charges.

(d) *Shared transmission facilities between tandem switches and end offices*. The costs of shared transmission facilities between tandem switches and end offices may be recovered through usage-sensitive charges, or in another manner consistent with the manner that the incumbent LEC incurs those costs.

(e) *Tandem switching*. Tandem switching costs may be recovered through usage-sensitive charges, or in another manner consistent with the manner that the incumbent LEC incurs those costs.

(f) *Signaling and call-related database services*. Signaling and call-related database service costs shall be usage-sensitive, based on either the number of queries or the number of messages, with the exception of the dedicated circuits known as signaling links, the cost of which shall be recovered through flat-rated charges.

(g) *Collocation*. Collocation costs shall be recovered consistent with the rate structure policies established in the *Expanded Interconnection* proceeding, CC Docket No. 91-141.

§ 51.511 Forward-looking economic cost per unit.

(a) The forward-looking economic cost per unit of an element equals the forward-looking economic cost of the element, as defined in § 51.505 of this part, divided by a reasonable projection of the sum of the total number of units of the element that the incumbent LEC is likely to provide to requesting telecommunications carriers and the total number of units of the element that the incumbent LEC is likely to use in offering its own services, during a reasonable measuring period.

(b) (1) With respect to elements that an incumbent LEC offers on a flat-rate basis, the number of units is defined as the discrete number of elements (*e.g.*, local loops or local switch ports) that the incumbent LEC uses or provides.

(2) With respect to elements that an incumbent LEC offers on a usage-sensitive basis, the number of units is defined as the unit of measurement of the usage (*e.g.*, minutes of use or call-related database queries) of the element.

§ 51.513 Proxies for forward-looking economic cost.

(a) A state commission may determine that the cost information available to it with respect to one or more elements does not support the adoption of a rate or rates that are consistent with the requirements set forth in §§ 51.505 and 51.511 of this part. In that event, the state commission may establish a rate for an element that is consistent with the proxies specified in this section, provided that:

(1) any rate established through use of such proxies shall be superseded once the state commission has completed review of a cost study that complies with the forward-looking economic cost based pricing methodology described in §§ 51.505 and 51.511 of this part, and has concluded that such study is a reasonable basis for establishing element rates; and

(2) the state commission sets forth in writing a reasonable basis for its selection of a particular rate for the element.

(b) The constraints on proxy-based rates described in this section apply on a geographically averaged basis. For purposes of determining whether geographically deaveraged rates for elements comply with the provisions of this section, a geographically averaged proxy-based rate shall be computed based on the weighted average of the actual, geographically deaveraged rates that apply in separate geographic areas in a state.

(c) *Proxies for specific elements*.

(1) *Local loops*. For each state listed below, the proxy-based monthly rate for unbundled local loops, on a statewide weighted average basis, shall be no greater than the figures listed in the table below. (The Commission has not established a default proxy ceiling for loop rates in Alaska).

TABLE A

State	Proxy Ceiling	State	Proxy Ceiling
Alabama	$17.25	Nebraska	$18.05
Arizona	$12.85	Nevada	$18.95
Arkansas	$21.18	New Hampshire	$16.00
California	$11.10	New Jersey	$12.47
Colorado	$14.97	New Mexico	$18.66
Connecticut	$13.23	New York	$11.75
Delaware	$13.24	North Carolina	$16.71
District of Columbia	$10.81	North Dakota	$25.36
Florida	$13.68	Ohio	$15.73
Georgia	$16.09	Oklahoma	$17.63
Hawaii	$15.27	Oregon	$15.44
Idaho	$20.16	Pennsylvania	$12.30
Illinois	$13.12	Puerto Rico	$12.47
Indiana	$13.29	Rhode Island	$11.48
Iowa	$15.94	South Carolina	$17.07
Kansas	$19.85	South Dakota	$25.33
Kentucky	$16.70	Tennessee	$17.41
Louisiana	$16.98	Texas	$15.49
Maine	$18.69	Utah	$15.12
Maryland	$13.36	Vermont	$20.13
Massachusetts	$9.83	Virginia	$14.13
Michigan	$15.27	Washington	$13.37
Minnesota	$14.81	West Virginia	$19.25
Mississippi	$21.97	Wisconsin	$15.94
Missouri	$18.32	Wyoming	$25.11
Montana	$25.18		

(2) *Local switching*. The blended proxy-based rate for unbundled local switching shall be no greater than 0.4 cents ($0.004) per minute, and no less than 0.2 cents ($0.002) per minute, except that, where a state commission has, before August 8, 1996, established a rate less than or equal to 0.5 cents ($0.005) per minute, that rate may be retained pending completion of a forward-looking economic cost study. The blended rate for unbundled local switching shall be calculated as the sum of the following:

(A) the applicable flat-rated charges for subelements associated with unbundled local switching, such as line ports, divided by the projected average minutes of use per flat-rated subelement; and

(B) the applicable usage-sensitive charges for subelements associated with unbundled local switching, such as switching and trunk ports. A weighted average of such charges shall be used in appropriate circumstances, such as when peak and off-peak charges are used.

(3) *Dedicated transmission links*. The proxy-based rates for dedicated transmission links shall be no greater than the incumbent LEC's tariffed interstate charges for comparable entrance facilities or direct-trunked transport offerings, as described in §§ 69.110 and 69.112 of this chapter.

(4) *Shared transmission facilities between tandem switches and end offices*. The proxy-based rates for shared transmission facilities between tandem switches and end offices shall be no greater than the weighted per-minute equivalent of DS1 and DS3 interoffice dedicated transmission link rates that reflects the relative number of DS1 and DS3 circuits used in the tandem to end office links (or a surrogate based on the proportion of copper and fiber facilities in the interoffice network), calculated using a loading factor of 9,000 minutes per month per voice-grade circuit, as described in § 69.112 of this chapter.

(5) *Tandem switching*. The proxy-based rate for tandem switching shall be no greater than 0.15 cents ($0.0015) per minute of use.

(6) *Collocation*. To the extent that the incumbent LEC offers a comparable form of collocation in its interstate expanded interconnection tariffs, as described in §§ 64.1401 and 69.121 of this chapter, the proxy-based rates for collocation shall be no greater than the effective rates for equivalent services in the interstate expanded interconnection tariff. To the extent that the incumbent LEC does not offer a comparable form of collocation in its interstate expanded interconnection tariffs, a state commission may, in its discretion, establish a proxy-based rate, provided that the state commission sets forth in writing a reasonable basis for concluding that its rate would approximate the result of a forward-looking economic cost study, as described in § 51.505 of this part.

(7) *Signaling, call-related database, and other elements*. To the extent that the incumbent LEC has established rates for offerings comparable to other elements in its interstate access tariffs, and has provided cost support for those rates pursuant to § 61.49(h) of this chapter, the proxy-based rates for those elements shall be no greater than the effective rates for equivalent services in the interstate access tariffs. In other cases, the proxy-based rate shall be no greater than a rate based on direct costs plus a reasonable allocation of overhead loadings, pursuant to § 61.49(h) of this chapter.

§ 51.515 Application of access charges.

(a) Neither the interstate access charges described in part 69 nor comparable intrastate access charges shall be assessed by an incumbent LEC on purchasers of elements that offer telephone exchange or exchange access services.

(b) Notwithstanding §§ 51.505, 51.511, and 51.513(d)(2) of this part and paragraph (a) of this section, an incumbent LEC may assess upon telecommunications carriers that purchase unbundled local switching elements, as described in § 51.319(c)(1) of this part, for interstate minutes of use traversing such unbundled local switching elements, the carrier common line charge described in § 69.105 of this chapter, and a charge equal to 75% of the interconnection

charge described in § 69 124 of this chapter, only until the earliest of the following, and not thereafter:

(1) June 30, 1997;

(2) the later of the effective date of a final Commission decision in CC Docket No. 96-45, *Federal-State Joint Board on Universal Service*, or the effective date of a final Commission decision in a proceeding to consider reform of the interstate access charges described in part 69; or

(3) with respect to a Bell operating company only, the date on which that company is authorized to offer in-region interLATA service in a state pursuant to section 271 of the Act. The end date for Bell operating companies that are authorized to offer interLATA service shall apply only to the recovery of access charges in those states in which the Bell operating company is authorized to offer such service.

(c) Notwithstanding §§ 51.505, 51.511, and 51.513(d)(2) of this part and paragraph (a) of this section, an incumbent LEC may assess upon telecommunications carriers that purchase unbundled local switching elements, as described in § 51.319(c)(1) of this part, for intrastate toll minutes of use traversing such unbundled local switching elements, intrastate access charges comparable to those listed in paragraph (b) and any explicit intrastate universal service mechanism based on access charges, only until the earliest of the following, and not thereafter:

(1) June 30, 1997;

(2) the effective date of a state commission decision that an incumbent LEC may not assess such charges; or

(3) with respect to a Bell operating company only, the date on which that company is authorized to offer in-region interLATA service in the state pursuant to section 271 of the Act. The end date for Bell operating companies that are authorized to offer interLATA service shall apply only to the recovery of access charges in those states in which the Bell operating company is authorized to offer such service.

Subpart G - Resale.

§ 51.601 Scope of resale rules.

The provisions of this subpart govern the terms and conditions under which LECs offer telecommunications services to requesting telecommunications carriers for resale.

§ 51.603 Resale obligation of all local exchange carriers.

(a) A LEC shall make its telecommunications services available for resale to requesting telecommunications carriers on terms and conditions that are reasonable and non-discriminatory.

(b) A LEC must provide services to requesting telecommunications carriers for resale that are equal in quality, subject to the same conditions, and provided within the same provisioning time intervals that the LEC provides these services to others, including end users.

§ 51.605 Additional obligations of incumbent local exchange carriers.

(a) An incumbent LEC shall offer to any requesting telecommunications carrier any telecommunications service that the incumbent LEC offers on a retail basis to subscribers that are not telecommunications carriers for resale at wholesale rates that are at the election of the state commission–

(1) consistent with the avoided cost methodology described in §§ 51.607 and 51.609 of this part; or

(2) interim wholesale rates, pursuant to § 51.611 of this part,

(b) Except as provided in § 51.613 of this part, an incumbent LEC shall not impose restrictions on the resale by a requesting carrier of telecommunications services offered by the incumbent LEC.

§ 51.607 Wholesale pricing standard.

(a) The wholesale rate that an incumbent LEC may charge for a telecommunications service provided for resale to other telecommunications carriers shall equal the incumbent LEC's existing retail rate for the telecommunications service, less avoided retail costs, as described in § 51.609 of this part.

(b) For purposes of this subpart, exchange access services, as defined in section 3 of the Act, shall not be considered to be telecommunications services that incumbent LECs must make available for resale at wholesale rates to requesting telecommunications carriers.

§ 51.609 Determination of avoided retail costs.

(a) Except as provided in § 51.611 of this part, the amount of avoided retail costs shall be determined on the basis of a cost study that complies with the requirements of this section.

(b) Avoided retail costs shall be those costs that reasonably can be avoided when an incumbent LEC provides a telecommunications service for resale at wholesale rates to a requesting carrier.

(c) For incumbent LECs that are designated as Class A companies under § 32.11 of this chapter, except as provided in paragraph (d), avoided retail costs shall:

(1) include, as direct costs, the costs recorded in USOA accounts 6611 (product management), 6612 (sales), 6613 (product advertising), 6621 (call completion services), 6622 (number services), and 6623 (customer services) (§§ 32.6611, 32.6612, 32.6613, 32.6621, 32.6622, and 32.6623);

(2) include, as indirect costs, a portion of the costs recorded in USOA accounts 6121-6124 (general support expenses), 6711, 6712, 6721-6728 (corporate operations expenses), and 5301 (telecommunications uncollectibles) (§§ 32.6121-32.6124, 32.6711, 32.6712, 32.6721-32.6728, and 32.5301); and

(3) not include plant-specific expenses and plant non-specific expenses, other than

general support expenses (§§ 32.6110-32.6116, 32.6210-32.6565).

(d) Costs included in accounts 6611-6613 and 6621-6623 described in paragraph (c) (§§ 32.6611-32.6613 and 32.6621-32.6623) may be included in wholesale rates only to the extent that the incumbent LEC proves to a state commission that specific costs in these accounts will be incurred and are not avoidable with respect to services sold at wholesale, or that specific costs in these accounts are not included in the retail prices of resold services. Costs included in accounts 6110-6116 and 6210-6565 described in paragraph (c) (§§ 32.6110-32.6116, 32.6210-32.6565) may be treated as avoided retail costs, and excluded from wholesale rates, only to the extent that a party proves to a state commission that specific costs in these accounts can reasonably be avoided when an incumbent LEC provides a telecommunications service for resale to a requesting carrier.

(e) For incumbent LECs that are designated as Class B companies under § 32.11 of this chapter and that record information in summary accounts instead of specific USOA accounts, the entire relevant summary accounts may be used in lieu of the specific USOA accounts listed in paragraphs (c) and (d).

§ 51.611 Interim wholesale rates.

(a) If a state commission cannot, based on the information available to it, establish a wholesale rate using the methodology prescribed in § 51.609 of this part, then the state commission may elect to establish an interim wholesale rate as described in paragraph (b) of this section.

(b) The state commission may establish interim wholesale rates that are at least 17 percent, and no more than 25 percent, below the incumbent LEC's existing retail rates, and shall articulate the basis for selecting a particular discount rate. The same discount percentage rate shall be used to establish interim wholesale rates for each telecommunications service.

(c) A state commission that establishes interim wholesale rates shall, within a reasonable period of time thereafter, establish wholesale rates on the basis of an avoided retail cost study that complies with § 51.609 of this part.

§ 51.613 Restrictions on resale.

(a) Notwithstanding § 51.605(b) of this part, the following types of restrictions on resale may be imposed:

(1) *Cross-class selling*. A state commission may permit an incumbent LEC to prohibit a requesting telecommunications carrier that purchases at wholesale rates for resale, telecommunications services that the incumbent LEC makes available only to residential customers or to a limited class of residential customers, from offering such services to classes of customers that are not eligible to subscribe to such services from the incumbent LEC.

(2) *Short term promotions*. An incumbent LEC shall apply the wholesale discount to the ordinary rate for a retail service rather than a special promotional rate only if

(A) such promotions involve rates that will be in effect for no more than 90 days; and

(B) the incumbent LEC does not use such promotional offerings to evade the wholesale rate obligation, for example by making available a sequential series of 90-day promotional rates.

(b) With respect to any restrictions on resale not permitted under paragraph (a), an incumbent LEC may impose a restriction only if it proves to the state commission that the restriction is reasonable and nondiscriminatory.

(c) *Branding*. Where operator, call completion, or directory assistance service is part of the service or service package an incumbent LEC offers for resale, failure by an incumbent LEC to comply with reseller unbranding or rebranding requests shall constitute a restriction on resale.

(1) An incumbent LEC may impose such a restriction only if it proves to the state commission that the restriction is reasonable and nondiscriminatory, such as by proving to a state commission that the incumbent LEC lacks the capability to comply with unbranding or rebranding requests.

(2) For purposes of this subpart, unbranding or rebranding shall mean that operator, call completion, or directory assistance services are offered in such a manner that an incumbent LEC's brand name or other identifying information is not identified to subscribers, or that such services are offered in such a manner that identifies to subscribers the requesting carrier's brand name or other identifying information.

§ 51.615 Withdrawal of services.

When an incumbent LEC makes a telecommunications service available only to a limited group of customers that have purchased such a service in the past, the incumbent LEC must also make such a service available at wholesale rates to requesting carriers to offer on a resale basis to the same limited group of customers that have purchased such a service in the past.

§ 51.617 Assessment of end user common line charge on resellers.

(a) Notwithstanding the provision in § 69.104(a) of this chapter that the end user common line charge be assessed upon end users, an incumbent LEC shall assess this charge, and the charge for changing the designated primary interexchange carrier, upon requesting carriers that purchase telephone exchange service for resale. The specific end user common line charge to be assessed will depend upon the identity of the end user served by the requesting carrier.

(b) When an incumbent LEC provides telephone exchange service to a requesting carrier at wholesale rates for resale, the incumbent LEC shall continue to assess the interstate access

charges provided in part 69, other than the end user common line charge, upon interexchange carriers that use the incumbent LEC's facilities to provide interstate or international telecommunications services to the interexchange carriers' subscribers.

Subpart H - Reciprocal Compensation for Transport and Termination of Local Telecommunications Traffic.

§ 51.701 Scope of transport and termination pricing rules.

(a) The provisions of this subpart apply to reciprocal compensation for transport and termination of local telecommunications traffic between LECs and other telecommunications carriers.

(b) *Local telecommunications traffic*. For purposes of this subpart, local telecommunications traffic means:

(1) telecommunications traffic between a LEC and a telecommunications carrier other than a CMRS provider that originates and terminates within a local service area established by the state commission; or

(2) telecommunications traffic between a LEC and a CMRS provider that, at the beginning of the call, originates and terminates within the same Major Trading Area, as defined in § 24.202(a) of this chapter.

(c) *Transport*. For purposes of this subpart, transport is the transmission and any necessary tandem switching of local telecommunications traffic subject to section 251(b)(5) of the Act from the interconnection point between the two carriers to the terminating carrier's end office switch that directly serves the called party, or equivalent facility provided by a carrier other than an incumbent LEC.

(d) *Termination*. For purposes of this subpart, termination is the switching of local telecommunications traffic at the terminating carrier's end office switch, or equivalent facility, and delivery of such traffic to the called party's premises.

(e) *Reciprocal compensation*. For purposes of this subpart, a reciprocal compensation arrangement between two carriers is one in which each of the two carriers receives compensation from the other carrier for the transport and termination on each carrier's network facilities of local telecommunications traffic that originates on the network facilities of the other carrier.

§ 51.703 Reciprocal compensation obligation of LECs.

(a) Each LEC shall establish reciprocal compensation arrangements for transport and termination of local telecommunications traffic with any requesting telecommunications carrier.

(b) A LEC may not assess charges on any other telecommunications carrier for local telecommunications traffic that originates on the LEC's network.

§ 51.705 Incumbent LECs' rates for transport and termination.

(a) An incumbent LEC's rates for transport and termination of local telecommunications traffic shall be established, at the election of the state commission, on the basis of:

(1) the forward-looking economic costs of such offerings, using a cost study pursuant to §§ 51.505 and 51.511 of this part;

(2) default proxies, as provided in § 51.707 of this part; or

(3) a bill-and-keep arrangement, as provided in § 51.713 of this part.

(b) In cases where both carriers in a reciprocal compensation arrangement are incumbent LECs, state commissions shall establish the rates of the smaller carrier on the basis of the larger carrier's forward-looking costs, pursuant to § 51.711 of this part.

§ 51.707 Default proxies for incumbent LECs' transport and termination rates.

(a) A state commission may determine that the cost information available to it with respect to transport and termination of local telecommunications traffic does not support the adoption of a rate or rates for an incumbent LEC that are consistent with the requirements of §§ 51.505 and 51.511 of this part. In that event, the state commission may establish rates for transport and termination of local telecommunications traffic, or for specific components included therein, that are consistent with the proxies specified in this section, provided that:

(1) any rate established through use of such proxies is superseded once that state commission establishes rates for transport and termination pursuant to §§ 51.705(a)(1) or 51.705(a)(3) of this part; and

(2) the state commission sets forth in writing a reasonable basis for its selection of a particular proxy for transport and termination of local telecommunications traffic, or for specific components included within transport and termination.

(b) If a state commission establishes rates for transport and termination of local telecommunications traffic on the basis of default proxies, such rates must meet the following requirements:

(1) *Termination*. The incumbent LEC's rates for the termination of local telecommunications traffic shall be no greater than 0.4 cents ($0.004) per minute, and no less than 0.2 cents ($0.002) per minute, except that, if a state commission has, before August 8, 1996, established a rate less than or equal to 0.5 cents ($0.005) per minute for such calls, that rate may be retained pending completion of a forward-looking economic cost study.

(2) *Transport*. The incumbent LEC's rates for the transport of local telecommunications traffic, under this section, shall comply with the proxies described in § 51.513(d)(3), (4), and (5) of this part that apply to the analogous unbundled network elements used in transporting a call to the end office that serves the called party.

§ 51.709 Rate structure for transport and termination.

(a) In state proceedings, a state commission shall establish rates for the transport and termination of local telecommunications traffic that are structured consistently with the manner

that carriers incur those costs, and consistently with the principles in §§ 51.507 and 51.509 of this part.

(b) The rate of a carrier providing transmission facilities dedicated to the transmission of traffic between two carriers' networks shall recover only the costs of the proportion of that trunk capacity used by an interconnecting carrier to send traffic that will terminate on the providing carrier's network. Such proportions may be measured during peak periods.

§ 51.711 Symmetrical reciprocal compensation.

(a) Rates for transport and termination of local telecommunications traffic shall be symmetrical, except as provided in paragraphs (b) and (c).

(1) For purposes of this subpart, symmetrical rates are rates that a carrier other than an incumbent LEC assesses upon an incumbent LEC for transport and termination of local telecommunications traffic equal to those that the incumbent LEC assesses upon the other carrier for the same services.

(2) In cases where both parties are incumbent LECs, or neither party is an incumbent LEC, a state commission shall establish the symmetrical rates for transport and termination based on the larger carrier's forward-looking costs.

(3) Where the switch of a carrier other than an incumbent LEC serves a geographic area comparable to the area served by the incumbent LEC's tandem switch, the appropriate rate for the carrier other than an incumbent LEC is the incumbent LEC's tandem interconnection rate.

(b) A state commission may establish asymmetrical rates for transport and termination of local telecommunications traffic only if the carrier other than the incumbent LEC (or the smaller of two incumbent LECs) proves to the state commission on the basis of a cost study using the forward-looking economic cost based pricing methodology described in §§ 51.505 and 51.511 of this part, that the forward-looking costs for a network efficiently configured and operated by the carrier other than the incumbent LEC (or the smaller of two incumbent LECs), exceed the costs incurred by the incumbent LEC (or the larger incumbent LEC), and, consequently, that such that a higher rate is justified.

(c) Pending further proceedings before the Commission, a state commission shall establish the rates that licensees in the Paging and Radiotelephone Service (defined in part 22, subpart E of this chapter), Narrowband Personal Communications Services (defined in part 24, subpart D of this chapter), and Paging Operations in the Private Land Mobile Radio Services (defined in part 90, subpart P of this chapter) may assess upon other carriers for the transport and termination of local telecommunications traffic based on the forward-looking costs that such licensees incur in providing such services, pursuant to §§ 51.505 and 51.511 of this part. Such licensees' rates shall not be set based on the default proxies described in § 51.707 of this part.

§ 51.713 Bill-and-keep arrangements for reciprocal compensation.

(a) For purposes of this subpart, bill-and-keep arrangements are those in which neither

of the two interconnecting carriers charges the other for the termination of local telecommunications traffic that originates on the other carrier's network.

(b) A state commission may impose bill-and-keep arrangements if the state commission determines that the amount of local telecommunications traffic from one network to the other is roughly balanced with the amount of local telecommunications traffic flowing in the opposite direction, and is expected to remain so, and no showing has been made pursuant to § 51.711(b) of this part.

(c) Nothing in this section precludes a state commission from presuming that the amount of local telecommunications traffic from one network to the other is roughly balanced with the amount of local telecommunications traffic flowing in the opposite direction and is expected to remain so, unless a party rebuts such a presumption.

§ 51.715 Interim transport and termination pricing.

(a) Upon request from a telecommunications carrier without an existing interconnection arrangement with an incumbent LEC, the incumbent LEC shall provide transport and termination of local telecommunications traffic immediately under an interim arrangement, pending resolution of negotiation or arbitration regarding transport and termination rates and approval of such rates by a state commission under sections 251 and 252 of the Act.

(1) This requirement shall not apply when the requesting carrier has an existing interconnection arrangement that provides for the transport and termination of local telecommunications traffic by the incumbent LEC.

(2) A telecommunications carrier may take advantage of such an interim arrangement only after it has requested negotiation with the incumbent LEC pursuant to § 51.301 of this part.

(b) Upon receipt of a request as described in paragraph (a), an incumbent LEC must, without unreasonable delay, establish an interim arrangement for transport and termination of local telecommunications traffic at symmetrical rates.

(1) In a state in which the state commission has established transport and termination rates based on forward-looking economic cost studies, an incumbent LEC shall use these state-determined rates as interim transport and termination rates.

(2) In a state in which the state commission has established transport and termination rates consistent with the default price ranges and ceilings described in § 51.707 of this part, an incumbent LEC shall use these state-determined rates as interim rates.

(3) In a state in which the state commission has neither established transport and termination rates based on forward-looking economic cost studies nor established transport and termination rates consistent with the default price ranges described in § 51.707 of this part, an incumbent LEC shall set interim transport and termination rates at the default ceilings for end-office switching (0.4 cents per minute of use), tandem switching (0.15 cents per minute of use), and transport (as described in § 51.707(b)(2) of this part).

(c) An interim arrangement shall cease to be in effect when one of the following occurs

with respect to rates for transport and termination of local telecommunications traffic subject to the interim arrangement.

(1) a voluntary agreement has been negotiated and approved by a state commission;

(2) an agreement has been arbitrated and approved by a state commission; or

(3) the period for requesting arbitration has passed with no such request.

(d) If the rates for transport and termination of local telecommunications traffic in an interim arrangement differ from the rates established by a state commission pursuant to § 51.705 of this part, the state commission shall require carriers to make adjustments to past compensation. Such adjustments to past compensation shall allow each carrier to receive the level of compensation it would have received had the rates in the interim arrangement equalled the rates later established by the state commission pursuant to § 51.705 of this part.

§ 51.717 Renegotiation of existing non-reciprocal arrangements.

(a) Any CMRS provider that operates under an arrangement with an incumbent LEC that was established before August 8, 1996 and that provides for non-reciprocal compensation for transport and termination of local telecommunications traffic is entitled to renegotiate these arrangements with no termination liability or other contract penalties.

(b) From the date that a CMRS provider makes a request under paragraph (a) until a new agreement has been either arbitrated or negotiated and has been approved by a state commission, the CMRS provider shall be entitled to assess upon the incumbent LEC the same rates for the transport and termination of local telecommunications traffic that the incumbent LEC assesses upon the CMRS provider pursuant to the pre-existing arrangement.

Subpart I - Procedures for Implementation of Section 252 of the Act.

§ 51.801 Commission action upon a state commission's failure to act to carry out its responsibility under section 252 of the Act.

(a) If a state commission fails to act to carry out its responsibility under section 252 of the Act in any proceeding or other matter under section 252 of the Act, the Commission shall issue an order preempting the state commission's jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the state commission under section 252 of the Act with respect to the proceeding or matter and shall act for the state commission.

(b) For purposes of this part, a state commission fails to act if the state commission fails to respond, within a reasonable time, to a request for mediation, as provided for in section 252(a)(2) of the Act, or for a request for arbitration, as provided for in section 252(b) of the Act, or fails to complete an arbitration within the time limits established in section 252(b)(4)(C) of the Act.

(c) A state shall not be deemed to have failed to act for purposes of section 252(e)(5) of the Act if an agreement is deemed approved under section 252(e)(4) of the Act.

§ 51.803 Procedures for Commission notification of a state commission's failure to act.

(a) Any party seeking preemption of a state commission's jurisdiction, based on the state commission's failure to act, shall notify the Commission in accordance with following procedures:

(1) such party shall file with the Secretary of the Commission a petition, supported by an affidavit, that states with specificity the basis for the petition and any information that supports the claim that the state has failed to act, including, but not limited to, the applicable provisions of the Act and the factual circumstances supporting a finding that the state commission has failed to act;

(2) such party shall ensure that the state commission and the other parties to the proceeding or matter for which preemption is sought are served with the petition required in paragraph (a)(1) of this section on the same date that the petitioning party serves the petition on the Commission; and

(3) within fifteen days from the date of service of the petition required in paragraph (a)(1) of this section, the applicable state commission and parties to the proceeding may file with the Commission a response to the petition.

(b) The party seeking preemption must prove that the state has failed to act to carry out its responsibilities under section 252 of the Act.

(c) The Commission, pursuant to section 252(e)(5) of the Act, may take notice upon its own motion that a state commission has failed to act. In such a case, the Commission shall issue a public notice that the Commission has taken notice of a state commission's failure to act. The applicable state commission and the parties to a proceeding or matter in which the Commission has taken notice of the state commission's failure to act may file, within fifteen days of the issuance of the public notice, comments on whether the Commission is required to assume the responsibility of the state commission under section 252 of the Act with respect to the proceeding or matter.

(d) The Commission shall issue an order determining whether it is required to preempt the state commission's jurisdiction of a proceeding or matter within 90 days after being notified under paragraph (a) of this section or taking notice under paragraph (c) of this section of a state commission's failure to carry out its responsibilities under section 252 of the Act.

§ 51.805 The Commission's authority over proceedings and matters.

(a) If the Commission assumes responsibility for a proceeding or matter pursuant to section 252(e)(5) of the Act, the Commission shall retain jurisdiction over such proceeding or matter. At a minimum, the Commission shall approve or reject any interconnection agreement adopted by negotiation, mediation or arbitration for which the Commission, pursuant to section

252(e)(5) of the Act, has assumed the state's commission's responsibilities.

(b) Agreements reached pursuant to mediation or arbitration by the Commission pursuant to section 252(e)(5) of the Act are not required to be submitted to the state commission for approval or rejection.

§ 51.807 Arbitration and mediation of agreements by the Commission pursuant to section 252(e)(5) of the Act.

(a) The rules established in this section shall apply only to instances in which the Commission assumes jurisdiction under section 252(e)(5) of the Act.

(b) When the Commission assumes responsibility for a proceeding or matter pursuant to section 252(e)(5) of the Act, it shall not be bound by state laws and standards that would have applied to the state commission in such proceeding or matter.

(c) In resolving, by arbitration under section 252(b) of the Act, any open issues and in imposing conditions upon the parties to the agreement, the Commission shall:

(1) ensure that such resolution and conditions meet the requirements of section 251 of the Act, including the rules prescribed by the Commission pursuant to that section;

(2) establish any rates for interconnection, services, or network elements according to section 252(d) of the Act, including the rules prescribed by the Commission pursuant to that section; and

(3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

(d) An arbitrator, acting pursuant to the Commission's authority under section 252(e)(5) of the Act, shall use final offer arbitration, except as otherwise provided in this section:

(1) at the discretion of the arbitrator, final offer arbitration may take the form of either entire package final offer arbitration or issue-by-issue final offer arbitration.

(2) negotiations among the parties may continue, with or without the assistance of the arbitrator, after final arbitration offers are submitted. Parties may submit subsequent final offers following such negotiations.

(3) to provide an opportunity for final post-offer negotiations, the arbitrator will not issue a decision for at least fifteen days after submission to the arbitrator of the final offers by the parties.

(e) Final offers submitted by the parties to the arbitrator shall be consistent with section 251 of the Act, including the rules prescribed by the Commission pursuant to that section.

(f) Each final offer shall:

(1) meet the requirements of section 251, including the rules prescribed by the Commission pursuant to that section;

(2) establish rates for interconnection, services, or access to unbundled network elements according to section 252(d) of the Act, including the rules prescribed by the

Commission pursuant to that section, and

(3) provide a schedule for implementation of the terms and conditions by the parties to the agreement. If a final offer submitted by one or more parties fails to comply with the requirements of this section, the arbitrator has discretion to take steps designed to result in an arbitrated agreement that satisfies the requirements of section 252(c) of the Act, including requiring parties to submit new final offers within a time frame specified by the arbitrator, or adopting a result not submitted by any party that is consistent with the requirements of section 252(c) of the Act, and the rules prescribed by the Commission pursuant to that section.

(g) Participation in the arbitration proceeding will be limited to the requesting telecommunications carrier and the incumbent LEC, except that the Commission will consider requests by third parties to file written pleadings.

(h) Absent mutual consent of the parties to change any terms and conditions adopted by the arbitrator, the decision of the arbitrator shall be binding on the parties.

§ 51.809 Availability of provisions of agreements to other telecommunications carriers under section 252(i) of the Act.

(a) An incumbent LEC shall make available without unreasonable delay to any requesting telecommunications carrier any individual interconnection, service, or network element arrangement contained in any agreement to which it is a party that is approved by a state commission pursuant to section 252 of the Act, upon the same rates, terms, and conditions as those provided in the agreement. An incumbent LEC may not limit the availability of any individual interconnection, service, or network element only to those requesting carriers serving a comparable class of subscribers or providing the same service (*i.e.*, local, access, or interexchange) as the original party to the agreement.

(b) The obligations of paragraph (a) of this section shall not apply where the incumbent LEC proves to the state commission that:

(1) the costs of providing a particular interconnection, service, or element to the requesting telecommunications carrier are greater than the costs of providing it to the telecommunications carrier that originally negotiated the agreement, or

(2) the provision of a particular interconnection, service, or element to the requesting carrier is not technically feasible.

(c) Individual interconnection, service, or network element arrangements shall remain available for use by telecommunications carriers pursuant to this section for a reasonable period of time after the approved agreement is available for public inspection under section 252(f) of the Act.

14. Part 90 of Title 47 of the Code of Federal Regulations (C.F.R.) is amended as follows:

PART 90 - PRIVATE LAND MOBILE RADIO SERVICES

15. The authority citation for Part 90 is revised to read as follows:

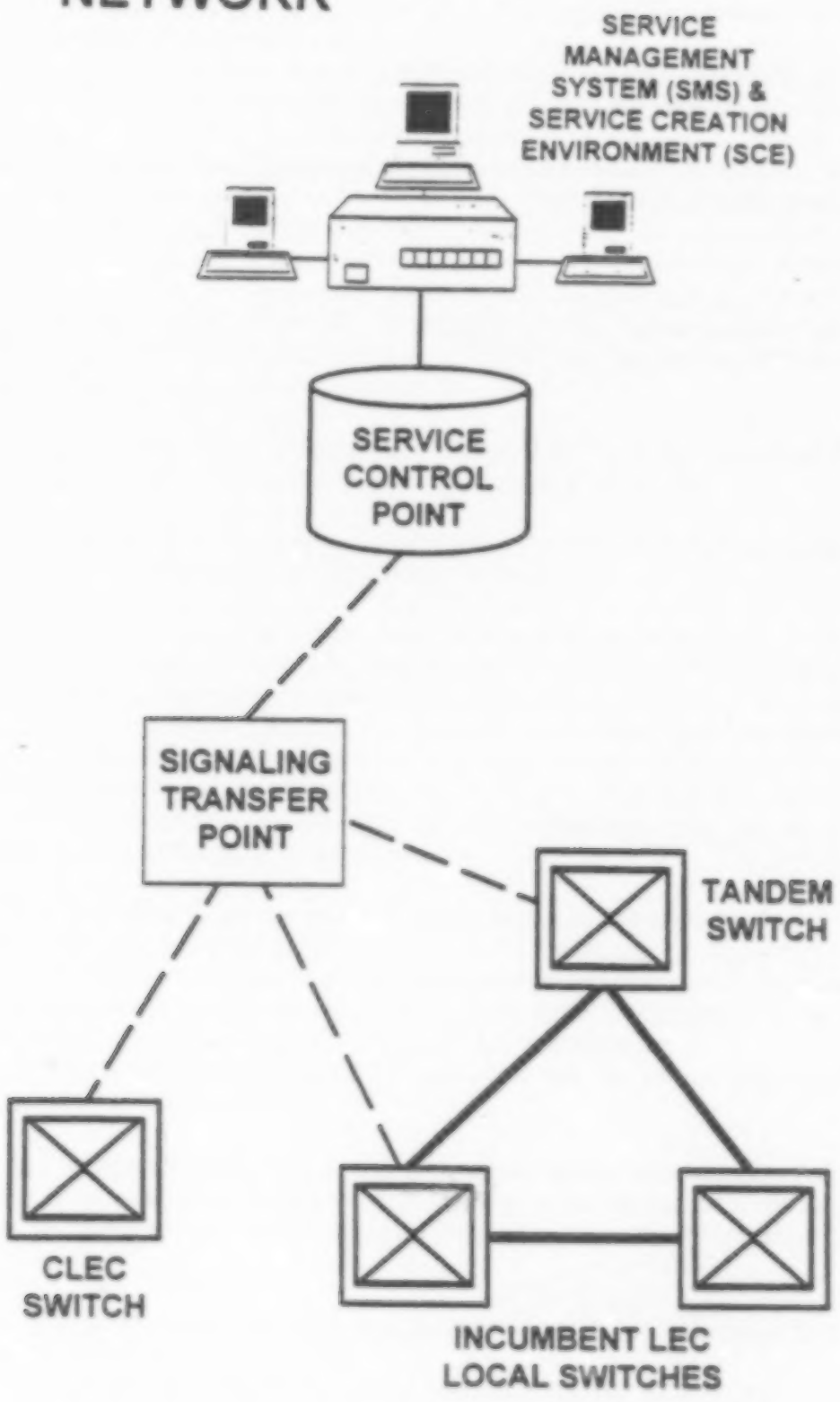
AUTHORITY: Secs. 4, 251-2, 303, 309, and 332, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 251-2, 303, 309 and 332, unless otherwise noted.

16. Section 90.5 is amended by adding paragraph (k) and renumbering the remaining paragraphs to read as follows:

*****

(k) Part 51 contains rules relating to interconnection.
(l) ***
(m) ***

ADVANCED INTELLIGENT NETWORK



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Appendix D
State Proxy Ceilings for the Local Loop

State	Proxy Ceiling	State	Proxy Ceiling
Alabama	$17.25	Montana	$25.18
Arizona	$12.85	Nebraska	$18.05
Arkansas	$21.18	Nevada	$18.95
California	$11.10	New Hampshire	$16.00
Colorado	$14.97	New Jersey	$12.47
Connecticut	$13.23	New Mexico	$18.66
Delaware	$13.24	New York	$11.75
District of Columbia	$10.81	North Carolina	$16.71
Florida	$13.68	North Dakota	$25.36
Georgia	$16.09	Ohio	$15.73
Hawaii	$15.27	Oklahoma	$17.63
Idaho	$20.16	Oregon	$15.44
Illinois	$13.12	Pennsylvania	$12.30
Indiana	$13.29	Puerto Rico	$12.47
Iowa	$15.94	Rhode Island	$11.48
Kansas	$19.85	South Carolina	$17.07
Kentucky	$16.70	South Dakota	$25.33
Louisiana	$16.98	Tennessee	$17.41
Maine	$18.69	Texas	$15.49
Maryland	$13.36	Utah	$15.12
Massachusetts	$9.83	Vermont	$20.13
Michigan	$15.27	Virginia	$14.13
Minnesota	$14.81	Washington	$13.37
Mississippi	$21.97	West Virginia	$19.25
Missouri	$18.32	Wisconsin	$15.94
		Wyoming	$25.11

August 8, 1996

In the Matter of
Implementation of the Local Competition Provisions in
the Telecommunications Act of 1996 (CC Docket No. 96-98)
and
Interconnection between Local Exchange Carriers and
Commercial Mobile Radio Service Providers (CC Docket No. 95-185)

Separate Statement of Chairman Reed E. Hundt

This order is the most pro-competitive action of government since the break-up of the Standard Oil Trust. I hope the whole country will join in common acknowledgement of all those who made this possible.

The private sector was ably represented, and provided us with much useful information and suggestions.

I specifically acknowledge and thank my colleagues, Commissioners Quello, Ness and Chong, and their staffs, all of whom contributed greatly throughout this process.

I would also especially thank Cheryl Parrino, President of the National Association of Regulatory Utility Commissioners. Her advice and counsel have been invaluable. Thanks also go to the two individuals who served as Chair of NARUC's Communications Committee during this period, Ken McClure and Lisa Rosenblum. I also thank the many other state commissioners from around the country who took time to discuss these matters with us, and who sent their staffs here for extended meetings on all these issues. I would also especially thank Chairman Dan Miller of the Illinois Commerce Committee who detailed one of his staff members, Augie Ros, to the FCC.

I owe a special debt of gratitude and respect to John Nakahata, my Senior Legal Adviser. John's brilliant, indefatigable, incisive and comprehensive work was essential to the triumph of analysis and policy that is in this order.

The highest commendations, however, go to the FCC staff, superbly led by Regina Keeney and Richard Metzger. I would like specifically to recognize each of the dedicated members of the Commission's staff who contributed to this effort, and I apologize if I have inadvertently omitted anyone:

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STATEMENT OF
COMMISSIONER JAMES H. QUELLO

August 8, 1996

Re: Interconnection Report and Order

Today marks the end of the pre-competitive era in local telephone service. By our vote today the Commission implements rules that will introduce competition into this last monopoly telecommunications market.

Our Report and Order refers to these rules as the first part of a trilogy that also includes future universal service and access charge reform. This is, to be sure, true. But I must confess that I also see today's action as not the first, but rather the third and final part, of a different trilogy -- one whose first two parts were the introduction of competition into the long-distance telephone market and the divestiture of the Bell Operating Companies from AT&T. These first two events made local telephone competition inevitable; today we usher it in.

Any Commissioner would be privileged to have served during one of these events. I have been lucky enough to have seen all three. From this perspective, then, I would offer several thoughts to the parties most immediately affected by today's decision.

First, to the public, I would say: unparalleled changes in the array of telecommunications services available to you, as well as in the companies that provide them, are going to occur. As competition proliferates and prices fall, economic growth will also occur, and that too will benefit all of us. This is the vision of the 1996 Act, and it is the goal of the rules we adopt today.

To those companies that seek to offer competitive local telephone service, I would say: the rules we adopt today attempt to provide the regulatory assistance you need to enter a market in which your competitor not only possesses a monopoly, but also controls the facilities upon which you must depend to compete. But even so, our rules are pro-competition, not pro-competitor. They are intended to make it possible for you to enter the market on fair and equitable terms, but not to so alter the market that entry occurs even where it otherwise might not. We have opened the door, but we have not paved the way.

To the wireless communications providers, I would say: we have heard and understand your concerns regarding the differences in your technical and market configurations and have, therefore, expressly reserved federal jurisdiction under Section 332. Nevertheless, it is important that our decisions implementing competition be technology-neutral and

provide an opportunity for negotiations under the comprehensive interconnection regime embodied by Congress in Section 251. We will presume good faith negotiations by all but stand ever vigilant to consider and resolve instances of discriminatory treatment.

To our state commission counterparts, I would say: with today's action, we effectively pass you the pen. It is now your responsibility to write the rules and set the prices and terms that will make Congress's vision of competition a reality. To provide added flexibility and to make this process administratively easier, we have also provided ranges of proxy prices that can be used until, or even instead of, state-specific rates are set. Our decision today borrows from and builds on the experience of those of you who are grappling with statewide competition issues. This has, in sum, been a collaborative process. It must continue to be a collaborative process if we are collectively to succeed.

To small telephone companies, I would say: our Report and Order relies largely on state commissions to implement the provisions of the law that ensure that competition will be introduced in a way that is sensitive to your unique circumstances. We cannot, and indeed would not want to, perpetuate what one small company has called a "reasonable, investment-backed expectation to hold competitive advantages over new market entrants." But while we will not guarantee your current profit margins, we are also confident that state decisions will assure that competition in your service areas will take hold in a reasonable manner.

To the Bell Operating Companies and other large independent local telcos, I would say: these rules will bring about competition. You will open your markets to competitors, and in return you will become competitors in other markets. The rules we adopt today will enable you to do both things. What they will not enable you to do is avoid the first, but obtain the second. These rules will bring change, not catastrophe; they will bring opportunity, not oblivion. It will be a different world, but one in which you will continue to play a vital role.

Finally, I must acknowledge that this day would not have come without the tireless dedication and tremendous talents of Gina Keeney and her gifted Common Carrier Bureau staff. The Chairman will, I am sure, commend each of you at length, and I will leave that privilege to him. For my part I want to express my thanks to the entire CCB "Dream Team," and especially to its captain, Richard Metzger. This job could literally not have been done this well in such short time without you, and for that you have my profound respect and appreciation.

August 8, 1996

SEPARATE STATEMENT
OF
COMMISSIONER SUSAN NESS

Re: Implementation of the Local Competition Provisions of the Telecommunications Act of 1996

Today we are fulfilling one of the most important responsibilities assigned to us by the Telecommunications Act of 1996 -- writing the rules that will achieve Congress's vision of fair and robust competition in all telecommunications markets. We are doing so with utmost fidelity to the letter and the spirit of the statute.

At the heart of the legislation is a bold commitment to supplant monopoly with competition. Based on the abundant benefits that have flowed to consumers as a result of competition in the provision of long distance services, information services, and customer-premises equipment, Congress decreed that the opportunity for competition be extended to the local telephone market. It ordered that barriers to entry be swept aside -- and that pathways to competitive entry be opened.

Sections 251 and 252 of the 1996 Act establish the foundation for this competition. On this foundation must be built radically different relationships than those that have previously existed -- between incumbent local exchange carriers and new entrants, between state and federal regulators, and between regulators and industry.

Congress recognizes that, to effectuate a new policy of local competition for markets that have traditionally been protected monopolies, a national policy framework is essential. But it also recognizes the need for flexibility. This balance is reflected in the 1996 Act, which sets forth the key principles in the statute, instructs this Commission to formulate implementing regulations, and assigns many of the duties pertaining to specific carriers and agreements to the state commissions.

At the same time, Congress encouraged voluntary negotiations between incumbent local exchange carriers and new entrants. Although voluntary agreements are not subject to Section 251 and our implementing regulations, we are aware that the negotiations may be influenced by the legislative and regulatory regime for arbitrated agreements. The "backdrop" of our rules should encourage, not impede, the successful negotiation of voluntary agreements.

The 1996 Act intends that the benefits of competition be available in all 50 states, not some lesser number. Congress recognized that some states were already making progress in the introduction of local competition, and it sought to permit that progress to continue. Consistent with the statute, the rules we promulgate today will enable those states in the vanguard to continue on their procompetitive course. Other states are being given the tools necessary to accelerate their progress. All states will have considerable responsibility for effectuating the transition to competition within their own borders.

Our decisions in this proceeding are the product of extensive discussions with state regulators concerning a wide variety of legal, economic, policy, and practical issues. The insights that have been shared with us by state regulators have guided us throughout our deliberations. Maintaining a successful partnership between state and federal regulators will be essential to fulfill the legislative expectations underlying the new structure set out in Sections 251 and 252 of the 1996 Act.

Out duty is to establish rules that are procompetition, not pro-competitor. Competitive access providers, cable companies, interexchange carriers, wireless companies, and others will all bring unique skills and strategies to the new competitive arena. Today's ruling, and the decisions that will follow from the state commissions, will enable all of these entities to compete robustly, and without hindrance based on other entities' entrenched market power.

In today's order, we are also facilitating new entry by identifying a core set of unbundled network elements that new entrants may obtain, singly or in combination, from incumbent LECs, to create new and innovative services. We send correct economic signals to potential entrants by requiring the use of forward-looking pricing principles. We promote voluntary negotiations by establishing minimal rules regarding the duty to bargain in good faith. We are providing immediate relief from CMRS-LEC interconnection agreements that violate fair play and flout our existing rules. In these and other respects, we act forcefully to bring to the local telephone market the dramatic change Congress intended.

Yet we also maintain fair treatment to the incumbent local exchange carriers. They are entitled to fair prices for the services and elements they offer, and our pricing principles accordingly reject costing methods that ignore the LECs' current network architecture or deny recovery of reasonable joint and common costs. The special needs of smaller incumbents, especially rural telcos, must be addressed with extra care, and just as Congress intended, we safeguard them today.

Some have expressed concern about the effect on universal service of flash-cut changes in market rules and pricing principles. We have listened -- and responded. With an abundance of caution, we have established an access charge transition of limited duration that will reduce the exposure of incumbent local exchange carriers to the sudden loss of access charge revenues. But we have also established for the long-term the principle that prices for network elements, transport and termination, and collocation must be based on costs -- not hidden subsidies that distort market forces.

We have committed to expeditious completion of the universal service proceeding, where we must make subsidies explicit and both eligibility and funding must become competitively neutral. On a parallel track, we must complete reform of access charges, to eliminate uneconomic incentives that distort investment decisions. A rational economic structure for all services and elements is vital to sustainable competition.

Only when the universal service, access reform, and interconnection rules are all in effect will local telephone subscribers really begin to see the full benefits of marketplace competition: lower prices, new services, and more choices. As market power wanes, the role of government will diminish as well.

Competition will take time to emerge. Expectations are high, but the reality will inevitably lag behind. As the process unfolds over the coming months and years, there are bound to be unforeseen circumstances, unintended consequences, and efforts to game the process. We will remain vigilant, and will reevaluate and refine our rules as necessary to promote competition that is both robust and fair.

Following the mandate of the Telecommunications Act of 1996, this Commission will not shrink from taking the steps necessary to enable the benefits of competition to reach consumers throughout the nation.

August 8, 1996

Separate Statement of

Commissioner Rachelle B. Chong

Re: In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers, CC Docket No. 95-185; Implementation of Sections 3(n) and 332 of the Communications Act, GN Docket No. 93-252.

The passage of the Telecommunications Act of 1996[1] marked the end of more than sixty years of monopoly style regulation. The changes wrought by the 1996 Act on the telephone industry are dramatic and comprehensive. I write separately to emphasize my strong belief that the pro-competitive path we have unanimously chosen in this interconnection order is the right one.

On the day the 1996 Act became law, the Commission embarked on a challenging journey to help implement the new statute. Our final destination has been clearly delineated by Congress. We are "to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition."[2]

True to this charge, we have resolved to act quickly and decisively to open all telecommunications markets to competition, to provide pricing methodologies that will drive rates toward cost, and to provide a national policy framework that will achieve this restructuring of the industry in an orderly and efficient manner. The rules in this item do not favor any particular industry or player over another, but instead free them from outdated regulatory restraints in order to compete with each other.

The 1996 Act opens up the local telephone network to competitors, and provides them with unprecedented access through an interconnection framework.[3] The Act provides three

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[1] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 *to be codified at* 47 U.S.C. §§ 151 *et. seq.* (1996 Act).

[2] S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 1 (1996).

[3] Interconnection refers to the physical linking of two networks for the mutual exchange of traffic.

methods of entry through which a competitor may enter the local telephone market: (1) full facilities-based entry; (2) purchase of unbundled elements from the incumbent local exchange carrier (LEC), i.e. network "piece parts;" and (3) resale, which gives a competitor the ability to purchase an incumbent LEC's retail service at a wholesale price and repackage it for sale to the competitor's own end user.

Facilities-based Competition. The first entry option -- facilities-based competition -- represents the most dramatic departure from our current bottleneck monopoly structure. A full facilities-based competitor would offer a myriad of distinct services through separate facilities to its subscribers, and thus providing consumers with the benefits of head-to-head competition. As a practical matter, however, we do not expect a market typified by full-fledged facilities-based competition to blossom overnight. These networks or systems must be planned, financed and constructed over time. As a result, the other two entry avenues -- the purchase of unbundled elements and resale -- take on a special importance in the near term to bring swift competition to the local marketplace.

Unbundled Elements. Some new entrants already have some network infrastructure in place, and lack only a few critical components in order to provide local exchange service to consumers. For example, today's cable operators have a coaxial wire that passes over 96.6% of the TV households in America.[4] If a cable operator can access the remaining necessary network elements from the incumbent LEC, the cable operator would be only a step away from providing local telephone service over its upgraded network. This example points out why it is essential for new entrants to obtain access to those network piece parts. In our order, we set forth a minimum list of unbundled network elements that incumbent LECs uniformly must make available to new entrants upon request. The state commissions may expand upon this list. We believe that this action will give new entrants what they need so competition is "jump started."

Resale. Resale is another critically important entry strategy because three types of new entrants stand to benefit. First, facilities-based competitors that want to immediately enter the market prior to completing their own networks can use resale as a transition mechanism. Second, facilities-based competitors whose existing infrastructure does not overlap the incumbent LEC's service area, may choose to use resale to ensure that it can offer a competing local service package within the same service territory as the incumbent LEC. Third, new entrants who do not intend to offer facilities-based competition will be able to compete immediately in the local market by purchasing discounted services of the incumbent LEC. For all of these categories, our decision provides a viable avenue for immediate market entry.

Free Market Negotiations. I highlight that the 1996 Act has made the mechanism for entry a *free market* negotiation process between the incumbent LEC and any potential new

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[4] Paul Kagan Associates, Inc., *Marketing New Media*, Mar. 18, 1996.

competitor. Under Section 252(a)(1), the Commission's Section 251 rules play no role if an incumbent LEC and a new entrant reach a purely voluntary agreement, and the state commission approves it through the process set forth in Section 252.

Need for Minimum National Baselines. It is only if the carriers are unsuccessful in their voluntary negotiations that government steps in. The Act provides that the state commissions arbitrate the disputes. In today's order, we set forth a baseline of terms and conditions for an arbitrated interconnection agreement. I support this action for three reasons. First, because interconnection matters are very complex and technical, I believe that minimum national guidelines will help parties lower their transaction costs and will help drive them to reach their voluntary agreements much faster. At the outset of their voluntary negotiations, parties will understand what their minimum rights will be in a subsequent state commission arbitration process; it is our hope this may encourage earlier agreement.

Second, a baseline of terms and conditions simplifies the state commission arbitration process. A baseline enables a state commission to quickly approve an agreement and thus rapidly introduce competition. The presence of a baseline minimizes any regulatory delay that might result if a state commission were to establish from scratch its own pricing methodology or conduct a proceeding to identify network elements that must be unbundled.

Third, in establishing some national minimum baselines, we greatly aid new entrants who have national or regional strategies. Without such baselines, these competitors would face a "patchwork quilt" of differing state regulatory requirements that may create a potential entry barrier by increasing their entry costs and causing substantial delay. Thus, it is my view that these baselines promote swift competitive entry, which in turn will lead to the earlier introduction of competitive services to consumers.

Access Charge Transition. Although we take a great leap forward toward competition with this interconnection order, our goal in making local telephone competition a reality will not be complete until we finish universal service reform and restructure our current access charge regime. Our order notes that the Act sets forth a specific time frame by which the Commission must issue final rules as to interconnection (August 1996) and universal service reform (May 1997). Because of the time differential between these dates, and in order to avoid undue disruption of the incumbent LECs' ability to support universal service, I have supported our decision to require new entrants when purchasing unbundled elements to pay a portion of certain access charges until no later than June 30, 1997. My support for the establishment of a short term access charge transition scheme is premised on the Commission's firm commitment to complete universal service and access charge reform by the first half of 1997. I underscore my determination that the interim access charge mechanism proposed herein is of a finite duration. I can foresee no circumstance upon which it would be extended beyond the dates set forth in our order.

Pricing Methodology. Prices of interconnection and unbundled elements, along with prices for transport and termination and resale, are all crucial to any interconnection

agreement. Again, should the parties voluntarily agree on such prices, these agreements will be submitted to the states for approval and there is no government intervention in the process

If carriers cannot agree, however, today's decision makes clear that the FCC will *not* set these prices. The Act provides that the appropriate state commission will step in to set prices. To help guide state commissions as they set prices according to local conditions, we have established methodological pricing principles that are consistent with the Act's cost-based pricing provisions. We have asked the state commissions to use the cost-based pricing methodology described in our order when they conduct an economic cost study to set their state specific rates. A clear benefit of this approach is that such a national framework will encourage the swift establishment of a common, pro-competition understanding of pricing principles among the states.

We also have established certain default proxies that states will use in the interim, if they have not completed a cost study during an arbitration, or if they lack the necessary resources to initiate their own cost study. It is my view that these default proxies, which are either price ceilings or price ranges, will greatly speed competition. For example, in a situation where the state commission has not yet completed a cost study but must render a decision on specific pricing issues in an arbitration pursuant to the deadline imposed by Section 252(e)(4), the default proxies will assist the state commission in resolving the pricing issues quickly and in a way consistent with the Act's cost-based pricing principles.

I emphasize that a state commission has the flexibility to set a specific rate that is either above or below the default proxy ceiling or range if it has conducted its own cost study consistent with the pricing methodology set forth in our order. The default proxy is only an interim mechanism and it may not be relied upon once a state commission has completed its own economic cost study.[5]

CMRS-LEC Interconnection Issues. In our order, I have supported our decision to allow CMRS-LEC interconnection matters to be governed by the Sections 251/252 provisions, while continuing to acknowledge our continuing jurisdiction pursuant to Section 332 over CMRS-LEC interconnection matters. In doing so, we have declined to opine on the precise extent of our Section 332 jurisdiction over CMRS-LEC interconnection matters, however. I emphasize that by opting to use the Section 251/252 framework, we are not repealing our Section 332 jurisdiction by implication or rejecting Section 332 as an alternative basis for jurisdiction.

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[5] It is unfortunate that we did not have enough of a record in this proceeding to decide what would be an appropriate proxy for paging carriers' termination costs or to set a default proxy. I am committed to moving forward with a further rulemaking proceeding on this issue as quickly as possible.

While we have generally crafted our interconnection rules not to favor any particular industry, player or technology over another, we cannot shut our eyes to inherent differences between some classes of carriers' services that may pose potential problems when we seek to apply our new interconnection rules. I believe that should the need arise in the future, we should not hesitate to adapt some of our general interconnection rules to recognize the unique nature of particular classes of service providers, such as CMRS providers. It is for this reason that I supported the Commission's decision to reserve its right to exercise jurisdiction over LEC-CMRS interconnection under Section 332.

There are several differences that set wireless CMRS providers apart from some of the other telecommunications carriers that will avail themselves of the Sections 251 and 252 interconnection framework. First, when adopting Section 332 in 1993, Congress created a national regulatory framework for CMRS providers, and granted the FCC authority to preempt states from entry and rate regulation. Congress made clear that its intent was to "foster the growth and development of mobile services that, by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure."[6] This recognition that CMRS services are uniquely interstate in scope was apt. CMRS service areas, which are established federally, can encompass more than one state jurisdiction.[7] Congress was rightly concerned that imposing multiple state regulatory schemes on CMRS providers may prove unduly burdensome, cause delay, and otherwise inhibit the industry's growth. Notably, Congress did not repeal Section 332 when it provided new Sections 251 and 252 in the 1996 Act.

Second, CMRS providers have suffered past discrimination at the hand of the LECs and by certain state commissions with regard to interconnection matters. Today's record is replete with examples of LECs that have significantly overcharged CMRS providers for past interconnection. Further, in violation of our rules, our record reflects that in some cases, LECs have refused to pay CMRS providers for calls terminated by LECs on the CMRS networks, while other wireline carriers have received such compensation from the LECs. In

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[6] H.R. Report No. 103-11, 103rd Cong., 1st Sess. 260 (1993).

[7] For example, Personal Communications Service (PCS) providers in the Washington - Baltimore Major Trading Area (MTA) are subject to six jurisdictions -- Pennsylvania, Delaware, Maryland, Virginia, West Virginia and the District of Columbia -- due to the large size and location of the federally set service areas. Should one of these PCS providers need to arbitrate an interconnection agreement pursuant to Section 251 and 252, such PCS provider could be subjected to as many as *six* state arbitration proceedings. This scenario could impose undue burdens, such as increased transaction costs, regulatory delay, and the potential for inconsistent results, for CMRS providers with interstate service areas. For this reason, we reserve our right to in the future to use Section 332 as an alternative basis for jurisdiction over CMRS providers faced with this type of a dilemma.

other instances. LECs have required certain CMRS providers to pay for the traffic the LEC carrier originates and terminates on the systems of the CMRS provider. These problems have been compounded by certain state commissions who have limited access by CMRS providers to more reasonable interconnection rates afforded by LECs to other wireline carriers.

In this order, we have taken a variety of measures to remedy this discrimination and to ensure that CMRS providers are placed on an even footing with other telecommunications carriers when obtaining LEC interconnection. I am particularly pleased that we will allow CMRS providers with current interconnection agreements that provide for non-mutual compensation an opportunity to renegotiate those agreements under the framework of Sections 251/252, without incurring any early termination penalties. In light of the past discrimination CMRS providers have experienced, however, I would have taken two additional steps.

First, I would have extended the "fresh look" opportunity to all CMRS providers -- not just those with non-mutual compensation arrangements. Our decision was to limit relief in this instance to contracts that are clearly unlawful because they violate Section 20.11 of our rules. Section 20.11, however, requires not only that CMRS-LEC interconnection agreements comply with principles of mutual compensation, but also that each carrier pay *reasonable* compensation. I believe that the record in this proceeding clearly demonstrates that the rates the LECs have charged CMRS providers have far exceeded their costs and thus could not fairly be characterized as "reasonable" compensation.

Second, instead of requiring the CMRS providers to continue paying their current interconnection rates, I would have permitted CMRS providers to immediately begin paying the default proxy rate while their interconnection arrangements were being renegotiated.

It is my hope that on a going-forward basis, CMRS providers will be able to obtain fair, reasonable and non-discriminatory interconnection rates under the terms of today's decision. For reasons of simplicity and regulatory parity, it makes sense to me to have a single regulatory scheme pursuant to Sections 251 and 252 apply as to all incumbent LEC interconnection matters. Bearing in mind Congress' concerns about the interstate nature of the CMRS industry, however, I have concerns that the state-by-state arbitration process may pose undue burdens on, or otherwise hinder the growth of, the CMRS industry. If it does, I would not hesitate to invoke our Section 332 jurisdiction if I believe that the framework we impose today is having adverse impacts on the CMRS industry.

EDITOR'S NOTE

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

AT&T CORP., *et al.*,
Petitioners,
v.
IOWA UTILITIES BOARD, *et al.*,
Respondents.

AT&T CORP., *et al.*,
Petitioners,
v.
CALIFORNIA, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Eighth Circuit

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I. INTRODUCTION AND OVERVIEW

1. In February, 1996, Congress passed and the President signed into law, the Telecommunications Act of 1996 (1996 Act).[1] The 1996 Act erects a "procompetitive, de-regulatory national framework designed to accelerate rapid private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition."[2] Section 101 of the 1996 Act adds new section 251 to the Communications Act of 1934. Congress intended that the provisions of this new section would help competition grow in the market for exchange and exchange access and related telecommunications services. It directed the Commission to adopt rules that would implement the requirements of this section no later than August 8, 1996.[3] We note, however, that, under section 251(f), certain rural or small local exchange carriers (LECs) are exempt or may seek relief from the rules we adopt herein.[4]

2. We began this rulemaking proceeding on April 19, 1996.[5] The *First Report and Order*, which addressed issues that were raised in this docket, decided that the Commission should establish national rules implementing section 251.[6] The *First Report and Order* interprets and implements, *inter alia*, section 251(a), (b)(1), (b)(4), (b)(5), (c)(1), (c)(2), (c)(3), (c)(4), and (c)(6). That order promulgates rules to open the local exchange and exchange access markets to competition by eliminating legal and technical barriers to such competition. This *Second Report and Order and Memorandum Opinion and Order* (*Order*) promulgates rules to implement the parts of section 251 that relate to the elimination of certain operational barriers to competition. Specifically, this *Order* addresses local exchange carriers' obligations to provide their competitors with dialing parity and nondiscriminatory access to certain services and functionalities;[7] incumbent local exchange carriers' duty to make

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[1] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (1996 Act), to be codified at 47 U.S.C. § 151 *et. seq.*

[2] S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 1 (1996).

[3] 47 U.S.C. § 251(d)(1).

[4] 47 U.S.C. § 251(f)(1) and (f)(2). We note that the term "United States" means "the several States and Territories, the District of Columbia, and the possessions of the United States, but does not include the Canal Zone." 47 U.S.C. § 153(50).

[5] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Notice of Proposed Rulemaking, CC Docket No. 96-98, FCC 96-182 (rel. April 19, 1996) (*NPRM*).

[6] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, *Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket No. 95-185, First Report and Order, FCC 96-235 (rel. Aug. 8, 1996) (hereinafter *First Report and Order*) at section II.

[7] 47 U.S.C. § 251(b)(3).

network information disclosures;[8] and numbering administration.[9] In this *Order* we also deny the Petition for Expedited Declaratory Ruling on the area code relief plan for Dallas and Houston that the Texas Public Utility Commission (Texas Commission) filed with this Commission on May 9, 1996.[10] We also address petitions for clarification or reconsideration in the *Ameritech* and *NANP* proceedings.[11]

3. Dialing parity, nondiscriminatory access, network disclosure, and numbering administration issues are critical issues for the development of local competition. As stated in the *First Report and Order*, incumbent local exchange carriers have little incentive to provide access to potential competitors to their networks. In other words, potential competitors in the local and long distance markets face numerous operational barriers to entry notwithstanding their legal right to enter such markets. The dialing parity, nondiscriminatory access, and network disclosure requirements should remove those barriers to entry. The rules we adopt herein will benefit consumers by making some of the strongest aspects of local exchange carrier incumbency -- the local dialing, telephone numbers, operator services, directory assistance, and directory listing -- available to all competitors on an equal basis.

A. Actions to Implement Section 251(b)(3)

1. Dialing Parity

4. Section 251(b)(3) of the 1996 Act directs each local exchange carrier (LEC)[12] to provide dialing parity to competing providers of telephone exchange and telephone toll

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[8] 47 U.S.C. § 251(c)(5).

[9] 47 U.S.C. § 251(e)(1).

[10] *In the Matter of Area Code Relief Plan for Dallas and Houston, Ordered by the Public Utility Commission of Texas*, Petition for Expedited Declaratory Ruling filed May 9, 1996.

[11] *See In the Matter of Proposed 708 Relief Plan and 630 Numbering Plan Area Code by Ameritech - Illinois*, IAD File no. 94-102, Declaratory Ruling and Order, 10 FCC Rcd 4596 (1995) (*Ameritech Order*) and *Administration of the North American Numbering Plan*, CC Docket No. 92-237, Report and Order, 11 FCC Rcd 2588, 2591 (1995) (*NANP Order*).

[12] The 1996 Act defines the term "local exchange carrier" as "any person that is engaged in the provision of telephone exchange service or exchange access. Such term does not include a person insofar as such person is engaged in the provision of commercial mobile service under section 332(c), except to the extent that the Commission finds that such provider should be included in the definition of such term." 47 U.S.C. § 153(26). For purposes of the dialing parity and nondiscriminatory access obligations that we impose pursuant to section 251(b)(3), we find that commercial mobile radio service (CMRS) providers are not LECs. *See infra* para. 29.

service.[13] This requirement means that customers of these competitors should not have to dial extra digits to have their calls routed over that LEC's network. To implement this statutory requirement, we adopt broad guidelines and minimum federal standards that build upon the experiences and accomplishments of state commissions. Although the 1996 Act requires a LEC to provide dialing parity only to providers of telephone exchange and toll services, section 251(b)(3) does not limit the type of traffic or service for which dialing parity must be afforded to those providers. We conclude, therefore, that section 251(b)(3) requires LECs to provide dialing parity to providers of telephone exchange or toll service with respect to all telecommunications services that require dialing to route a call and encompasses international, interstate, intrastate, local and toll services.

5. With respect to toll service, we further find that section 251(b)(3) requires, at a minimum, that customers be entitled to choose different presubscribed, or preselected, carriers for both their intraLATA and interLATA toll calls. In states, like Alaska and Hawaii, that have no LATAs,[14] customers must be able to choose different presubscribed carriers for both their intrastate and interstate toll calls. Based on this finding, we adopt a rule requiring all LECs to implement intraLATA and interLATA toll dialing parity, using the "full 2-PIC" presubscription method.[15] The toll dialing parity requirement we adopt is defined by LATA boundaries given that the Bell Operating Companies' (BOCs') operations are likely to be shaped by LATA boundary restrictions for a period of unforeseeable duration. Given that implementation of the 1996 Act over time may diminish the significance of LATA boundaries, however, we permit states to redefine the toll dialing parity requirement based on state, rather than LATA, boundaries where a state deems such a requirement to be pro-competitive and otherwise in the public interest.[16]

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[13] According to the 1996 Act, the term "dialing parity" means "that a person that is not an affiliate of a local exchange carrier is able to provide telecommunications services in such a manner that customers have the ability to route automatically, without the use of any access code, their telecommunications to the telecommunications services provider of the customer's designation from among 2 or more telecommunications services providers (including such local exchange carrier)." 47 U.S.C. § 153(15).

[14] 47 U.S.C. §153(25). According to the 1996 Act, a LATA is a "local access and transport area." It is a "contiguous geographic area–

(A) established before the date of enactment of the Telecommunications Act of 1996 by a Bell operating company such that no exchange area includes points within more than 1 metropolitan statistical area, consolidated metropolitan statistical area, or State, except as expressly permitted under the AT&T Consent Decree; or

(B) established or modified by a Bell operating company after such date of enactment and approved by the Commission."

[15] We note that the abbreviation "PIC" in the past has stood for the term "primary," or "preferred, interexchange carrier." While we retain the acronym "PIC," we define the term to include any toll carrier for purposes of the presubscription rules that we adopt in this *Order*. For a discussion of the full 2-PIC presubscription methodology, *see infra* section II.B(4).

[16] To illustrate, if the presubscription requirement were based on LATA boundaries, a customer would be entitled to choose a primary carrier for all intraLATA toll calls and a separate, or the same, primary carrier for all interLATA toll calls. If the presubscription requirement were based on state boundaries, a customer would be

6. In order to facilitate the orderly implementation of toll dialing parity, we require each LEC, including a BOC, to submit a plan to the state regulatory commission for each state in which it provides telephone exchange service setting forth the LEC's plan for implementing toll dialing parity, including the methods it proposes to enable customers to select alternative providers. In the event that a state elects not to evaluate such a plan sufficiently in advance of the date on which a LEC is required to implement toll dialing parity, we require the LEC to file its plan with the Commission. The Commission will act upon such a plan within 90 days of the date on which it is filed with the Commission.

7. Under the toll dialing parity implementation schedule we adopt, we require each LEC, including a BOC, to implement toll dialing parity no later than February 8, 1999. In addition, we require a LEC, including a BOC, to provide toll dialing parity throughout a state coincident with its provision of in-region, interLATA or in-region, interstate toll services in that state. LECs, other than BOCs, that are either already offering or plan to begin to provide in-region, interLATA or in-region, interstate toll services before August 8, 1997, must implement toll dialing parity by August 8, 1997. We note that smaller LECs, for which this implementation schedule may be unduly burdensome, may petition their state commission for a suspension or modification of the application of this requirement.[17]

8. Those states desiring to impose more stringent presubscription methodologies, *e.g.*, multi-PIC or smart-PIC,[18] will retain the flexibility to impose such additional requirements. We also announce our intention to issue a Further Notice of Proposed Rulemaking addressing the technical feasibility and nationwide availability of a separate presubscription choice for international calling based on the use of multi-PIC or smart-PIC technologies.

9. Pursuant to the local dialing parity requirements of section 251(b)(3), we require a LEC to permit telephone exchange service customers, within a defined local calling area, to dial the same number of digits to make a local telephone call, notwithstanding the identity of the customer's or the called party's local telephone service provider. We decline at this time to prescribe additional guidelines to address the methods that LECs may use to accomplish local dialing parity given our finding that local dialing parity will be achieved upon implementation of the number portability and interconnection requirements of section 251, as well as the provisions requiring nondiscriminatory access to telephone numbers found in section 251(b)(3).

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entitled to choose a primary carrier for all intrastate toll calls and a separate, or the same, primary carrier for all interstate toll calls.

[17] 47 U.S.C. § 251(f)(2).

[18] The multi-PIC or smart-PIC presubscription method would enable subscribers to select multiple carriers for various categories of toll traffic. For a discussion of multi-PIC and smart-PIC presubscription methodologies, *see infra* section II.B(4).

10. We also decline to adopt federal consumer education programs or procedures that would inform consumers of the existence of competitive telecommunications providers. Instead, we leave decisions regarding consumer education and carrier selection procedures to the states. We conclude that, in order to ensure that dialing parity is implemented in a pro-competitive manner, national rules are needed for the recovery of dialing parity implementation costs.

11. Section 271 of the 1996 Act requires BOCs to provide intraLATA toll dialing parity throughout a state coincident with the exercise of their authority to offer interLATA services originating within the state.[19] BOC entry into the interLATA market is conditioned upon their offering "nondiscriminatory access to such services or information as are necessary to allow the requesting carrier to implement local dialing parity in accordance with the requirements of Section 251(b)(3)."[20]

2. Nondiscriminatory Access

12. Section 251(b)(3) also requires all LECs to permit competing providers of telephone exchange service and toll service "nondiscriminatory access to telephone numbers, operator services, directory assistance and directory listings."[21] We conclude that "nondiscriminatory access," as used in section 251(b)(3), encompasses both: (1) nondiscrimination between and among carriers in rates, terms and conditions of access; and (2) the ability of competing providers to obtain access that is at least equal in quality to that of the providing LEC. This definition of "nondiscriminatory access" in section 251(b)(3) recognizes the more general application of that section to all LECs, whereas section 251(c) places more specific duties upon incumbent LECs in terms of nondiscriminatory access. We conclude that the term "nondiscriminatory access to telephone numbers" requires all LECs to permit competing providers access to telephone numbers that is identical to the access the LEC provides to itself.

13. We conclude that the term "operator services," for purposes of section 251(b)(3), means any automatic or live assistance to a consumer to arrange for billing or completion, or both, of a telephone call. Such a definition includes busy line verification, emergency assistance, operator-assisted directory assistance, and any other such services used to arrange for the billing and/or completion of telephone calls. We further conclude that any customer of a telephone service provider that provides operator services should be able to obtain these services by dialing "0" or "0-plus the desired telephone number." If a dispute arises regarding

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[19] 47 U.S.C. § 271(e)(2)(A).

[20] 47 U.S.C. § 271(c)(2)(B)(xii). We decline to address section 271(c)(2)(B) issues in this *Order*. We will consider each BOC's application to enter in-region, interLATA services pursuant to section 271(c)(2)(B) on a case-by-case basis to determine whether the BOC has complied with section 271(c)(2)(B)(xii).

[21] 47 U.S.C. § 251(b)(3).

a competitor's access to operator services, the burden will be upon the providing LEC to demonstrate, with specificity, that it has permitted nondiscriminatory access and that any disparity is not caused by network elements within its control. To the extent that operator services use any information services and adjuncts that are not "telecommunications services," of which resale is required under 251(b)(1), LECs are required to make available such services to competing providers in their entirety as a requirement of nondiscriminatory access under 251(b)(3).[22] Finally, we find that the refusal of a LEC providing nondiscriminatory access to comply with reasonable requests of competing providers to "brand" resold operator services as those of the reseller, or to remove its brand, creates a presumption that the LEC is unlawfully restricting access to operator services.

14. We conclude that the requirement in section 251(b)(3) of nondiscriminatory access to directory assistance means that LECs that provide directory assistance must permit access to this service to competing providers that is at least equal in quality to the access that the LEC provides to itself. We impose obligations upon all LECs to satisfy the requirement of nondiscriminatory access to directory listings. If a LEC provides directory assistance, that LEC must permit competing providers to have access to its directory assistance, so that any customer of a competing provider can access any listed number on a nondiscriminatory basis, notwithstanding the identity of the customer's local service provider. Further, we require LECs to share directory listings with competing service providers, in "readily accessible" tape or electronic formats, upon request, and in a timely manner. To the extent that all or part of directory assistance services are not "telecommunications services," of which resale is required under 251(b)(1), LECs must make available such services in their entirety as part of their obligation to permit nondiscriminatory access to competing providers.[23] This requirement thus extends to any information services and adjuncts used to provide directory assistance. Finally, as with the branding of resold operator services, we find that the refusal of a LEC providing nondiscriminatory access to directory assistance to "brand" resold directory assistance services as those of the reseller, or to remove its brand, creates a presumption that the LEC is unlawfully restricting access to directory assistance.

15. We also conclude that section 251(b)(3)'s requirement of nondiscriminatory access and its prohibition of unreasonable dialing delays applies to both the provision of local and toll dialing parity. We conclude that the dialing delay experienced by customers of a competing provider should not be greater than that experienced by customers of a LEC providing dialing parity or nondiscriminatory access, for identical calls or call types. Finally, we conclude that the statutory obligation to avoid unreasonable dialing delays places a duty on LECs that provide dialing parity, or nondiscriminatory access to operator services or directory assistance, to process all calls from competing providers on the same terms as calls from its own customers.

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[22] *Id.*

[23] *Id.*

B. Actions to Implement Section 251(c)(5)

16. In addition to the duties imposed by section 251(b)(3) on all LECs, new section 251(c)(5) imposes upon incumbent LECs the duty to "provide reasonable public notice of changes in the information necessary for the transmission and routing of services using that local exchange carrier's facilities or networks, as well as of any other changes that would affect the interoperability of those facilities or networks."[24] We adopt broad guidelines to implement section 251(c)(5). We also specify how public notice must be made whenever an upcoming change may affect the way in which a competing service provider transmits, routes, or otherwise provides its services.

17. We conclude that "information necessary for transmission and routing" in section 251(c)(5) means any information in the incumbent LEC's possession that affects a competing service provider's performance or ability to provide either information or telecommunications services. We define "interoperability" as the ability of two or more facilities, or networks, to be connected, to exchange information, and to use the information that has been exchanged.

C. Actions Taken to Implement Section 251(e)

18. New section 251(e)(1) restates the Commission's authority over matters relating to the administration of numbering resources by giving the Commission "exclusive jurisdiction over those portions of the North American Numbering Plan that pertain to the United States."[25] This section also requires the Commission to "create or designate one or more impartial entities to administer telecommunications numbering and to make such numbers available on an equitable basis."[26] Finally, section 251(e)(2) provides that the cost of establishing telecommunications numbering administration arrangements "shall be borne by all telecommunications carriers on a competitively neutral basis as determined by the Commission."[27] In this *Order*, we address whether further action is required to create or designate an impartial entity to administer telecommunications numbering. We clarify the states' role in number administration, and provide direction to states wishing to use area code overlay plans. We also clarify how cost recovery for numbering administration will occur. We deny the petition for expedited declaratory ruling filed by the Texas Commission based on

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[24] An incumbent LEC, with respect to an area, is defined under the 1996 Act as "the local exchange carrier that: (A) on the date of enactment of the Telecommunications Act of 1996, provided telephone exchange service in such area; and (B)(i) on such date of enactment, was deemed to be a member of the exchange carrier association pursuant to section 69.601(b) of the Commission's regulations (47 C.F.R. 69.601(b)); or (ii) is a person or entity that, on or after such date of enactment, became a successor or assign of a member described in clause (i)." 47 U.S.C. § 251(h)(1).

[25] 47 U.S.C. § 251(e)(1).

[26] *Id.*

[27] 47 U.S.C. § 251(e)(2).

our finding that the Texas Commission's wireless-only area code overlay plan violates the guidelines set forth in our *Ameritech Order*. We authorize Bellcore and the incumbent LECs to perform number administration functions as they did prior to the enactment of the 1996 Act until such functions are transferred to the new North American Numbering Plan Administrator.

19. We conclude that we have taken appropriate action to designate an impartial number administrator pursuant to section 251(e)(1). We further conclude that the Commission should retain its authority to set policy with respect to all facets of numbering administration to ensure the creation of a nationwide, uniform system of numbering that is essential to the efficient delivery of interstate and international telecommunications services and to the development of a competitive telecommunications services market. While we retain this policy-making authority, we authorize the states to resolve matters involving implementation of new area codes subject to the guidelines set forth in this *Order*.

20. In this *Order*, we also prohibit the use of service-specific or technology-specific area code overlay plans. States may employ all-services overlays only if they also mandate 10-digit dialing for all local calls within the area affected by the area code change and ensure the availability of at least one central office code in the existing area code to every entity authorized to provide local exchange service in that area, including CMRS providers.

21. To fulfill the mandate of section 251(e)(2), we require that (1) only "telecommunications carriers," as defined in Section 3(44) of the 1996 Act, shall contribute to the costs of numbering administration;[28] and (2) that such contributions shall be based on each contributor's gross revenues from its provision of telecommunications services reduced by all payments for telecommunications services and facilities that have been paid to other telecommunications carriers.

II. DIALING PARITY REQUIREMENTS

A. In General

22. With dialing parity a telephone customer can preselect any provider of telephone exchange service or telephone toll service without having to dial extra digits to route a call to that carrier's network. Until now, in most states, telephone customers wishing to have their intraLATA toll calls carried by a carrier other than their current provider of telephone exchange service had to dial a five- or seven-digit prefix or access code before dialing the

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[28] The term "telecommunications carrier" means "any provider of telecommunications services, except that such term does not include aggregators of telecommunications services (as defined in section 226). A telecommunications carrier shall be treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunications services, except that the Commission shall determine whether the provision of fixed and mobile satellite service shall be treated as common carriage." 47 U.S.C. § 153(44).

called party's telephone number.[29] Presubscription to a carrier other than a customer's telephone exchange service provider has not been an option for *interstate*, intraLATA toll calls or in most states for *intrastate*, intraLATA toll calls.[30] In states where intrastate, intraLATA toll dialing parity is available, a customer may presubscribe to a carrier other than his or her provider of telephone exchange service and have all of that customer's intrastate, intraLATA toll calls carried by that selected carrier simply by dialing "1" plus the area code and telephone number of the called party.[31] The section 251(b)(3) dialing parity obligation will foster vigorous local exchange and long distance competition by ensuring that each customer has the freedom and flexibility to choose among different carriers for different services without the burden of dialing access codes.

1. The Need for Minimum Nationwide Dialing Parity Standards

a. Background and Comments

23. Section 251(b)(3) imposes on all LECs the "duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service."[32] In the *NPRM*, we sought comment on whether the Commission should adopt nationwide dialing parity standards and, if so, what those standards should be.[33]

24. A majority of commenters urge the Commission to adopt uniform nationwide dialing parity guidelines, but commenters differ on how detailed such federal rules should be. For example, the Telecommunications Resellers Association maintains that specific national standards are needed to ensure that competing providers are able to utilize common network designs in multiple markets and to prevent incumbent LECs from "gaming" or "manipulating

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[29] Sometimes referred to as "10XXX" or "101XXXX" dialing, callers may reach a long distance carrier in states where such dialing arrangements are authorized by dialing a five-digit carrier access code ("10XXX," with "XXX" representing a three-digit carrier identification code) or a seven digit carrier access code ("101XXXX," with "XXXX" representing a carrier identification code).

[30] An "interstate, intraLATA toll call" is a call that: (1) crosses a state boundary but does not cross a LATA boundary; and (2) is subject to a charge. A call from Philadelphia, Pennsylvania to Cherry Hill, New Jersey (currently handled by Bell Atlantic) is an example of such a call.

[31] It is our understanding that some form of intraLATA toll dialing parity is available or has been ordered in Alaska, Arizona, Connecticut, Florida, Georgia, Illinois, Kentucky, Michigan, Minnesota, New Jersey, New York, Ohio, Pennsylvania, West Virginia, Wisconsin and Wyoming. *See Ex parte* letter from Charles D. Cosson, USTA, to William F. Caton, Acting Secretary, Federal Communications Commission, filed in CC Docket No. 96-98, July 10, 1996, at 2.

[32] 47 U.S.C. § 251(b)(3).

[33] *NPRM* at paras. 206, 207, 209-213, 218, 219.

the processes" of the states.[34] Ameritech urges the Commission to adopt "broad rules that afford sufficient flexibility to accommodate local conditions."[35] Other commenters, such as Bell Atlantic, opposing the adoption of federal dialing parity standards, assert that the proponents of such standards have failed to demonstrate how they or consumers have been harmed by "locally tailored implementation" of dialing parity in the intraLATA toll markets. Without such a demonstration, argues Bell Atlantic, the Commission should not interfere with states' activities.[37] Cincinnati Bell Telephone Company (CBT) likewise opposes federal standards, maintaining that so long as a state regulatory commission adopts a toll dialing parity arrangement that "offers consumers a choice from at least two carriers, one of which is the local exchange carrier, the requirements of the 1996 Act have been met."[38]

b. Discussion

25. We conclude that the purpose of the statutory dialing parity requirements -- to facilitate the introduction of competition in the local and toll markets -- is best served by the adoption of broad guidelines and minimum federal standards that build upon the states' experiences. We conclude that such minimum nationwide standards will facilitate competition to the extent that new entrants seeking to offer regional or national services will not be subjected to an array of differing state standards and timetables.[39] We note that our conclusion to adopt nationwide dialing parity standards is consistent with our conclusion in the *First Report and Order* that nationwide standards to implement other section 251 provisions are necessary to facilitate competition by serving as a backdrop against which interconnection negotiations and arbitration can occur.[40] We are persuaded that, contrary to the views of Bell Atlantic, the failure to adopt minimum federal standards would harm both new entrants and consumers by delaying the introduction of competition and imposing additional costs on competitors, including small entities, particularly when different network configurations are required in each market. We conclude that uniform standards -- in some cases minimum, uniform standards -- will speed competitive entry by more promptly opening the local and toll markets to competition.

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[34] Telecommunications Resellers Association reply at 8-9.

[35] Ameritech reply at *i*.

[36] Bell Atlantic reply at 2.

[37] *Id.*

[38] CBT comments at 5.

[39] We note that section 271(e)(2)(B) precludes most states from requiring a BOC to implement intraLATA toll dialing parity in a state before the BOC has received authority to provide in-region, interLATA services in such state or before three years after enactment of the 1996 Act, whichever is earlier. 47 U.S.C. § 271(e)(2)(B).

[40] *See First Report and Order* at section II.

2. Scope of the Dialing Parity Requirements

a. Background

26. Under section 251(b)(3) a LEC must provide dialing parity only to competing providers of telephone exchange service and telephone toll service.[41] The scope of the obligation to provide dialing parity, however, is not limited to a particular type of traffic or service. Section 251(b)(3) makes no distinction among international, interstate and intrastate traffic for purposes of the dialing parity provisions.[42] The statutory definition of "dialing parity" also contains no such distinctions and, instead, speaks generally in terms of the provision of "telecommunications services" by "a person that is not an affiliate of a local exchange carrier."[43] Based on the absence of any such distinctions in defining the scope of the dialing parity requirements, the *NPRM* tentatively concluded that section 251(b)(3) creates a duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service with respect to all telecommunications services that require dialing to route a call, and encompasses international as well as interstate and intrastate, local and toll services.[44]

b. Comments

27. Numerous parties express support for the Commission's tentative conclusion.[45] Several parties qualify their support for this conclusion, however, by asserting that the duty to provide dialing parity to competing providers of telephone toll service applies to international calls only to the extent that it entitles a customer to route automatically, without the use of an access code, all of the customer's international calls to his or her presubscribed interLATA long distance carrier.[46] These parties maintain that section 251(b)(3) does not require LECs to provide customers a separate presubscription choice for international calling.[47]

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[41] 47 U.S.C. § 251(b)(3).

[42] *Id.*

[43] 47 U.S.C. § 153(15).

[44] *NPRM* at para. 206.

[45] *See, e.g.*, MFS comments at 2; California Commission comments at 3.

[46] *See, e.g.*, Sprint comments at 4-5; SBC comments at 5.

[47] *Id.*

28. A broad range of parties also support the tentative conclusion that section 251(b)(3) imposes a duty on the LEC to provide both local and toll dialing parity.[48] Two parties reject this tentative conclusion, arguing that the dialing parity requirements apply only to local calling and do not extend to toll services.[49] Specifically, Lincoln Telephone and the Pennsylvania Commission contend that Congress addressed toll dialing parity only in section 271(e)(2) of the 1996 Act as it relates to the conditions under which a BOC may enter the in-region, interLATA toll business and question the Commission's authority to implement toll dialing parity requirements.[50] U S WEST similarly argues that section 251(b)(3) imposes only a duty to provide local dialing parity and suggests that the only affirmative obligation to provide toll dialing parity is contained in the equal access provisions of section 251(g) of the 1996 Act, which, U S WEST states, applies only to the BOCs and GTE.[51] Lincoln Telephone makes the additional argument that competitive providers wishing to enter the intraLATA toll market should be required to "share responsibility for serving the entire LATA, rather than simply selecting the lowest cost customers from the most profitable exchanges without regard to that practice's effect on other customers."[52] The imposition of such a requirement, according to Lincoln Telephone, would "reflect a commitment to affordable universal service."[53]

c. Discussion

29. We adopt our tentative conclusion that section 251(b)(3) creates a duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service with respect to all telecommunications services that require dialing to route a call, and encompasses international as well as interstate and intrastate, local and toll services.[54] We note that section 251(b)(3) does not limit the types of traffic or services for which dialing parity must be provided to competing providers of telephone exchange and telephone toll service. The reference to these types of providers clearly shows that dialing parity must be provided for exchange service and toll service. Nothing in the statutory language limits the scope of the dialing parity obligation to exchange and toll services or distinguishes among the various types of telecommunications services in imposing the dialing parity obligations. This conclusion is further supported by the statutory definition of dialing parity insofar as it refers

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[48] *See, e.g.*, Excel comments at 6; MCI comments at 2; BellSouth comments at 9.

[49] Lincoln Telephone comments at 2-3; Pennsylvania Commission comments at 1-2.

[50] *Id.*

[51] U S WEST comments at 4-5.

[52] Lincoln Telephone comments at 5.

[53] *Id.* at 6.

[54] *NPRM* at para. 206.

to the provision of "telecommunications services" generally without distinction among various types of telecommunications services.[55] In addition, we are not persuaded that section 251(g) relieves certain LECs of the duty to provide toll dialing parity. That section contains no reference or cross reference to dialing parity or to section 251(b)(3). Section 251(g) preserves the equal access obligations already imposed on the BOCs and GTE, but does not exempt them or other LECs from the toll dialing parity requirements. Finally, we note that CMRS providers are not required to provide dialing parity or nondiscriminatory access under section 251(b)(3) because the Commission has not determined that CMRS providers are LECs and section 332(c) of the Communications Act of 1934 provides that a "person engaged in the provision of commercial mobile services . . . shall not be required to provide equal access to common carriers for the provision of toll services."[56]

30. Finally, concerning Lincoln Telephone's proposal to require competitive providers of intraLATA toll service to serve an entire LATA, rather than merely certain low cost customers within a LATA, we note that Lincoln Telephone, in essence, is asking us to condition a carrier's receipt of dialing parity upon that carrier's assuming the obligation of an "eligible" telecommunications carrier.[57] We find neither the language of section 251(b)(3) nor its legislative history supports the conclusion that Congress intended to condition a carrier's right to receive the benefits of dialing parity upon its assuming the obligations of an eligible telecommunications carrier. The issue of encouraging carriers to provide universal service throughout a service territory is beyond the scope of this proceeding.[58] Also, for the Commission to make LATA-wide or state-wide service a precondition of entry into that LATA or state would be to erect a major legal barrier to entry, particularly for smaller telecommunications services providers, that is contrary to the basic thrust of the 1996 Act.

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[55] The issue of whether a separate presubscription choice is required for international, interstate, and intrastate toll calls is discussed more fully in section II.B(2) *infra*.

[56] 47 U.S.C. § 332(c)(8).

[57] An eligible telecommunications carrier is a common carrier that offers all services that are supported by federal universal service support mechanisms under section 254(c) and that uses "media of general distribution" to advertise the availability of those services and its charges for them. 47 U.S.C. § 214(e)(1). The issue of which services should receive support from universal service support mechanisms is being addressed by the Commission and the Federal-State Joint Board on universal service, as required by new section 254 of the Communications Act, as amended by the 1996 Act. *See Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Notice of Proposed Rulemaking and Order Establishing Joint Board, FCC 96-93, (rel. Mar. 8, 1996) (*Universal Service NPRM*) (proposing rules to implement section 254 of the 1996 Act).

[58] *See Universal Service NPRM*.

B. Implementation of the Toll Dialing Parity Requirements

1. Presubscription Method of Achieving Toll Dialing Parity

a. Background

31. The statutory definition of dialing parity provides that the customer must have the ability to choose "from among 2 or more telecommunications services providers (including such local exchange carrier)."[59] The definition also provides that customers must be able to exercise this choice by being able "to route automatically without the use of access codes, their telecommunications to the telecommunications services provider of the customer's designation."[60] Thus, LECs are precluded from relying on access codes as a means of providing dialing parity to competitive service providers.[61] The 1996 Act, however, does not specify what methods should be used to implement dialing parity. The *NPRM* tentatively concluded that presubscription represents the most feasible method of achieving dialing parity in long distance markets consistent with the statutory definition of dialing parity and sought comment as to this tentative conclusion.[62] In this context, the *NPRM* defined "presubscription" as the process by which a customer preselects a carrier to which all of a particular category or categories of calls on the customer's line will be routed automatically.[63]

32. As stated in the *NPRM*, presubscription to a carrier other than the customer's local exchange carrier has not been available for *interstate*, intraLATA toll calls nor has it been available in most states for *intrastate*, intraLATA toll calls.[64] Instead, LECs automatically carry these calls rather than routing them to a presubscribed carrier of the customer's choice. If the state from which the customer is calling has authorized competition, but has not ordered presubscription in the intraLATA toll market, a customer wishing to route an intraLATA toll call to an alternative carrier typically must dial the carrier access code of the alternative carrier.

b. Comments

33. Nearly all parties concur in the Commission's tentative conclusion that presubscription represents the most feasible method of achieving toll dialing parity consistent

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[59] 47 U.S.C. § 153(15).

[60] *Id.*

[61] *Id.*

[62] *NPRM* at para. 207.

[63] *Id.*

[64] *Id.* at para. 208.

with the statutory definition of dialing parity.[65] PacTel and Lincoln Telephone suggest that presubscription is not required to achieve toll dialing parity so long as customers can reach competing toll carriers through the use of carrier access codes.[66] Finally, BellSouth argues that the toll dialing parity requirement is satisfied by "removing the intraLATA default to the incumbent LEC, thus assuring that no additional digits need to be dialed in order to reach carriers competing with the incumbent LEC for intraLATA toll service."[67] BellSouth further argues that the Commission should confirm that such arrangements are consistent with the statutory dialing parity requirements.[68]

c. Discussion

34. We adopt our tentative conclusion that the dialing parity requirement for toll calling can best be achieved through presubscription because that method would enable customers to route a particular category of traffic to a preselected carrier without having to dial access codes. We note that the use of access codes to route calls among competing providers of telephone toll service is precluded under the statutory definition of dialing parity.[69] Accordingly, we disagree with those parties who contend that toll dialing parity can be achieved through the use of access codes in a manner that is consistent with the statutory definition of dialing parity.[70] We also cannot conclude that the toll dialing parity requirement is satisfied by removing the intraLATA default, as BellSouth maintains.[71] Removing the intraLATA default would not satisfy the toll dialing parity requirement unless the LEC also uses the full 2-PIC presubscription methodology discussed below.[72]

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[65] *See, e.g.*, Ohio Commission comments at 6; NEXTLINK comments at 9.

[66] *See, e.g.*, PacTel reply at 10 ("Toll dialing parity, on the other hand, should mean that customers can reach competing toll carriers on the same dialing basis, including through the use of carrier access codes, with an equal number of digits."); Lincoln Telephone comments at 2-3.

[67] BellSouth comments at 11 n.23.

[68] *Id.*

[69] *See* 47 U.S.C. § 153(15).

[70] Although the use of access codes to access competing providers of telephone toll service does not constitute dialing parity as defined in 47 U.S.C. § 153(15), we do not intend to preclude their use where a customer wishes to route a call to a carrier other than his or her presubscribed intraLATA toll carrier.

[71] We understand BellSouth's reference to "removing the intraLATA default" to mean that BellSouth would modify its switches so they no longer automatically route all intraLATA toll calls to BellSouth and thus, would permit customers to choose an alternative intraLATA toll carrier.

[72] For a discussion of the full 2-PIC methodology, *see* section II.B(4) *infra*.

2. Categories of Domestic, Long Distance Traffic Subject to Presubscription

a. Background

35. In the *NPRM*, the Commission sought comment as to the categories of long distance traffic (*e.g.*, intrastate, interstate, and international traffic) for which a customer should be entitled to choose presubscribed carriers.[73] The *NPRM* also sought comment on specific alternative methods for implementing local and toll dialing parity, including various forms of presubscription, in the interstate and intrastate long distance and international markets, that are consistent with the statutory requirements set forth in the 1996 Act.[74]

b. Comments

36. Most parties appear to agree that customers should be entitled to presubscribe to two separate carriers for their toll calling.[75] There is a lack of consensus in the record, however, regarding how the Commission should define the presubscription requirement. USTA, for example, argues that "[a]ll telecommunications carriers, including LECs, should be permitted to define the scope of local service and toll service in response to market forces."[76] USTA further argues that the "relevant distinction, for the long term, will be between intrastate and interstate toll traffic."[77] Sprint, on the other hand, argues in favor of maintaining a presubscription requirement based on LATA boundaries and recommends that customers continue to be allowed to choose separate intraLATA and interLATA toll carriers.[78] Sprint urges us to maintain the LATA distinction, asserting that "competition over the past 12

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[73] *NPRM* at para. 210.

[74] *Id.* at para. 209.

[75] *See, e.g.*, Ohio Consumers' Counsel comments at 2; *see also* MCI comments at 3 (recommending that call types subject to presubscription should include: 1-plus/0-plus interexchange, 7-digit interexchange and 1+555-1212 calls); *cf.* GTE comments at 9 (maintaining that decisions regarding appropriate presubscription categories should be left to state regulatory agencies on theory that states are best positioned to balance value of additional carrier choices against higher administrative and network design costs associated with increased number of presubscription choices).

[76] *Ex parte* letter from Charles D. Cosson, USTA, to William F. Caton, Acting Secretary, Federal Communications Commission, filed in CC Docket No. 96-98, June 17, 1996, at 2.

[77] USTA comments at 3 n.2; *see also* MFS reply at 12-13 ("The Commission should recognize that rules for intraLATA presubscription are transitory. At some point, when the BOCs and GTE are authorized to provide both interLATA and intraLATA service, the distinctions between interLATA and intraLATA calls will no longer be meaningful, and the Commission should be prepared to revisit and eliminate these distinctions.").

[78] Sprint comments at 4.

years has developed around the LATA concept, and presubscription has for the most part already occurred along these lines."[79]

c. Discussion

37. With respect to toll service, we conclude that section 251(b)(3) requires, at a minimum, that customers be entitled to choose presubscribed carriers for their intraLATA and interLATA toll calls. Because of the variations that exist among LATA boundaries and toll traffic within, and among, the various states, we have also concluded that each state should have the opportunity to determine whether customers should be able to presubscribe to carriers for intrastate toll service and for interstate toll service in lieu of the intraLATA and interLATA toll presubscription dichotomy that we have established as a minimum nationwide standard at this time. Although toll dialing parity typically has been based on LATA boundaries in multi-LATA states where it has been implemented, we do not impose a requirement that toll dialing parity be based only on LATA boundaries given our expectation that implementation of the 1996 Act eventually will diminish the significance of LATA boundaries.[80] We are aware that BOCs remain subject to certain LATA boundary restrictions for at least the near-term and that some BOCs may find it technically infeasible, or otherwise undesirable, to implement toll dialing parity based on state boundaries.[81] We thus conclude that states should be able to take the relevance of those factors into account, where applicable, and have the flexibility to require that toll dialing parity implementation be based on state boundaries where they determine that implementing toll dialing parity on the basis of state boundaries would be pro-competitive and otherwise in the public interest. In Alaska and Hawaii, states with no LATAs, toll dialing parity will continue to be based on state boundaries.

38. We also direct each LEC to submit to the state regulatory commission for each state in which it provides telephone exchange service the LEC's plan for implementing toll dialing parity. That plan must contain detailed implementation information, including the proposed date for dialing parity implementation for that exchange that the LEC operates in each state, and the method it proposes for enabling customers to select alternative providers of

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[79] *Id.* At the same time, Sprint asks that we eliminate the intrastate intraLATA/interstate intraLATA distinction and make all intraLATA toll calls (both interstate and intrastate) subject to a single presubscription.

[80] USTA correctly notes that independent exchange carriers have not been subject to the interLATA line of business restrictions that were imposed on the BOCs pursuant to the AT&T Consent Decree. *See United States v. American Telephone and Telegraph Co.*, 552 F. Supp. 226 (D.D.C. 1982). *See* USTA comments at 3 n.2.

[81] For example, where BOCs receive authority to provide in-region, interLATA services, they are required to provide such services through a separate affiliate for at least three years pursuant to section 272 of the 1996 Act. *See* 47 U.S.C. §§ 272(a)(2), (f)(1). Accordingly, it appears that the LATA distinction will remain relevant insofar as it will continue to define the geographic areas in which a BOC must provide toll services through an affiliate and those in which it may provide toll services directly.

telephone toll service. For a LEC, other than a BOC, the plan also must identify the LATA with which the LEC proposes to associate.[82]

39. We find that the states are best able to evaluate implementation plans in a way that will avoid service disruptions for subscribers and promote competition in the intrastate toll market. A LEC must first obtain state approval of its implementation plan before it implements toll dialing parity. If the LEC determines that a state commission elects not to evaluate the LEC's toll dialing parity implementation plan for that state sufficiently in advance of the date on which a LEC is required to implement toll dialing parity pursuant to the Commission's rules, we direct the LEC to file its plan with the Commission.[83] The Commission will release a public notice of any such LEC filings, in order to give interested parties an opportunity to comment. The LEC's plan will be deemed approved on the fifteenth day following release of the Commission's public notice unless, no later than the fourteenth day following the release of the Commission's public notice, either: (1) the Common Carrier Bureau notifies the LEC that its plan will not be deemed approved on the fifteenth day; or (2) an opposition to the plan is filed with the Commission and served on the LEC that filed the plan. The opposition must state specific reasons why the plan does not serve the public interest.

40. If one or more oppositions are filed, the LEC that filed the plan will have seven additional days (*i.e.*, until no later than the twenty-first day following the release of the Commission's public notice) within which to file a reply to the opposition(s) and serve it on all parties that filed oppositions. The response shall: (a) include information responsive to the allegations and concerns identified by the opposing party; and (b) identify possible revisions to the plan that will address the opposing party's concerns. In the case of such contested toll dialing parity plans, the Common Carrier Bureau will act on the plan within ninety days of the date on which the Commission released its public notice.[84] In the event the Bureau fails to act within 90 days, the plan will not go into effect pending Bureau action. If the plan is not contested but did not go into effect on the fifteenth day after the Commission released its public notice, and the Common Carrier Bureau fails to act on the plan within ninety days of the date on which the Commission released its public notice, the plan will be deemed approved without further Commission action on the ninety-first day after the date on which the Commission released its public notice of the plan's filing.

41. A LEC's plan may not accomplish toll dialing parity by automatically assigning toll customers to itself, to a customer's currently presubscribed interLATA or interstate toll

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[82] States may require a LEC to provide other categories of information in its plan in addition to the information categories stated here.

[83] *See infra* para. 62 , which sets forth the dates by which a dialing parity implementation plan must be filed with the Commission in the event that a state will not be evaluating the plan.

[84] We delegate to the Chief, Common Carrier Bureau, the authority to approve, modify, or require the refiling of each plan that is filed with the Commission pursuant to this requirement.

carrier, or to any other carrier except when, in a state that already has implemented intrastate, intraLATA toll dialing parity, the subscriber has selected the same intraLATA and interLATA presubscribed carrier. Finally, when LATA boundaries encompass parts of two adjacent states, we permit the LEC to implement in each state the procedures that that state approved for implementing toll dialing parity within its borders. If a state commission elects not to evaluate the LEC's intrastate toll dialing parity plan, we direct the LEC to file both its intrastate toll dialing plan and its interstate toll dialing plan with the Commission. The plans will be acted on in accordance with the procedures outlined above.

42. We note that the minimum intraLATA/interLATA toll presubscription requirement that we adopt in this *Order* is necessarily an interim measure. Specifically, we expect that the development of the "multi-PIC" or "smart-PIC" presubscription methodology will enable customers to presubscribe to multiple carriers for various categories of long-distance calling.[85] Thus, in time, we anticipate that service markets, and the presubscription requirement in particular, will be defined by technological, economic and marketing considerations and that LATA or state boundary distinctions will diminish for purposes of the toll dialing parity requirements. As the record before us provides an inadequate basis for adopting more specific requirements now, we intend to monitor developments in this area and issue a Further Notice of Proposed Rulemaking to address these long range considerations so that end users will be able to preselect alternative providers for operator services, directory assistance, international and other services.

3. Separate Presubscription for International Calls

a. Background and Comments

43. The *NPRM* sought comment on whether customers should be entitled to choose a presubscribed carrier for international calls and on what Commission action, if any, is necessary to implement dialing parity for such calls.[86]

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[85] The terms "smart-PIC" and "multi-PIC" have been defined differently in various contexts. For example, GVNW states that the multi-PIC presubscription method would permit customers to choose up to three different toll carriers, which, GVNW suggests, might include an intraLATA toll, interLATA toll and an international service provider. *See* GVNW comments at 6. GVNW states that the smart-PIC presubscription method would allow customers more than three carrier choices, "as when a fourth PIC for interstate, intraLATA is needed." *Id.* In a recent state commission decision, the terms "multi-PIC" and "smart-PIC," deemed to be synonymous, were defined as the ability to "select multiple carriers for various subdivisions of their interLATA and intraLATA toll calls." *Local Exchange Competition and Other Competitive Issues*, Case No. 95-845-TP-COL, 164 P.U.R.4th 214 (Ohio Pub. Util. Comm'n Sept. 27, 1995).

[86] *NPRM* at para. 210.

44. Most parties maintain that the 1996 Act does not require, and the Commission should not mandate, a separate presubscription choice for international calling.[87] Several parties take the position that the toll dialing parity requirement applies to international calling only to the extent that it entitles a customer to route automatically without the use of an access code the customer's international calls to the customer's presubscribed interLATA carrier.[88] A number of parties contend that the technology required to support a separate presubscription choice for international calling, the so-called multi-PIC or smart-PIC methodology, is not currently available.[89] USTA suggests that the cost of providing a separate presubscription choice for international calling should be weighed against the amount of customer demand for such an option, and the harm to consumers that may result from a potentially greater number of unauthorized carrier changes.[90] AT&T, Ameritech, Sprint and the Indiana Commission urge the Commission to revisit the issue of a separate presubscription choice for international calling only after it is demonstrated to be technically and economically feasible.[91]

b. Discussion

45. While we believe that a separate presubscription choice for international calling is consistent with the intent of the 1996 Act because it could foster additional carrier competition, we recognize that technical limitations preclude our imposing such a nationwide requirement at this time.[92] To the extent that such a capability becomes technically feasible and is ordered in a particular state, we find that the deployment of a separate presubscription choice for international calling is consistent with the 1996 Act. We will address in a further notice at a future date the issue of how soon a separate presubscription choice for international calling will be technically feasible on a nationwide basis.[93]

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[87] *See, e.g.*, SBC reply at 3 n.6; AT&T comments at 4 n.4.

[88] *See, e.g.*, SBC comments at 5.

[89] Ameritech comments at 18-19; Bell Atlantic reply at 3; CBT comments at 4-6; SBC comments at 5; U S WEST comments at 6; Sprint comments at 4-6; USTA reply at 2; *cf.* Sprint comments at 6 (noting implementation of multi-PIC system by GTE-Hawaiian Telephone Company that offers customers a separate international presubscription option).

[90] USTA comments at 3.

[91] Ameritech comments at 18-19; AT&T comments at 5 n.6; Sprint comments at 5; Indiana Commission Staff comments at 9.

[92] Bell Atlantic reply at 3; CBT comments at 4-6; SBC comments at 5; U S WEST comments at 6; Sprint comments at 4-6; USTA reply at 2.

[93] Sprint comments at 6 (noting development of multi-PIC system by GTE-Hawaiian Telephone that offers customers a separate international presubscription option). It is our understanding that GTE Hawaiian Telephone Company has multi-primary interexchange carrier capability that enables customers in Hawaii to select three

4. Full 2-PIC Presubscription Method

a. Background

46. In the *NPRM*, the Commission sought comment as to whether the Commission should adopt a nationwide presubscription methodology for implementing the toll dialing parity requirements.[94] The *NPRM* also noted that states have adopted a variety of intraLATA toll dialing parity requirements and implementation methodologies.[95]

47. Among the presubscription methodologies that states have examined are the "modified 2-PIC," the "full 2-PIC," and the "multi-PIC" or "smart-PIC" methods.[96] The modified 2-PIC method generally allows a customer to presubscribe to a telecommunications carrier for all interLATA toll calls and to presubscribe to either the customer's presubscribed interLATA carrier or the customer's local exchange carrier for all intraLATA toll calls. The full 2-PIC method generally allows customers to presubscribe to a telecommunications carrier for all interLATA toll calls and to presubscribe to another telecommunications carrier (including, but not limited to, the customer's local exchange carrier) for all intraLATA toll calls. The multi-PIC or smart-PIC methods, as known today, would allow customers to presubscribe to multiple carriers, each one of which would be selected to transport a specified component of toll traffic.

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long-distance carriers, *i.e.*, an intrastate, interstate, and international carrier. *See ex parte* letter from Clarence Clay M. Nagao, Chief Counsel, State of Hawaii Public Utilities Commission, Department of Budget and Finance, to Mr. William F. Caton, Acting Secretary, Federal Communications Commission, filed in CC Docket No. 96-98, July 2, 1996. We note that the arrangement by which GTE Hawaiian Telephone Company provides a third carrier choice for international calling is a unique, interim solution that uses a combination of carrier identification codes and switch routing databases. This solution is not suitable for nationwide deployment because the switch database is too limited in size and the supply of CICs too small to support an adequate number of interLATA/international carrier combinations in many areas of the country. *Ex parte* letter from F.G. Maxson, GTE Service Corporation, to William F. Caton, Acting Secretary, Federal Communications Commission, filed in CC Docket No. 96-98, August 6, 1996.

[94] *NPRM* at para. 210.

[95] *Id.*

[96] *Id.*

b. Comments

48. Nearly all parties favor adoption of the full 2-PIC method.[97] Few parties favor deploying the modified 2-PIC method.[98] Likewise, few commenters favor immediate deployment of the multi-PIC method.[99] Several parties suggest that the multi-PIC or smart-PIC methodology and technology may warrant consideration in the future, but is currently unavailable.[100] Others maintain that the Commission should conclude that the 2-PIC approach is consistent with the 1996 Act based on the theory that the 1996 Act does not require more than a two-PIC capability to achieve toll dialing parity.[101]

c. Discussion

49. We adopt in this *Order* the full 2-PIC method as the minimum presubscription standard. Under our rules and pursuant to section 251(d)(3),[102] however, state commissions may impose more stringent presubscription requirements, such as multi-PIC or smart-PIC.

50. We adopt the full 2-PIC method as the minimum presubscription standard at this time for several reasons. We conclude that, as compared with the modified 2-PIC method, the full 2-PIC method will maximize choice for consumers and open the long-distance telecommunications markets to a greater number of competitive services providers, including smaller providers, and thus is more consistent with the congressional objectives underlying enactment of section 251(b)(3). Second, this method clearly is preferred by the majority of state regulators and telecommunications service providers.[103] Third, as compared with the multi-PIC method, the technology for the full 2-PIC method is widely available and well defined. By contrast, there is no evidence in the record to support a finding that the technical and economic feasibility of the multi-PIC method has been demonstrated on a nationwide

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[97] *See, e.g.*, Michigan Commission Staff comments at 4; MCI comments at 5-6, Pennsylvania Commission comments at 2; SBC reply at 2; PacTel reply at 10-11.

[98] *See, e.g.*, Sprint comments at 5; USTA comments at 3.

[99] GSA/DOD reply at 4 (In initial comments, "GSA favored a 'multi-PIC' arrangement . . . . Although there was conceptual support for eventual implementation of the 'multi-PIC' methodology, it is clear that the technical and economic feasibility of this approach has not yet been demonstrated."); GVNW comments at 6 ("[T]he FCC should not require [the smart-PIC method] on a nationwide basis or schedule, as this will result in uneconomic network upgrades, added costs for the incumbent LECs, and higher prices to customers and competitors").

[100] *See, e.g.*, Ameritech comments at 18-19; AT&T comments at 5 n.6; CBT comments at 4; GVNW comments at 3; Indiana Commission Staff comments at 9; Sprint comments at 5.

[101] SBC reply at 3; GTE reply at 12-13.

[102] 47 U.S.C. § 251(d)(3).

[103] *See, e.g.*, Pennsylvania Commission comments at 2; SBC reply at 2; PacTel reply at 10-11.

basis. We conclude that this national standard should speed competitive entry into the intraLATA and intrastate toll markets while providing states that are considering a more stringent presubscription method, *i.e.*, multi-PIC or smart-PIC, flexibility to impose such additional requirements. Until the Commission considers the issue of multi-PIC or smart-PIC methods in a further notice, we believe that the states are best situated to evaluate the technical feasibility and economic impact of such methods on LECs, including smaller LECs, in their jurisdictions.

5. Deployment of Presubscription Software in Each End Office

a. Background

51. With end office equal access, presubscription software is installed at each end office switch within the LEC's service areas. Toll calls are then directly routed at each end office switch to the presubscribed provider of telephone toll service. With centralized equal access, presubscription software is installed at a central tandem switch location. With the latter, toll calls are routed from an end office to a tandem switch for presubscription information.[104] Providers of telephone toll service may connect at the tandem to receive this traffic rather than at each individual end office that is associated with the tandem.

b. Comments

52. MCI raises the issue of whether presubscription software should be deployed in each end office or at a single tandem location and proposes that the Commission require end office equal access rather than centralized equal access.[105] Specifically, MCI argues that end office equal access represents a superior form of access to the extent that it enhances redundancy and reduces post dial delays.[106] Centralized equal access should not be permitted, MCI maintains, insofar as that approach requires that all end offices receive the equal access features from the tandem and any interruption in service from the tandem can affect a larger number of subscribers on the system.[107] In addition, because calls are routed from the end office to the tandem and back, MCI contends that centralized equal access would result in significant post-dial delay.[108] MCI does suggest, however, that in areas that "would not

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[104] In this context, presubscription information refers to the information that is used by the switch to determine which interconnecting carrier carries and bills for the call.

[105] MCI comments at 5.

[106] *Id.*

[107] *Id.*

[108] *Id.* MCI does not attempt to define or quantify the term "significant."

otherwise convert to interLATA or intraLATA equal access, centralized equal access provides consumers at least a limited form of carrier choice."[109]

53. Two commenters who are centralized equal access providers oppose MCI's position.[110] Specifically, Iowa Network Services and MIEAC counter that centralized equal access is not inferior to end office equal access and repeatedly has been found to serve the public interest by the Commission and numerous state regulatory commissions.[111] MIEAC takes issue with MCI's argument that centralized equal access is inferior to end office equal access, noting that recent technological advances, and the use of SS7 trunk signaling, in particular, have improved call set up times and reduced post dial delay.[112] Iowa Network Services calls the argument that centralized equal access provides less network redundancy a "red herring" and notes its recent installation of a redundant fiber ring facility to connect its participating exchanges, which will allow instant rerouting of traffic in the case of a facilities equipment failure.[113] Iowa Network Services also operates a "diversity access tandem" that provides switch redundancy should its primary tandem fail.[114] MIEAC argues that centralized equal access networks fully comply with the toll dialing parity requirement of section 251(b)(3) insofar as these networks support 2-PIC presubscription.[115] Finally, MIEAC and Iowa Network Services contend that centralized equal access represents an appropriate method of providing equal access in rural areas where it otherwise would not be technically or economically feasible.[116]

c. Discussion

54. The issue of presubscription software deployment was not raised in the *NPRM* and, as a result, few commenters address it. We conclude that the record is not sufficient for us to require LECs, pursuant to section 251(b)(3), to provide end office equal access rather than centralized equal access to competing providers of telephone toll service. No specific information is provided, let alone consensus reached in this record, on such threshold issues as

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[109] *Id.* at 5 n.7.

[110] *See generally* Iowa Network Services joint reply; MIEAC reply.

[111] Iowa Network Services joint reply at 4-7; MIEAC reply at 2-4.

[112] MIEAC reply at 3.

[113] Iowa Network Services joint reply at 5.

[114] *Id.*

[115] MIEAC reply at 3-4.

[116] *Id.* at 5-7; Iowa Network Services joint reply at 2 (noting that centralized equal access fosters intraLATA and interLATA competition by making equal access technology available in exchanges where installation of end office equal access is economically or technically infeasible).

the technical and economic feasibility of placing the software in one location over another. We note that while MCI and Iowa Network Services disagree generally on the benefits of deployment locations, neither addresses such important implementation issues as whether different switching equipment owned by various companies might provide obstacles to deployment, or the relevant costs associated with one deployment scheme over another. Iowa Network Services, we further note, does not address how its proposal would comport with the Commission's generally prescribed requirement under which most LECs are required to implement equal access at end offices.[117] Based on the reasons stated above, and based on our concern regarding the harm that could come to small telecommunications services providers if we adopt MCI's proposal, we decline to adopt at this time a requirement prescribing the location for deployment of presubscription software under section 251(b)(3).

C. Implementation Schedule for Toll Dialing Parity

1. Background and Comments

i. Timetable for BOCs

55. Section 271(e)(2)(A) requires a BOC to provide intraLATA toll dialing parity throughout a state "coincident with" its exercise of authority to provide in-region, interLATA services in that state.[118] Section 271(e)(2)(B) precludes most states from imposing intraLATA toll dialing parity requirements on a BOC before the earlier of the date on which a BOC is authorized to provide in-region, interLATA services in a state or three years from the date of enactment of the 1996 Act.[119] The *NPRM* sought comment on what implementation schedule should be adopted for all LECs.[120]

56. The BOCs generally argue that section 271(e)(2) establishes the relevant implementation schedule for all BOCs and, thereby, obviates the need for a nationwide implementation schedule for BOCs.[121] For example, Ameritech argues that, except in single-LATA states and where a state has previously ordered intraLATA presubscription, section 271(e)(2) requires a BOC to implement intraLATA toll dialing parity "coincident with its

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[117] *See generally MTS and WATS Market Structure*, CC Docket No. 78-72, Phase III, 100 F.C.C. 2d 860 (1985).

[118] 47 U.S.C. § 271(e)(2)(A).

[119] 47 U.S.C. § 271(e)(2)(B). Exceptions from this requirement are made for single-LATA states and states that issued an order by December 19, 1995, requiring intraLATA toll dialing parity. *Id.*

[120] *NPRM* at para. 212.

[121] *See, e.g.*, Ameritech comments at 19.

exercise of in-region, interLATA authority" or three years after enactment of the 1996 Act.[122] Other parties urge the Commission to require BOCs to implement toll dialing parity in advance of these dates on the theory that only the states, and not the Commission, are constrained by the limitations in section 271(e)(2)(B).[123] Frontier suggests that the Commission mandate that dialing parity be made available immediately for interstate, intraLATA toll calls.[124] AT&T asserts that "except as provided in Section 271(e)(2)(B), the Commission should require all Tier 1 LECs to implement dialing parity, utilizing the Full 2-PIC method, by January 1, 1997."[125] NYNEX maintains that the Commission should recognize and give effect to state orders granting deferrals or waivers of the toll dialing parity requirements.[126]

ii. Timetable for all other LECs

57. For all other LECs, other than BOCs, the 1996 Act provides no timetable for implementing toll dialing parity. The *NPRM* sought comment on what implementation schedule should be adopted for all LECs.[127]

58. USTA argues that there is no need for a uniform implementation schedule and suggests that the Commission permit states to adopt their own timetables.[128] PacTel similarly opposes our adoption of an implementation schedule and advocates that all LECs be permitted to design their own schedules based on "local conditions and state requirements."[129] In contrast, MCI urges the Commission to adopt an implementation schedule based on the concern that incumbent LECs, if permitted to design their own timetables, would delay implementation because they lack incentive to implement dialing parity quickly. TCC proposes that non-BOC incumbent LECs should be required to provide toll dialing parity by no later than January 1, 1997.[130] NECA argues that a LEC's obligation to provide dialing parity should be triggered only upon the receipt of a *bona fide* request from a competitive toll

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[122] *Id.*

[123] *See, e.g.*, Sprint comments at 6 n.3.

[124] Frontier comments at 2.

[125] AT&T comments at 5.

[126] NYNEX comments at 3 n.7.

[127] *NPRM* at para. 212.

[128] USTA reply at 3-4.

[129] PacTel reply at 12.

[130] TCC comments at 4.

provider.[131] Finally, MFS suggests that incumbent LECs be required to implement intraLATA toll dialing parity within a year of the effective date of the rules, or by the date previously ordered by a state commission.[132] MFS also asks the Commission to adopt rules specifying that in any geographic area where a BOC is not required to provide intraLATA presubscription pursuant to section 271(e)(2)(A), no other LEC in that geographic area will be required to provide toll dialing parity until the BOC is required to provide it.[133]

2. Discussion

59. As discussed above, we require all LECs to provide intraLATA and interLATA toll dialing parity no later than February 8, 1999. In addition, we require a LEC, including a BOC, to provide toll dialing parity throughout a state based on LATA boundaries coincident with its provision of in-region, interLATA or in-region, interstate toll services in that state. As discussed below, for non-BOC LECs that currently are providing, or within a year of release of this *Order* begin to provide, in-region, interLATA or in-region, interstate toll service, we provide a grace period during which those LECs will be able to provide such toll service before having to provide toll dialing parity to their customers. Moreover, non-BOC LECs that implement intraLATA and interLATA toll dialing parity may choose whichever LATA within their state that they deem to be most appropriate to define the area within which they will offer intraLATA toll dialing parity. State commissions in ruling upon such a choice of LATA association shall determine whether the proposed LATA association is pro-competitive and otherwise in the public interest. We note, however, as discussed above, that states may redefine the toll dialing parity requirement based on state, rather than LATA, boundaries where a state deems such a requirement to be pro-competitive and otherwise in the public interest.

60. We decline to adopt the recommendations of parties that urge us to require BOCs to provide toll dialing parity in a state before the earlier of the date on which those BOCs receive authority to provide in-region, interLATA services in that state or February 8, 1999. Subject to the requirements of the 1996 Act, we do, however, authorize states to determine whether a more accelerated implementation schedule should be utilized for LECs operating within their jurisdictions.[134] Where a state issued an order by December 19, 1995 requiring a BOC to implement toll dialing parity in advance of the implementation deadlines we establish, we do not intend to extend the toll dialing parity implementation deadline for the BOC beyond the implementation deadline established by that state. In addition, where a state

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[131] NECA reply at 3-4; *see also* Rural Tel. Coalition comments at 6-7; GVNW comments at 5.

[132] MFS comments at 6.

[133] *Id.*; *cf.* Ohio Commission comments at 9 (new entrant LECs should be required to implement intraLATA toll dialing parity coincident with their offering of local telephone service since new entrants can equip their network switches to provide dialing parity before installation).

[134] *See* 47 U.S.C. § 271(e)(2)(b).

issued an order prior to the release of this *Order* requiring a LEC, other than a BOC, to implement toll dialing parity in advance of the implementation deadlines we establish, we do not intend to extend the toll dialing parity implementation deadline for the LEC beyond the implementation deadline established by that state.

61. We further conclude that LECs, other than BOCs, that begin providing in-region, interLATA or in-region, interstate toll services before August 8, 1997, including LECs that currently offer such services, are not required to implement toll dialing parity until August 8, 1997.[135] We do not mandate compliance with the toll dialing parity requirement by these LECs "coincident with" their provision of in-region, interLATA or in-region, interstate toll services because it would place certain carriers in violation of this order upon its release and would impose an unreasonably short timetable on others. To the extent that a LEC is unable to comply with the August 8, 1997 deadline, that LEC is required to notify the Commission's Common Carrier Bureau by May 8, 1997. The notification must state, in detail, the justification for the LEC's inability to comply by August 8, 1997 and set forth the date by which it will be able to implement toll dialing parity.[136] Finally, we have considered the arguments of LECs that seek to make their toll dialing parity obligation contingent upon the receipt of a *bona fide* request and conclude that special implementation schedules for smaller LECs are unnecessary because these LECs may petition their state commission, pursuant to section 251(f)(2), for a suspension or modification of the application of the dialing parity requirements.[137]

62. In summary, we establish the following toll dialing parity implementation schedule and filing deadlines for all LECs:

(a) Each LEC, including a BOC, must implement intraLATA and interLATA toll dialing parity based on LATA boundaries no later than February 8, 1999. If the state

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[135] We note that the 1996 Act distinguishes between in-region services, for which BOCs must receive Commission authority to provide under section 271(d)(1), 47 U.S.C. § 271(d)(1), and out-of-region services, which BOCs are currently authorized to provide. *See* 47 U.S.C. § 271(b)(1), (b)(2). We note that for non-BOC LECs, it is the provision of toll services outside of the LEC's study area or the provision of interstate toll services that triggers the duty to provide toll dialing parity. We use the term in-region, interLATA or in-region interstate toll services to include those toll services, the provision of which by a LEC triggers the LEC's duty to provide toll dialing parity.

[136] As recently noted in the context of waiver petitions for certain caller identification rules, the Commission will not hesitate to take enforcement action, including monetary fines and other remedial measures against carriers that are unable to provide a compelling justification for failing to comply with Commission rules, particularly when they have been given a reasonable period within which to comply. *See Rules and Policies Regarding Calling Number Identification Service – Caller ID*, CC Docket No. 91-281, Memorandum Opinion and Order, DA 96-875 (1996).

[137] 47 U.S.C. § 251(f)(2).

commission elects not to evaluate a LEC's toll dialing parity implementation plan,[138] the LEC must file that plan with the Commission not later than 180 days before February 8, 1999.

(b) Except as provided in subparagraph (c) below, a LEC, including a BOC, that begins to provide in-region, interLATA toll services or in-region, interstate toll services in a state before February 8, 1999, must implement intraLATA and interLATA toll dialing parity based on LATA boundaries coincident with its provision of in-region, interLATA or in-region, interstate toll services. If the state commission elects not to evaluate its toll dialing parity implementation plan, the LEC must file such plan with the Commission not later than 180 days before the date on which it begins to provide in-region, interLATA toll services.

(c) A LEC, other than a BOC, that begins to provide in-region, interLATA or in-region, interstate toll services in a state before August 8, 1997, must implement intraLATA and interLATA toll dialing parity based on LATA boundaries by August 8, 1997. If the LEC is unable to comply with this August 8, 1997, implementation deadline, the LEC must notify the Commission's Common Carrier Bureau by May 8, 1997. At that time it must state its justification for noncompliance by August 8, 1997, and set forth the date by which it will be able to implement toll dialing parity. If the state commission elects not to evaluate the LEC's toll dialing parity implementation plan, the LEC must file such plan with the Commission not later than 90 days after publication of this *Order* in the Federal Register.

63. We further conclude that the 1996 Act does not authorize the Commission to give effect to a state order that purports to grant a BOC a deferral, waiver or suspension of the BOC's obligation to implement dialing parity. We note that section 251(f)(2) provides procedures for suspending or modifying application of the dialing parity requirements only for certain LECs, *i.e.*, those "with fewer than 2 percent of the Nation's subscriber lines installed in the aggregate nationwide."[139] Given that section 251 contains no comparable procedures for larger LECs, we are persuaded that Congress intended the dialing parity requirements that we adopt pursuant to section 251(b)(3) to apply, without exception, to all LECs with 2 percent or more of the Nation's subscriber lines.

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[138] For a discussion of the content of and procedures relating to the toll dialing parity implementation plans, *see* section II.B(2) *supra*.

[139] 47 U.S.C. § 251(f)(2).

D. Implementation of the Local Dialing Parity Requirements

1. In General

a. Background

64. The *NPRM* tentatively concluded that, pursuant to section 251(b)(3), a LEC is required to permit telephone exchange service customers within a defined local calling area to dial the same number of digits to make a local telephone call, notwithstanding the identity of a customer's or the called party's local telephone service provider.[140] The *NPRM* sought comment on this tentative conclusion.[141]

b. Comments

65. Nearly all parties concur with the Commission's proposed interpretation of the local dialing parity requirements of section 251(b)(3).[142] Ameritech contends, however, that the 1996 Act requires only that local calls between competing LECs be dialed without the use of an access code.[143] Ameritech states that, while the Senate version of the dialing parity provision would have required LECs to provide customers with the ability "to dial the same number of digits" when using any carrier providing telephone exchange and exchange access service in the same area, Congress narrowed the dialing parity obligation in the final legislation to require only that calls between competing LECs be dialed without the use of an access code.[144] In response to Ameritech's proposed interpretation of the local dialing parity requirements, the Ohio Consumers' Counsel asserts that it does "not believe that consumers would see any real functional difference between having to dial extra digits and having to dial an access code" and, thus, urges that customers not be required to dial access codes or extra digits when using a competing provider's services.[145]

66. Ameritech also asks the Commission to clarify that "the dialing parity obligation applies only to competing carriers that provide both telephone exchange service *and* telephone

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[140] *NPRM* at para. 211.

[141] *Id.*

[142] *See, e.g.*, ALTS comments at 4; GTE comments at 8; Ohio Commission comments at 8.

[143] Ameritech comments at 3-4. Notwithstanding its interpretation of the local dialing parity requirements, Ameritech notes that it has exceeded these requirements by establishing interconnection arrangements that allow customers of competing LECs to complete calls by dialing the same number of digits. *Id.* at 4.

[144] *Id.*

[145] Ohio Consumers' Counsel reply at 2.

toll service (*i.e.*, competing LECs)."[146] Finally, USTA urges the Commission to clarify that section 251(b)(3) does not include an obligation to provide dialing parity to CMRS providers.[147] USTA contends that the provision of dialing parity to CMRS providers by LECs would complicate implementation of "sender pays" arrangements that have been adopted in certain states if dialing parity were interpreted to preclude the use of extra digits and/or recorded announcements associated with a "sender pays" arrangement.[148] USTA expresses concern that customers may receive bills for calling CMRS customers without advance notice that they are going to be billed for such calls.[149]

c. Discussion

67. We adopt our tentative conclusion that, pursuant to section 251(b)(3), a LEC is required to permit telephone exchange service customers within a defined local calling area to dial the same number of digits to make a local telephone call, notwithstanding the identity of a customer's or the called party's local telephone service provider. As we stated in the *NPRM*, we believe that this interpretation of the dialing parity requirement as applied to the provision of telephone exchange service would best facilitate the introduction of competition in local markets by ensuring that customers of competitive service providers are not required to dial additional access codes or personal identification numbers in order to make local telephone calls. We disagree with Ameritech's view that Congress intended only to preclude the use of access codes and did not intend to preclude the dialing of extra digits. The fact that Congress ultimately adopted a dialing parity definition that precludes "the use of any access code"[150] does not constrain the Commission from precluding the dialing of extra digits, including access codes. Given that the statute does not define the term "access code," we conclude that our interpretation of the local dialing parity requirement will avoid potential disputes concerning what is and what is not an "access code." We are also persuaded by the argument advanced by the Ohio Consumers' Counsel that consumers would not perceive a functional difference between having to dial extra digits and having to dial an access code when using a competing provider's services.

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[146] Ameritech comments at 3 n.6 (emphasis in original).

[147] USTA comments at 5.

[148] *Id.* In this context, the term "sender pays" refers to an arrangement under which a customer who originates a call to a CMRS customer pays the cost of airtime for terminating the call. Under a sender pays arrangement, the customer typically receives information regarding the price of the call before the call is placed. Once the customer receives this information, the customer then may decide whether or not to complete the call. Sender pays arrangements are atypical insofar as it is the CMRS customer who generally pays the cost of airtime for terminating calls.

[149] *Id.*

[150] 47 U.S.C. § 153(15).

68. We conclude that Ameritech's additional argument that the dialing parity obligation applies only to competing carriers that provide both telephone exchange service *and* telephone toll service, represents an impermissibly narrow reading of the statute. We find that the phrase "providers of telephone exchange service and telephone toll service" imposes an obligation on LECs to provide dialing parity to providers of solely telephone exchange service, to providers of solely telephone toll service, or to providers of both telephone toll and exchange service. We believe that this interpretation is consistent with both the language of the statute and Congress' intent to encourage the entry of new competitors in both the local and toll markets.[151] We reject USTA's argument that the section 251(b)(3) dialing parity requirements do not include an obligation to provide dialing parity to CMRS providers.[152] To the extent that a CMRS provider offers telephone exchange service, such a provider is entitled to receive the benefits of local dialing parity. Regarding USTA's argument that applying section 251(b)(3) in a way that benefits CMRS providers could complicate implementation of sender pays arrangements in some states, we conclude that the record before us is insufficient to determine whether, or under what circumstances, sender pays arrangements, including those requiring the dialing of extra digits or recorded announcements, are consistent with the 1996 Act. Although we do not intend to preclude the states from lawfully enforcing legitimate consumer protection policies that do not have an anticompetitive impact, we cannot conclude on this record that the arrangements USTA describes would be permissible. Finally, given our expectation that local dialing parity will be achieved through LECs' compliance with other section 251 requirements, we do not adopt a timetable for implementing the local dialing parity requirements.

2. Local Dialing Parity Methodologies

a. Background and Comments

69. In the *NPRM*, we stated our expectation that the local dialing parity obligations would not be achieved through presubscription.[153] Rather, we anticipated that a customer's ability to select a telephone exchange service provider and make local telephone calls without dialing extra digits will be accomplished through the unbundling, number portability and

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[151] As the U.S. Court of Appeals for the Fifth Circuit stated in *Peacock v. Lubbock Compress Company*, "the word 'and' is not a word with a single meaning, for chameleonlike, it takes its color from its surroundings." The court held that "[i]n the construction of statutes, it is the duty of the Court to ascertain the clear intention of the legislature. In order to do this, Courts are often compelled to construe 'or' as meaning 'and,' and again 'and' as meaning 'or'." *Peacock v. Lubbock Compress Company*, 252 F.2d 892, 893 (5th Cir. 1958) (*citing United States v. Fisk*, 70 U.S. 445, 448 (1865).

[152] *See* section X of the *First Report and Order* for a discussion of the applicability of section 251 to CMRS providers.

[153] *NPRM* at para. 207 n.284.

interconnection requirements of section 251.[154] The *NPRM* sought information and comment as to how the local dialing parity requirement should be implemented.[155]

70. The parties generally agree that local dialing parity will be accomplished through implementation of the unbundling, number portability and interconnection requirements of section 251.[156] Parties add to this list the 1996 Act's equal access requirements.[157] A few parties contend that local dialing parity is assured once competing providers of telephone exchange service are permitted nondiscriminatory access to telephone numbers.[158]

b. Discussion

71. We anticipate that local dialing parity will be achieved upon implementation of the number portability and interconnection requirements of section 251. We also concur with the view that the ability of competing local exchange service providers to receive telephone numbers on a nondiscriminatory basis is critical to the achievement of local dialing parity. We believe that the interconnection requirements that section 251(c)(2) imposes on incumbent local exchange carriers will reduce the likelihood that customers of a competing LEC will have to dial an access code to reach a customer of the incumbent LEC insofar as the two networks are connected. Number portability will ensure that customers switching local service providers will not need to dial additional digits to make local telephone calls. Likewise, allowing every telecommunications carrier authorized to provide local telephone service, exchange access, or paging service in an area code to have at least one NXX in an existing area code also reduces the potential local dialing disparity that may result if competing LECs can only give customers numbers from a new area code. We therefore decline to prescribe now any additional guidelines addressing the methods that LECs may use to accomplish local dialing parity. We also conclude that, contrary to the views expressed by some parties, the provision of nondiscriminatory access to telephone numbers, by itself, does not fulfill the local dialing parity mandate of section 251(b)(3). Given that acquisition of a central office code by a LEC would not necessarily ensure that the LEC's customers would be relieved of an obligation to dial extra digits, access codes or some other special dialing protocol, the provision of nondiscriminatory access to telephone numbers does not by itself ensure local dialing parity. Rather, we find that under section 251(b)(3) each LEC must ensure that its customers within a defined local calling area be able to dial the same number of digits to make a local telephone call notwithstanding the identity of the calling party's or called party's local telephone service provider.

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[154] *Id.*

[155] *NPRM* at paras. 209, 211.

[156] *See, e.g.*, SBC comments at 3 n.4; NEXTLINK comments at 8.

[157] *See, e.g.*, BellSouth comments at 9.

[158] *See, e.g.*, U S WEST comments at 6.

3. Non-Uniform Local Calling Areas

a. Background

72. The *NPRM* tentatively concluded that, pursuant to section 251(b)(3), a LEC is required to permit telephone exchange service customers within a defined local calling area to dial the same number of digits to make a local telephone call, notwithstanding the identity of a customer's or the called party's local telephone service provider.[159] The *NPRM* did not address the potential dialing parity implications of non-uniform local calling areas[160] nor did it address the potential impact of our proposed interpretation of the local dialing parity obligation on local calling area boundaries.[161]

b. Comments

73. A number of parties express concern about the potential interrelationship between our proposed interpretation of the local dialing parity requirements and local calling area boundaries.[162] For example, WinStar cautions the Commission that by requiring that customers "within a defined local calling area" be able to dial the same number of digits to make a local telephone call, certain parties may interpret this to require that a competing provider of local exchange service must define its local calling area to match the local calling area of the incumbent LEC.[163] GSA/DOD maintains that dialing is not truly at parity if different carriers have different definitions of the geographic areas in which calls can be made with seven-digit dialing.[164] To address the potential dialing parity issue that may arise when a new entrant's "network coverage" is more limited than the incumbent LEC's, GSA/DOD

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[159] *NPRM* at para. 211.

[160] We use the term "non-uniform local calling area" to refer to a situation in which a telephone exchange service provider's local calling area is either larger or smaller than that of another telephone exchange service provider that is providing telephone exchange service in the same geographic area.

[161] Insofar as parties contend that the section 251(b)(3) dialing parity requirements compel the use of a ten-digit dialing plan for local calls within an area code overlay (*see, e.g.*, MFS comments at 3-5), we note that these concerns are addressed more fully below in paragraphs 286 through 287.

[162] *See, e.g.*, WinStar comments at 10-11; GSA/DOD comments at 4-5; Florida Commission comments at 3.

[163] WinStar comments at 10-11 ("The Commission should proceed carefully to ensure that it does not inadvertently limit carriers from experimenting with local calling areas."); *see also*, U S WEST comments at 6 (where dialing parity disputes arise over fact that local calling areas of two competing LECs do not match, states should resolve such disputes since they are familiar with local calling areas and calling patterns in that state).

[164] GSA/DOD comments at 4.

recommends that the Commission adopt rules that ensure that local calling areas are consistently defined for LEC wholesale and retail services.[165]

74. GTE contends that "[s]o long as new entrants have the technical ability to deploy equipment necessary to offer the same seven-digit dialing as the incumbent LEC, dialing parity should be deemed to exist even if one or more of the new entrants ultimately chooses to provide ten-digit dialing."[166] To illustrate its point that all local calls cannot be dialed using the same number of digits, NYNEX notes that in the New York City Metro LATA local calls span three different area codes, with seven-digit dialing within an area code and ten-digit dialing between area codes.[167] Finally, the Florida Commission expresses concern regarding the potential customer confusion that may result if customers in local calling areas are required to dial ten rather than the currently dialed seven digits to make local "Extended Calling Service" calls.[168]

c. Discussion

75. A telephone call requiring seven-digit dialing is not necessarily a local call[169] and a telephone call requiring ten-digit dialing is not necessarily a toll call.[170] Disparity in local dialing plans, by itself, does not contravene our interpretation of the local dialing parity requirements unless such plans are anti-competitive in effect.[171] By requiring that all customers "within a defined local calling area" be able to dial the same number of digits to make a local telephone call, we do not intend to require a competing provider of local exchange service to define its local calling area to match the local calling area of an incumbent LEC. We further do not intend to require a competing provider of telephone exchange service that voluntarily chooses to provide ten-digit as opposed to seven-digit dialing in a local calling area to modify its dialing plan in this instance in order to conform to

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[165] *Id.* at 5.

[166] GTE comments at 8 n.10.

[167] NYNEX comments at 3 n.6.

[168] Florida Commission comments at 3.

[169] We note that several states permit seven-digit dialing for toll calls. *North American Numbering Plan, Area Codes 1996 Update*, Bellcore (January 1996) at 14. For example, within the 518 area code a call from Clifton Park, New York to Hague, New York is a toll call that can be dialed with seven digits.

[170] Section 3(48) defines "telephone toll service" as "telephone service between stations in different exchange areas for which there is made a separate charge not included in contracts with subscribers for exchange service." 47 U.S.C. § 153(48). By contrast, charges for calls within a local calling area generally are not assessed on a per call basis. Thus, the construct of local calling areas serves as the basis by which carriers price their services.

[171] *See, e.g.*, the discussion at paras. 281-291 regarding the discriminatory and anticompetitive nature of a service-specific or technology-specific overlay in connection with area code relief plans.

the dialing plan of another LEC. No other commenter addressed GSA's proposal that the Commission adopt rules that ensure that local calling areas are consistently defined for LEC wholesale and retail services. Therefore, we conclude that the record is insufficient to permit us to take such action at this time.

E. Consumer Notification and Carrier Selection Procedures

a. Background

76. Section 251(b)(3) does not specifically require that procedures be established to permit consumers to choose among competitive telecommunications providers (*e.g.*, through balloting).[172] The *NPRM* sought comment as to whether the Commission should require LECs to notify consumers about carrier selection procedures or impose any additional consumer education requirements.[173] We also sought comment on an alternative proposal that would make competitive telecommunications providers responsible for notifying customers about carrier choices and selection procedures through their own marketing efforts.[174]

b. Comments

77. Several parties contend that the responsibility for consumer education should be borne, at least in part, by the incumbent LECs[175] and claim that incumbent LECs are uniquely situated to assist in this function.[176] Conversely, others maintain that responsibility for the notification and education of consumers should be imposed on the carriers seeking those customers' business, as part of those carriers' marketing efforts.[177] GSA/DOD favors letting carriers "fight it out among themselves," noting that carriers themselves will have every incentive to make sure that prospective customers are aware of their choices.[178] PacTel suggests that states are in the best position to assess the informational needs of their citizens.[179] Several commenters express concern that any customer notification requirement

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[172] 47 U.S.C. § 251(b)(3).

[173] *NPRM* at para. 213.

[174] *Id.*

[175] *See, e.g.*, ACSI comments at 10; Ameritech comments at 20; California Commission comments at 4.

[176] *See, e.g.*, Illinois Commission comments at 67; ACSI comments at 10 (incumbent LECs should be required to provide bill inserts to customers alerting them to opportunity to select alternative service provider).

[177] *See, e.g.*, CBT comments at 5; Bell Atlantic comments at 5; Frontier comments at 4; BellSouth reply at 4; GTE reply at 15.

[178] GSA/DOD comments at 6.

[179] PacTel comments at 13.

must recognize that the details of any such notification plan should reflect local circumstances, including local carrier selection options, rates and dialing plans.[180] Ameritech maintains that a "carrier-neutral customer notification of the toll dialing parity selection processes is in the public interest and should be a part of the implementation of any toll dialing parity plan."[181]

78. While several commenters urge the Commission to adopt rules for balloting,[182] the majority of parties urge us to reject this option.[183] Parties that oppose balloting argue that such decisions should be left to the individual states[184] and claim that balloting is confusing to customers,[185] costly,[186] and forces consumers to make selections before they might otherwise choose to do so.[187] Commenters also argue that competition for customers will ensure that carriers notify customers as to how their services can be obtained.[188] In stating its opposition to a balloting requirement, MFS observes that:

> the long-distance market today differs markedly from the situation in the mid-1980's, when non-dominant carriers were virtually unknown to most consumers and balloting was mandated as a way of educating consumers to their ability to choose a carrier. No such education is needed today, because most consumers are well aware of their long-distance choices, and the carriers have readily available means of contacting those who are not.[189]

79. Commenters also raised a number of issues related to consumer notification and carrier selection methods. For example, PacTel asserts that "the default carrier for both existing and new customers who do not actively choose an intraLATA toll provider should be the dial-tone provider."[190] Sprint agrees that "existing customers who are currently obtaining

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[180] *See, e.g.*, Ameritech comments at 21; GTE comments at 12; PacTel reply at 13.

[181] Ameritech comments at 20.

[182] *See, e.g.*, NEXTLINK comments at 9; Excel comments at 7.

[183] *See, e.g.*, Ohio Consumers' Counsel comments at 3; SBC reply at 1; MFS reply at 12; CBT reply at 3-4.

[184] *See, e.g.*, Florida Commission comments at 2; PacTel reply at 13.

[185] *See, e.g.*, Ohio Commission comments at 7.

[186] *See, e.g.*, GTE comments at 13; Sprint comments at 4.

[187] Ameritech comments at 20.

[188] *See, e.g.*, GTE comments at 13; U S WEST comments at 8.

[189] MFS comments at 6.

[190] PacTel comments at 11.

intraLATA toll service from the dial tone provider, and do not indicate a desire to change carriers, should remain with that intraLATA toll provider."[191] Sprint rejects PacTel's proposal, however, "to default new customers who do not choose an intraLATA toll provider to the dial tone provider."[192] Concerning whether customers should be assessed a "PIC change charge" when they select an alternative provider of telephone toll or telephone exchange service, parties propose allowing customers a "grace period" during which they could switch carriers without charge.[193] The Ohio Consumers' Counsel supports a cap on the cost of initiating both local and toll service with a new carrier, noting that a "customer's old carrier should not be able to impose an 'exit fee' upon the customer who switches."[194] Finally, GVNW urges that the Commission's rules, complaint procedures and penalties for "slamming" be applied to any carrier selection procedures that the Commission adopts with respect to local exchange service providers.[195]

c. Discussion

80. We agree with those commenters who observe that competitive providers of telephone exchange and telephone toll service have an incentive to make consumers aware of the choices available, and we perceive no need to prescribe detailed consumer notification or carrier selection procedures at this time. We do believe, however, that states may adopt such procedures. The states are best positioned to determine the consumer education and carrier selection procedures that best meet the needs of consumers and telecommunications services providers in their states. Thus, states may adopt consumer education and carrier selection procedures that will enable consumers to select alternative carriers for their local and toll services. We further agree that a customer notification requirement should take into consideration local circumstances. The states may adopt balloting, consumer education and notification requirements for services originating within their states, that are not anti-competitive in effect. States also may adopt measures to prevent abuse of the customer notification and carrier selection processes. All such procedures, however, must be consistent with the guidelines set forth above with respect to the requisite categories of toll traffic for which consumers must be entitled to presubscribe and the toll presubscription method that we require carriers to implement. We note that the consumer notification requirements already

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[191] Sprint reply at 5-6 n.8.

[192] *Id.* On a related issue, AT&T urges the Commission to intercede where abuse of the customer notification process occurs, such as when a LEC uses its "provision of exchange service to influence toll PIC choices." AT&T comments at 6 n.9. AT&T adds that the Commission should prohibit LECs from extending interLATA PIC "freezes" to intraLATA traffic. *Id.*

[193] Ohio Commission comments at 7 (proposing 90 day grace period with a charge for subsequent changes); Citizens Utilities comments at 6-7 (proposing 6 month grace period).

[194] Ohio Consumers' Counsel reply at 2.

[195] GVNW comments at 7.

imposed by states' intrastate, intral ATA toll dialing parity orders have required LECs to inform customers either once or twice of their opportunity to choose an alternative carrier.[196] We anticipate that any subsequently imposed consumer notification requirements would be no more be burdensome, and, in particular, would not require more than two notifications to consumers of their opportunity to choose alternative carriers to transport their intraLATA toll calls.

81. We conclude that "dial-tone providers" should not be permitted automatically to assign to themselves new customers who do not affirmatively choose a toll provider. New customers of a telephone exchange service provider who fail affirmatively to select a provider of telephone toll service, after being given a reasonable opportunity to do so, should not be assigned automatically to the customer's dial-tone provider or the customer's preselected interLATA toll or interstate toll carrier. Rather, we find that consistent with current practices in the interLATA toll market, such nonselecting customers should dial a carrier access code to route their intraLATA toll or intrastate toll calls to the carrier of their choice until they make a permanent, affirmative selection. This action eliminates the possibility that a LEC could designate itself automatically as a new customer's intraLATA or intrastate toll carrier without notifying the customer of the existence of alternative carrier choices. Finally, notwithstanding our decision to entrust the issues of consumer notification and carrier selection to the states, we emphasize that all telecommunications carriers remain subject to the requirements of section 258 as well as any verification or "anti-slamming"[197] procedures that the Commission may adopt to prevent unauthorized changes in a customer's selection of a provider of telephone exchange or telephone toll service.[198]

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[196] *See, e.g., Adoption of rules relating to intra-Market Service Area presubscription and changes in dialing arrangements related to the implementation of such presubscription*, Interim Order (Ill. Comm. Comm'n. Apr. 7, 1995).

[197] The Commission has defined slamming as the unauthorized conversion of a customer's interexchange carrier by another interexchange carrier, an interexchange resale carrier, or a subcontractor telemarketer. *Cherry Communications, Inc. Consent Decree* 9 FCC Rcd 2986, 2987 (1994).

[198] Section 258 makes it unlawful for any telecommunications carrier to "submit or execute a change in a subscriber's selection of a provider of telephone exchange service or telephone toll service except in accordance with such verification procedures as the Commission shall prescribe." 47 U.S.C. § 258(a). The section further provides that:

> [a]ny telecommunications carrier that violates the verification procedures described in subsection (a) and that collects charges for telephone exchange service or telephone toll service from a subscriber shall be liable to the carrier previously selected by the subscriber in an amount equal to all charges paid by such subscriber after such violation.

47 U.S.C. § 258(b). Section 258 extends the slamming prohibition to all telecommunications carriers, not just interexchange carriers, as is the case under the Commission's current Part 64 rules. *See* 47 C.F.R. § 64.1100.

F. Cost Recovery

a. Background

82. In the *NPRM*, the Commission noted that the 1996 Act does not specify how LECs will recover the costs associated with providing dialing parity to competing providers.[199] The Commission therefore sought comment on: (1) what, if any, standard should be used for arbitration to determine the dialing parity implementation costs that LECs should be permitted to recover; and (2) how those costs should be recovered.[200]

b. Comments

83. At the outset, we note that there does not appear to be a consensus among commenters as to either of the two cost recovery issues raised in the *NPRM*. The parties are generally divided into two positions: (1) interexchange carriers and competitive carriers prefer a Commission standard under which carriers could recover from competing providers only the specific incremental costs of providing intraLATA toll dialing parity; and (2) incumbent LECs and several states prefer that no national standards be developed, and that cost recovery issues be left either to the states or to intercarrier negotiations.

84. AT&T suggests that carriers only be entitled to recover incremental costs directly associated with the implementation of dialing parity, and states that the Commission should "explicitly exclude (a) recovery of costs intended to reimburse an incumbent carrier for revenues it expects to lose as a result of implementing dialing parity . . . as well as (b) costs associated with network upgrades that are not necessary to implement dialing parity."[201] AT&T further suggests that the Commission mandate an "Equal Access Recovery Charge" on all providers of toll service based on minutes of use subject to dialing parity, and that this charge be tariffed separately from any access charges, approved by the state commission, and amortized over a period not to exceed eight years.[202]

85. MCI appears to agree with AT&T's proposal, stating that "incremental costs incurred to implement dialing parity should be recovered from all carriers that carry intraLATA toll on a presubscribed basis in accordance with cost causative principles."[203] MCI also suggests that dialing parity costs be recovered on a minutes-of-use basis, as an addition to the local switching rate element, which would be separately identified in a tariff, and that

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[199] *NPRM* at para. 219.

[200] *Id.*

[201] AT&T comments at 7.

[202] *Id.*

[203] MCI comments at 3.

Commission rules for cost recovery be "presumptively correct" (*i.e.*, states can depart from such rules if they can show their mechanism is more effective).[204] Several parties urge the Commission to draw upon its cost recovery paradigms for interLATA equal access, and apply the same basic principles to the intraLATA toll market.[205]

86. Many other competitive providers also advocate various forms of incremental cost recovery, on a per-minutes of use basis, to be assessed against all providers of presubscribed intraLATA toll services; such costs could include, for example, hardware costs, software costs, and consumer education costs.[206] GSA/DOD asks the Commission to "view LEC claims for large cost compensation with considerable skepticism," and suggests that the Commission "distribute any verifiable incremental costs associated with achieving dialing parity as a percentage surcharge on the bills of all carriers, including the incumbent LECs."[207]

87. Taking the opposite view, BOC commenters, together with GTE and USTA, argue that there is essentially no need for the Commission to adopt cost recovery measures for dialing parity, and that cost recovery issues are best left for the states to address.[208] Several state public utility commissions also argue that, given the state-specific nature of intraLATA cost recovery issues, and the omission of a specific cost-recovery standard from Congress in section 251(b)(3), the individual states are in the best position to address these issues.[209] In support of these arguments, some state commenters have provided the Commission with detailed descriptions of their current mechanisms for recovering intraLATA presubscription costs.[210]

88. Ameritech argues that dialing parity costs "should be recovered under normal regulatory principles from the cost-causer," and Bell Atlantic argues that "only carriers who will benefit from intraLATA presubscription should pay the costs. Unless interexchange carriers bear the full costs of implementing intraLATA presubscription, exchange carrier customers who do not switch intraLATA toll carriers and do not benefit from presubscription

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[204] *Id.* at 7-8.

[205] *See, e.g.*, GVNW comments at 8; MCI comments at 7.

[206] *See, e.g.*, Citizens Utilities comments at 6; GSA/DOD comments at 6-8.

[207] GSA/DOD comments at 6-7, 8.

[208] *See* Bell Atlantic comments at 5; GTE comments at 20-21; NYNEX comments at 10-11; PacTel comments at 17; SBC comments at 9; USTA comments at 4.

[209] *See* Illinois Commission comments at 72; Indiana Commission comments at 9; Ohio Consumers' Counsel comments at 4; and Ohio Commission comments at 11.

[210] *Id.*; *see also* Louisiana Commission comments at 7.

would ultimately be required to pay for it."[211] On the other extreme, the Telecommunications Resellers Association states that incumbent LECs should "shoulder the full financial burden of remedying this competitive imbalance [in the intraLATA toll market]."[212]

89. The reply comments reveal substantial disagreement among carriers from the two opposing positions. Interexchange carriers and competitive carriers reject the suggestion that they shoulder the full cost burden for intraLATA dialing parity, and urge that, at a minimum, costs be spread among all service providers that enjoy dialing parity.[213] AT&T states that "the proposal by Ameritech and Bell Atlantic to recover implementation costs exclusively from their competitors underscores the need for explicit national rules. . . . [n]othing could be more. . .harmful to competition, than allowing incumbent LECs to charge a fee for new entrants for the "privilege" of competing with them."[214] GSA/DOD also urges the Commission to "reject" the proposals of Bell Atlantic and SBC.[215] MFS correctly notes that there was "little consensus" on this issue, and states "it is entirely inappropriate in a competitive environment that an individual carrier's costs be recovered from its competitors."[216] The Ohio Consumer's Counsel states that Ameritech's "cost-causer" proposal "ignores the fact that the benefits of dialing parity are network-wide."[217]

90. Incumbent LECs maintain that the Commission should not set national cost recovery standards, and that this matter remains the prerogative of the states.[218] GTE "strongly opposes" AT&T's suggestions, and PacTel states that "LECs cost recovery should not be limited by noncompensatory incremental methodologies or unreasonably long amortization requirements."[219] SBC asserts that the proposals of MCI and AT&T are "examples of regulatory micro-management, are inconsistent with Congressional intent, and

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[211] Ameritech comments at 10; Bell Atlantic comments at 5.

[212] Telecommunications Resellers Association comments at 8.

[213] *See, e.g.*, Sprint reply at 12; Telecommunications Resellers Association reply at 7; WinStar reply at 12.

[214] AT&T reply at *iii.*

[215] GSA/DOD reply at 8.

[216] MFS reply at 14.

[217] Ohio Consumers' Counsel reply at 4.

[218] *See* Bell South reply at 4; Bell Atlantic reply at 5; NYNEX reply at 4; PacTel reply at 18; and USTA reply at 5.

[219] PacTel reply at *iii.*

would also. . .place the major burden of dialing parity cost recovery squarely on the backs of incumbent LECs."[220]

91. GCI states that "costs should be recovered in a competitively neutral manner because all LECs, not just incumbent LECs, must meet this obligation."[221] Western Alliance contends that "costs incurred to achieve dialing parity should be included in the investment recoverable through explicit universal [service] supports."[222] Finally, NECA argues that there is no need for the Commission to prescribe specific cost recovery mechanisms.[223]

c. Discussion

92. We conclude that, in order to ensure that dialing parity is implemented in a pro-competitive manner, national rules are needed for the recovery of dialing parity costs. We further conclude that these costs should be recovered in the same manner as the costs of interim number portability, as mandated in our recent *Number Portability Order*.[224] Our authority to promulgate national cost recovery rules derives from section 251(d) of the 1996 Act and section 4(i) of the 1934 Act. In section 251(d), Congress directed the Commission to take the necessary steps to implement section 251. Section 4(i) of the 1934 Act authorizes us to take any action we consider "necessary and proper" to further the public interest in the regulation of telecommunications. Because we determine that dialing parity is crucial to the development of local exchange competition, we conclude that we should establish pricing principles for the recovery of dialing parity costs. Accordingly, we reject the arguments of incumbent LECs and others who oppose national standards for cost recovery of the network upgrades required to achieve dialing parity.

93. Many of the network upgrades necessary to achieve dialing parity, such as switch software upgrades, are similar to those required for number portability. Moreover, with both dialing parity and number portability, customer inconvenience represents the barrier to effective competition Congress intends to eliminate, whether that inconvenience results from the dialing of extra digits in the case of dialing parity, or notification of family, friends and business contacts when a customer is forced to change his or her number. For these reasons, we determine that our recent *Number Portability Order* provides guidance regarding which costs incumbent LECs should be able to recover in implementing dialing parity, as well as how such costs should be recovered. The rules adopted in the *Number Portability Order*

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[220] SBC reply at 8.

[221] GCI reply at 2.

[222] Western Alliance reply at 2 n.6.

[223] NECA reply at 2.

[224] *Telephone Number Portability*, FCC 96-286, CC Docket No. 95-116 (July 2, 1996) (*Number Portability Order*).

apply only to currently-available number portability mechanisms. We sought further comment on cost recovery for long-term number portability, because long-term number portability will involve a different kind of system than currently available solutions. We tentatively concluded that under section 251(e)(2), the same cost recovery principles should apply to long-term number portability. In the case of dialing parity, there is a similar distinction between currently-available solutions (*i.e.*, full 2-PIC presubscription), and long-term solutions (*i.e.*, multi-PIC or smart-PIC methodologies). Like number portability, we may need to revisit the issue of an appropriate cost recovery standard once other presubscription technologies become available on a nationwide basis.

94. In the *Number Portability Order*, we concluded that costs for number portability should be recovered on a competitively-neutral basis.[225] We also concluded that any recovery mechanism should: (1) not give one service provider an appreciable, incremental cost advantage over another service provider, when competing for a specific subscriber; and (2) not have a disparate effect on the ability of competing service providers to earn a normal return.[226] We therefore reject the arguments of those commenters that assert that only new entrants should bear the costs of implementing dialing parity, because such an approach would not be competitively neutral. We also concluded in the *Number Portability Order* that LECs could only recover the incremental costs of implementing number portability. Because we determine that number portability and dialing parity share significant technical similarities and overcome similar barriers to competition, we conclude that we should impose the same cost standard for dialing parity costs that we have adopted for number portability costs. We therefore agree with AT&T that LECs may not recover from other carriers under a dialing parity cost recovery mechanism any network upgrade costs not related to the provision of dialing parity.

95. In our *Number Portability Order*, we concluded that the costs of long-term number portability that could be recovered through a competitively-neutral mechanism included installation of number portability-specific switch software, implementation of SS7 and IN or AIN capability, and the construction of number portability databases.[227] We determined that states could use several allocators, including gross telecommunications revenues, number of lines, and number of active telephone numbers, to spread number portability costs across all telecommunications carriers.[228] Applying the same cost recovery principles to dialing parity, we conclude that LECs may recover the incremental costs of dialing parity-specific switch software, any necessary hardware and signalling system

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[225] Section 251(e)(2) of the 1996 Act states that "the cost of establishing ... number portability shall be born by all telecommunications carriers on a competitively neutral basis, as determined by the Commission." This statutory provision does not apply to the dialing parity requirement.

[226] *Number Portability Order* at paras. 121-140.

[227] *Id.* at para. 122.

[228] *Id.* at paras. 134-36.

upgrades, and consumer education costs that are strictly necessary to implement dialing parity. These costs must be recovered from all providers of telephone exchange service and telephone toll service in the area served by a LEC, including that LEC, using a competitively-neutral allocator established by the state.[229] Although, under section 251(e)(2), number portability costs must be recovered from all telecommunications carriers, section 251(b)(3) only requires that dialing parity be provided to providers of telephone exchange service and telephone toll service. Therefore, we conclude that a competitively-neutral recovery mechanism for dialing parity should only allocate costs to this more limited class. States may use any of the allocators described in the *Number Portability Order*, or any other allocator that meets the criteria we have established. States should apply the principles we adopt today, and the other guidelines for recovering costs of currently available number portability measures, in establishing more specific cost recovery requirements for dialing parity.

G. Unreasonable Dialing Delays

96. For a discussion of the section 251(b)(3) prohibition on unreasonable dialing delays, as that section applies to the provision of local and toll dialing parity, see section III(E) below.

III. NONDISCRIMINATORY ACCESS PROVISIONS

A. Definition of the Term "Nondiscriminatory Access"

1. Background

97. Section 251(b)(3) requires all LECs to permit "nondiscriminatory access" to telephone numbers, operator services, directory assistance, and directory listings to competing providers of telephone exchange service, and to competing providers of telephone toll service.[230] In the *NPRM*, we tentatively concluded that "nondiscriminatory access" requires each LEC to permit the same degree of access that the LEC itself receives for the services specified in section 251(b)(3).[231] The Commission also asked for specific comment on whether the nondiscriminatory access provisions of section 251(b)(3) also impose a duty on LECs to resell operator and directory assistance services to competing providers.[232]

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[229] We recognize that, unlike the case for number portability costs, states would not be able to establish a cost allocator based on numbers of lines because such an allocator could not apportion costs on a competitively neutral basis where dialing parity is provided to a CMRS provider. We expect that states will establish a competitively neutral allocator that can be used to apportion costs among all providers.

[230] 47 U.S.C. § 251(b)(3).

[231] *See NPRM* at para. 214.

[232] *See NPRM* at paras. 216, 217.

2. Comments

98. A number of commenters concur that, as proposed in the *NPRM*, "nondiscriminatory access" should require each LEC to permit the same access to these services that the LEC itself receives.[233] Bell Atlantic argues, however, that access need not be strictly equal, but must "simply be of a type that will permit the other carrier to provide comparable services with no difference in quality perceptible to callers."[234] Bell Atlantic cites the Modification of Final Judgment (MFJ) for the proposition that "equal access" does not require "strict technical equality of services and facilities," but rather it requires that consumers should perceive no qualitative differences.[235] Sprint objects to Bell Atlantic's use of "customer perception" as the nondiscriminatory access standard, arguing that this standard would allow the incumbent LEC to "discriminate against its competitors in ways not visible to the end user."[236]

99. Ameritech requests a clarification that a LEC's duty under section 251(b)(3) is owed only to "providers of telephone exchange and telephone toll service."[237] Ameritech also argues that because Congress did not expressly impose a strict equality standard in section 251(b)(3), as it did in section 251(c)(2)(C) for incumbent LECs, "the only logical interpretation is that LECs are required to provide access . . . that is nondiscriminatory among carriers."[238] The Ohio Consumer's Counsel responds that "Ameritech is claiming that giving all other carriers an equal level of *degraded* access, *i.e.*, inferior to that provided to itself, is 'non-discriminatory.' Surely Congress contemplated nothing of the sort, as is recognized even by other incumbent LECs."[239]

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[233] *See, e.g.*, AT&T reply at iii - iv; ACSI comments at 9; California Commission comments at 5; Excel comments at 8; Florida Commission comments at 5; MCI comments at 2; and Telecommunications Resellers Association comments at 5.

[234] *See* Bell Atlantic comments at n.11.

[235] *Id.* at 6, *citing United States v. Western Electric Co.*, 569 F. Supp. 1057, 1063 (D.D.C. 1983). Bell Atlantic also states that the Commission followed this approach in a 1985 "equal access" order. *Id.* at 11, *citing In the Matter of MTS and WATS Market Structure (Phase III)*, Report and Order, CC Docket No. 78-72, 100 F.C.C. 2d. 860, 877 (1985) (*MTS and WATS Order (III)*).

[236] Sprint reply at 9-10.

[237] Ameritech comments at 11.

[238] *Id.* at 12 - 13. Section 251(c)(2)(C) imposes a duty on incumbent LECs to provide interconnection that is "at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection." 47 U.S.C. § 251(c)(2)(C).

[239] Ohio Consumers' Counsel reply at 3.

100. As for resale, a number of commenters agree that LECs should make operator and directory assistance services available for resale to competing providers under section 251(b)(3), in order to further nondiscriminatory access to such services.[240] On the other hand, several commenters contend that this provision does not imply any resale requirements.[241] AT&T argues that resale is not required under section 251(b)(3), because "to the extent that a local exchange carrier provides transmission with, or as part of, its operator services, the service must be made available for resale under sections 251(b)(1) and 251(c)(4) of the Act."[242] Bell Atlantic takes a similar approach, arguing that, to the extent that a LEC provides operator and directory assistance services that are "telecommunication services," the service must be made available for resale by LECs under section 251(b)(1), and, if the services are telecommunication services offered to retail customers, incumbent LECs must offer them for resale at wholesale prices under section 251(c)(4).[243]

3. Discussion

101. We conclude that the term "nondiscriminatory access" means that a LEC that provides telephone numbers, operator services, directory assistance, and/or directory listings ("providing LEC")[244] must permit competing providers to have access to those services that is at least equal in quality to the access that the LEC provides to itself. We conclude that "nondiscriminatory access," as used in section 251(b)(3), encompasses both: (1) nondiscrimination between and among carriers in rates, terms and conditions of access; and (2) the ability of competing providers to obtain access that is at least equal in quality to that of the providing LEC.[245] LECs owe the duty to permit nondiscriminatory access to competing providers of telephone exchange service and to providers of telephone toll service, as the plain language of the statute requires. Such competing providers may include, for example, other LECs, small business entities entering the market as resellers, or CMRS providers.

102. Section 251(b)(3) requires that each LEC, to the extent that it provides telephone numbers, operator services, directory assistance, and/or directory listings for its customers,

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[240] *See, e.g.*, ALTS comments at n.4; MCI reply at 3; MFS reply at 10; and Telecommunications Resellers Association comments at *ii*.

[241] *See, e.g.*, GTE comments at 16; Ameritech comments at n.16; NYNEX comments at 6-7.

[242] AT&T comments at n.13.

[243] Bell Atlantic comments at 8.

[244] We use the term "providing LEC" throughout this section to refer to the LEC that is permitting nondiscriminatory access to its services pursuant to section 251(b)(3). The term "competing provider" refers to a provider of telephone exchange service or a provider of telephone toll service that seeks nondiscriminatory access from a providing LEC.

[245] *See also* corresponding definition of "nondiscriminatory" in the *First Report and Order* at section V for the purposes of section 251(c)(2).

must permit competing providers *nondiscriminatory* access to these services.[246] Any standard that would allow a LEC to permit access that is inferior to the quality of access enjoyed by that LEC itself is not consistent with Congress' goal to establish a pro-competitive policy framework.

103. We are not persuaded by Bell Atlantic's statement that the standard for nondiscriminatory access should focus *only* upon "customer perceptions" of service quality. Such a standard overlooks the potential for a providing LEC to subject its competitors to discriminatory treatment in ways that are not visible to the customer, such as the imposition of disparate conditions between similarly-situated carriers on the pricing and ordering of services covered by Section 251(b)(3). While invisible to the customer, such conditions can severely diminish a competitor's ability to provide exchange and/or toll service on the same terms as the LEC permitting the access.

104. The *MTS and WATS Order (III)* does not preclude us from requiring LECs to permit access that is at least equal in quality to the access the LEC itself receives.[247] In the *MTS and WATS Order (III)*, the Commission simply held that neither "absolute technical equality" nor an "overly quantitative and microscopic" definition of equal access was desirable.[248] We find that the nondiscrimination standard established in this *Order* is consistent with those previous decisions. We do not set forth in this *Order* an overly technical definition of nondiscriminatory access.

105. We conclude that, to the extent all or part of any operator or directory assistance services, and features that are adjunct to such services, are not "telecommunications services" within the meaning of section 3(44)[249] of the Communications Act of 1934, LECs that provide such services must nonetheless make the services and features available under section 251(b)(3). We recognize that resale of operator services and directory assistance is a primary vehicle through which competing providers, especially new entrants and small business entities, can make operator services or directory assistance available to their customers and that providing LECs are a primary source from which competing providers can obtain these services.[250] Operator and directory assistance services, or the portions of such services, that are "telecommunications services" are already subject to resale requirements under: (1) section 251(c)(4)(A), which requires incumbent LECs "to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not

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[246] *See also First Report and Order* at section V.

[247] *MTS and WATS Order (III)*, 100 F.C.C. 2d at 860. *See also supra* n.234.

[248] *MTS and WATS Order (III)*, 100 F.C.C. 2d at 877.

[249] 47 U.S.C. § 153(44).

[250] *See also infra* para. 118, for discussion of the unbundling of operator services and directory assistance under section 251(c)(3).

telecommunications carriers"; and (2) section 251(b)(1), which imposes a duty on all LECs not to prohibit the resale of their telecommunications services, nor to impose unreasonable or discriminatory conditions on the resale of such services.[251] Operator and directory assistance services, however, generally use various adjunct information features, *e.g.*, rating tables or customer information databases.[252] We recognize that without access to such information features, competing providers cannot make full use of such services. Thus, to ensure that competing providers can obtain nondiscriminatory access to operator services and directory assistance, we require LECs to make such services available to competing providers *in their entirety*.[253]

B. Nondiscriminatory Access to Telephone Numbers

1. Definition

106. Currently, the largest LEC in each area code serves as the Central Office (CO) code administrator for that area. In the *NPRM*, this Commission proposed that the term "nondiscriminatory access to telephone numbers" means that all LECs providing telephone numbers must permit access to telephone numbers to competing providers in the same manner that the LECs themselves receive such access.[254] The few commenters who addressed this issue support the extension of our general definition of nondiscriminatory access to cover access to telephone numbers.[255] We conclude, consistent with the general definition of nondiscriminatory access in para. 101, *supra*, that the term "nondiscriminatory access to telephone numbers" requires a LEC providing telephone numbers to permit competing providers access to these numbers that is identical to the access that the LEC provides to

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[251] 47 U.S.C. § 251(b)(1), (c)(4)(A). Operator services and directory assistance are also unbundled network elements subject to section 251(c)(3). *See First Report and Order* at section V. The 1934 Act, as amended, defines "telecommunications service" as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." 47 U.S.C. § 153(46). "Telecommunications" is defined as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 153(43). "Information service" is defined as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information, via telecommunications . . . ." 47 U.S.C. § 153(20). *See also First Report and Order* at section V.

[252] "Rating tables" are databases that cross-reference area codes, numbers called, and time of day to determine the price to be charged for telephone calls. Directory assistance may use databases that contain customer names, numbers and addresses, and operator services may use databases that contain customer billing information (*e.g.*, whether a customer will accept collect calls or third party billing).

[253] *See infra* paras. 108-151, for further discussion of operator services and directory assistance.

[254] *See NPRM* at para. 215.

[255] *See, e.g.*, Telecommunications Resellers Association reply at 5. *See supra* para. 101, for the general definition of "nondiscriminatory access."

itself. In addition, as discussed in paras. 261-345, *infra*, the delegation of the administration of numbering resources to a neutral administrator will further the statutory objective that all competing providers receive nondiscriminatory access to telephone numbers.

2. Commission Action to Enforce Access to Telephone Numbers

107. In the *NPRM*, we sought comment on what, if any, Commission action is necessary or desirable to implement the requirement under section 251(b)(3) that LECs permit nondiscriminatory access to telephone numbers.[256] Many commenters state that no additional Commission actions, beyond those already required by section 251(e), are necessary.[257] We conclude that issues regarding access to telephone numbers will be addressed by our implementation of section 251(e) herein.[258]

C. Nondiscriminatory Access to Operator Services

1. Definition of "Operator Services"

a. Background and Comments

108. The 1996 Act does not define the term "operator services." In the *NPRM*, the Commission proposed to use the definition of "operator services" in the Telephone Operator Consumer Services Improvement Act (TOCSIA) of 1990.[259] Section 226 (a)(7), which was added to the 1934 Act by TOCSIA, defines operator services as: "any automatic or live assistance to a consumer to arrange for billing or completion, or both, of a telephone call through a method other than: (1) automatic completion with billing to the telephone from which the call originated; or (2) completion through an access code by the consumer, with billing of an account previously established with the telecommunications service provider by the consumer."[260]

109. Bell Atlantic, BellSouth and MCI agree with the proposed definition of "operator services."[261] AT&T, however, expresses concern that this definition should not be used by

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[256] *NPRM* at para. 215.

[257] *See, e.g.*, Bell Atlantic comments at 6; CBT comments at 6; and U S WEST comments at 8. *See generally infra* paras. 261-308, for a discussion of previous Commission actions in the area of number administration.

[258] *See generally infra* paras. 261-345.

[259] 47 U.S.C. § 226(a)(7); *see NPRM* at para. 294.

[260] *NPRM* at para. 216.

[261] *See, e.g.*, Bell Atlantic comments at 8; BellSouth comments at n.24; and MCI comments at 8.

incumbent LECs to claim that they are then not obligated to make operator services, including transmission of information, available for resale at wholesale rates, pursuant to section 251(c)(4).[262] AT&T thus suggests that the Commission adopt the definition as proposed in the *NPRM*, but explicitly state that the definition is applicable only in the context of section 251(b)(3).[263] AT&T asserts that the traditional functions of "emergency interrupt," "busy line verification," and "operator assisted directory assistance" are within the meaning of "operator services" in this context.[264]

b. Discussion

110. TOCSIA defines operator services to be "any automatic or live assistance to a consumer to arrange for billing or completion, or both, of a telephone call through a method other than: (1) automatic completion with billing to the telephone from which the call originated; or (2) completion through an access code by the consumer, with billing of an account previously established with the telecommunications service provider by the consumer."[265] Based on support in the record and the desirability of having a definition consistent with that in the preexisting statute, we conclude that we should adopt the definition of operator services as used in TOCSIA for purposes of section 251(b)(3), with modifications. For purposes of section 251(b)(3), we do not exempt (1) and (2), above, from the definition of operator services. Accordingly, the term operator services, for purposes of section 251(b)(3), means "any automatic or live assistance to a consumer to arrange for billing or completion, or both, of a telephone call." Although commenters did not focus on this issue, nor suggest that the exemptions be deleted from the TOCSIA definition of "operator services," we conclude that we should adopt a modified definition of operator services for the purpose of implementing section 251(b)(3). When enacted, the TOCSIA definition was intended to address services from an aggregator location, rather than addressing the types of operator services in general that would be essential to competition in telecommunications markets. Operator services are becoming increasingly automated, and thus excluding access to automatic call completion from the obligations imposed by section 251(b)(3) could deny competitors access to a service that is essential to competition in the local exchange market. We conclude that, for the same reason, "completion by an access code by the consumer," a common means of completing calls made from payphones, should also be included in the definition of operator services for section 251(b)(3).

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[262] *See* AT&T comments at 8. 47 U.S.C. § 251(c)(4), *inter alia*, requires incumbent LECs to offer for resale, at wholesale rates, any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers.

[263] *Id.*

[264] *Id.* at n. 11.

[265] 47 U.S.C. § 226(a)(7).

111. Adopting a national definition of "operator services" based on the TOCSIA definition, as modified above, will allow for consistency and ease of compliance with the statute, specifically with respect to services to which all LECs must permit nondiscriminatory access.[266] We further conclude that we should state explicitly that busy line verification, emergency interrupt, and operator-assisted directory assistance are forms of "operator services," because they assist customers in arranging for the billing or completion (or both) of a telephone call. Thus, if a LEC provides these functions, the LEC must offer them on a nondiscriminatory basis to all providers of telephone exchange and/or toll service. To avoid confusion with the TOCSIA definition at section 226, we state here that this definition *only* applies for purposes of section 251. Finally, unlike the definition of operator services in TOCSIA, we point out that our definition of "operator services" under section 251(b)(3) is applicable to both *interstate* and *intrastate* operator services.[267]

2. Definition of "Nondiscriminatory Access to Operator Services"

a. Background

112. In the *NPRM*, we proposed that the phrase "nondiscriminatory access to operator services" should be interpreted to mean that a telephone service customer, regardless of the identity of his or her local telephone service provider, must be able to connect to a local operator by dialing "0," or "0 plus" the desired telephone number.[268]

b. Comments

113. Several commenters agree with the Commission's interpretation of this phrase as proposed in the *NPRM*.[269] PacTel, however, requests that we clarify that the "0" or "0 plus" requirement does not mean "that a customer must be able to access *every* LEC's operator services or directory assistance using the same dialing scheme, but rather only the services of the carrier selected to provide local service."[270] AT&T requests that operator service connection methods continue to include dialing "00" in order to access the pre-selected long distance carrier operator.[271] CBT asks that we find that the nondiscriminatory access

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[266] *See also infra* para. 146.

[267] *See First Report and Order* at section V for discussion of application of section 251 to interstate and intrastate matters.

[268] *See NPRM* at para. 216.

[269] *See, e.g.*, AT&T comments at 9; MCI comments at 8; and Telecommunications Resellers Association comments at 6.

[270] *See* PacTel comments at 16.

[271] *See* AT&T comments at 9.

requirements only apply when a competing local service provider is using either a LEC's local exchange services on a resale basis or when the competing provider is using a LEC's unbundled switch ports.[272] GCI states that, in Alaska, LECs currently do not provide "0" or "0 plus" the telephone number; rather, interexchange carriers provide these services. GCI requests that arrangements such as those in Alaska not be precluded.[273] Bell Atlantic, USTA, and PacTel request that we state that, while LECs must offer their operator services to their competitors, there is no duty for a LEC to ensure that the competitors' customers have access to these services.[274] Finally, U S WEST states that "regulatory agencies should not mandate all carriers provide certain adjunct non-essential services, including "0" and "0+" services. Nor should regulatory agencies dictate the manner in which adjunct, non-essential services are accessed."[275]

c. Discussion

114. We adopt the interpretation of "nondiscriminatory access to operator services" that we proposed in the *NPRM*, with the following clarifications. First, LECs are required to permit nondiscriminatory access to operator services by competing providers, and have no duty, apart from factors within their own control, to ensure that a competing provider's customers can in fact access the services. We make this clarification because the statute does not refer to the *customers* of competing providers, and the record does not support such an interpretation of the statutory language. Second, there is no requirement that a LEC must provide call handling methods or different credit card or other alternate billing arrangements different from those it provides to itself or its affiliates. And finally, we find that the duty to permit nondiscriminatory access to operator services applies only to LECs that provide operator services to their own customers.

115. Once a LEC permits a competing provider to have access to operator services, this access may become degraded in the competing provider's network by factors outside the control of the providing LEC.[276] On the other hand, when a LEC unbundles network loop elements, the providing LEC may also retain maintenance and control responsibilities over such elements.[277] We require that, if a dispute arises between a LEC providing access to

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[272] *See* CBT comments at 6, 7.

[273] *See* GCI reply at 3 n.4.

[274] *See* Bell Atlantic comments at 7; USTA comments at *ii*; PacTel comments at 15.

[275] U S WEST comments at 8-9.

[276] For example, the customers of a competing provider may experience dialing delays or call blockage due to inadequate facilities or poor call management in the competing provider's network.

[277] We note that incumbent LECs have an obligation to offer operator services and directory assistance on an unbundled basis under section 251(c)(3). 47 U.S.C. § 251(c)(3). *See First Report and Order* section V.

operator services and a competing provider regarding the delivery of such access, the initial burden is upon the providing LEC to demonstrate with specificity: (1) that it has provided nondiscriminatory access, and (2) that the degradation of access is not caused by factors within the control of the providing LEC. Our use of the term "factors" is not limited to network facilities, but also includes human and non-facilities elements used in the provision of operator services. A providing LEC must also demonstrate with specificity that any degradation in access by competing providers is not caused by, *inter alia*, the providing LEC's inadequate staffing, poor maintenance or cumbersome ordering procedures.

116. We take into account PacTel's comments in concluding that the nondiscriminatory access requirement of section 251(b)(3) does not require that a customer be able to access *every* LEC's operator services, but only the operator services offered by that customer's chosen local service provider.[278] Furthermore, section 251(b)(3) neither specifically addresses nor precludes arrangements wherein operator services are provided by interexchange carriers, as described by GCI. Section 251(b)(3) requires all LECs, but not interexchange carriers or other service providers, to permit nondiscriminatory access to operator services. Thus, to the extent that an OSP is not within the statutory definition of "local exchange carrier," it is not required by section 251(b)(3) to permit nondiscriminatory access to its operator services.

117. The "00" access method currently allows an end user to connect to the operator services of his or her presubscribed long distance carrier. Consistent with our definition of nondiscriminatory access, we require that, if a LEC allows its customers access to operator services of their presubscribed long distance carriers by dialing "00," it must permit competing providers to have access to any features and functions that are necessary to enable the competing provider to allow its customers likewise to obtain access to such operator services by dialing "00." We find that CBT's proposal to limit a LEC's operator services obligations to only those competitors reselling a LEC's services, or using a LEC's unbundled switch ports, is inconsistent with the statute. The nondiscriminatory access provisions of section 251(b)(3) are not confined to situations in which a competing provider resells a LEC's services, or uses unbundled network elements of a LEC. We do not agree with U S WEST's statement that it would be inappropriate to mandate that all LECs who offer operator services must accommodate "0" and "0 plus" dialing. This service is not, as U S WEST states, an "adjunct, non-essential" service.

118. Finally, we note that in the *First Report and Order* we found that operator services as well as directory assistance are network elements that an incumbent LEC must make available to requesting telecommunications carriers. In the absence of an agreement between the parties, unbundled element rates for operator services and directory assistance are

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[278] The operator services provided by a customer's local service provider, for example, could be that provider's own operator services, resold operator services of a LEC providing nondiscriminatory access, or operator services provided by an independent OSP.

governed by section 252(d)(1) and our rules thereunder.[279] The obligation of incumbent LECs to provide operator services and directory assistance as unbundled elements is in addition to the duties of all LECs (including incumbent LECs) under section 251(b)(3) and the rules we adopt herein.[280]

3. Commission Action to Ensure Nondiscriminatory Access to Operator Services

a. Background and Comments

119. In the *NPRM*, the Commission sought comment on what, if any, Commission action is necessary or desirable to ensure nondiscriminatory access to operator services under section 251(b)(3).[281] Bell Atlantic, GTE and PacTel assert that there is no need for the Commission to adopt detailed rules in this area.[282] On the other hand, Sprint is "concerned that leaving access to these services to carrier negotiations will result in unreasonable delays and discriminatory terms and conditions as between the incumbent LEC and CLEC."[283] MFS and WinStar support an "unambiguous national policy" of requiring incumbent LECs to make services available to new entrants.[284] MFS justifies this position by noting "some incumbent LECs say they already provide access, some say they are not obligated to offer such offering for resale, some assert that they are included in various unbundled elements or that they should not be unbundled . . . incumbent LECs should not be allowed to unilaterally decide whether, or to what extent to offer access to operator services, directory assistance and directory listings."[285]

120. The Telecommunications Resellers Association states that "[p]rompt and strong Commission response to complaints alleging failures by LECs to provide nondiscriminatory access to operator services is required to ensure compliance with this requirement."[286] Finally,

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[279] *See First Report and Order* at section V.

[280] *See First Report and Order* at section V.

[281] *See NPRM* at para. 216.

[282] *See* Bell Atlantic comments at 6; GTE reply at 18; and PacTel comments at 14.

[283] Sprint reply at 8.

[284] MFS reply at 10, WinStar reply at 13.

[285] MFS reply at 10.

[286] Telecommunications Resellers Association comments at 7.

the Florida Commission asserts that "[s]tates should be allowed to ensure compliance with the Act as it relates to these services as defined in the *NPRM*."[287]

b. Discussion

121. We conclude that detailed Commission rules are not required to implement the requirement under section 251(b)(3) that LECs must permit competing providers nondiscriminatory access to operator services. We recognize the need for flexibility in order for maximum access to operator services when networks interconnect, as there may be a variety of technical interconnection methods through which such nondiscriminatory access to operator services can be achieved. We view the definition of "nondiscriminatory access to operator services" set forth in paras. 114-118, *supra*, as the overarching standard to which LECs must adhere under section 251(b)(3). As noted, in part III (C)(2), once a LEC permits nondiscriminatory access to operator services to its competitors, that LEC has no further duty to ensure that the competitor's customers can access those services. To the extent that a dispute arises regarding a competing provider's access to operator services, however, the burden is on the LEC permitting the access to demonstrate with specificity that it has provided nondiscriminatory access, and that any disparity is not caused by factors within its control.

122. Beyond placing the initial burden of proof on the providing LEC, we find that specific enforcement standards for nondiscriminatory access to operator services are not required at this time. Rather, disputes concerning nondiscriminatory access can be addressed under our general enforcement authority pursuant to Titles II and V of the Act.[288] The 1996 Act also directs the Commission to establish such procedures as are necessary for the review and resolution of complaints against the BOCs within the statutory deadlines.[289] This requirement will be addressed in a separate proceeding.

4. "Branding" Requirements for Operator Services

a. Background

123. Section 226(b)(1)(A) of the Act and Part 64 of the Commission's rules require an operator services provider (OSP) to identify itself audibly and distinctly to the consumer at the beginning of each interstate telephone call, before the consumer incurs any charge for that

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[287] *See* Florida Commission comments at 5.

[288] *See, e.g.*, 47 U.S.C. § 208 [common carrier complaint authority]; *see generally* 47 U.S.C. §§ 501 -510. *See also, First Report and Order* at section II [authority to take enforcement action].

[289] *See* 47 U.S.C. § 271(d)(6)(B).

call.[290] This procedure is commonly referred to as "call branding." In a recent *Report and Order*, the Commission amended its rules to require "branding" to the parties on both ends of a collect call.[291]

124. In using the term "branding requirements" in this context, we do not refer to the section 226 requirements obligating OSPs to identify themselves to consumers; rather, we refer to the obligations beyond section 226, if any, of a LEC to a competing provider that is using the LEC's facilities to provide its own operator services, or is reselling the operator services of the LEC. In these situations, the issue is *whose brand* should be used.

125. The *NPRM* did not ask whether branding of operator services should be required under section 251(b)(3). This issue was raised by several parties, however, in the context of nondiscriminatory access to such services. Specifically, parties raised the question of whether competing providers have the right to have resold operator services of a LEC "branded" in the competing provider's name, in order to ensure nondiscriminatory access and consumer perceptions of seamless service.

b. Comments

126. AT&T states that the Commission should reject claims that LECs may refuse to comply with "reasonable requests to brand resold operator services as those of the reseller," and that the "continued use of the incumbent LEC's own brand with services that are resold to CLEC customers would stifle competition and confuse customers."[292] AT&T further recommends that "equal opportunities for branding" be made available, asserting that if a LEC brands its own operator services, it should ensure that other OSPs have the capability to do the same; and if branding is infeasible for the OSP, the LEC should not brand its service at all.[293] Bell Atlantic and SBC object to AT&T's proposal, because one possible outcome would be that branding would not be performed on interstate calls, which would violate current Federal and state statutes and regulations.[294]

127. USTA states that when there are no technical limitations to branding, each LEC should be responsible for branding its own services, and where multiple brands are infeasible,

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[290] *See* 47 U.S.C. § 226(b)(1)(A); *see also* 47 C.F.R. § 64.703(a)(1).

[291] *Amendment of Policies and Rules Concerning Operator Service Providers and Call Aggregators*, CC Docket No. 94-158, Report and Order and Further Notice of Proposed Rulemaking, FCC 96-75 (1996) (*OSP Order*).

[292] AT&T reply at n.20.

[293] *See* AT&T comments at n.12.

[294] *See* Bell Atlantic reply at 5-6; SBC reply at 7.

the branding announcement of the facilities-based carrier should be used by "default."[295] Bell Atlantic and CBT contend that the issue of branding operator services is best left to inter-carrier negotiations, where technical and cost issues can be resolved between the parties.[296] PacTel notes that "in a resale environment, we accommodate the CLEC by not branding our service at all. If a CLEC wants to brand its own operator services, it can establish a facilities-based arrangement and set up its own operator services."[297]

c. Discussion

128. Since these comments are a logical outgrowth of the language in our *NPRM*, we address them herein. We recognize that branding plays a significant role in markets where competing providers are reselling the operator services of the providing LEC. Continued use of the providing LEC's brand with a competing provider's customers clearly advantages the providing LEC. Consistent with the requirements that we imposed on incumbent LECs in the *First Report and Order*, we conclude that a providing LEC's failure to comply with the reasonable, technically feasible request of a competing provider for the providing LEC to rebrand operator services in the competing provider's name, or to remove the providing LEC's brand name, creates a presumption that the providing LEC is unlawfully restricting access to these services by competing providers.[298] This presumption can be rebutted by the providing LEC if it demonstrates that it lacks the capability to comply with the competing provider's request. We note also that the Illinois Commission recently ordered rebranding of operator services as those of the reseller "[t]o the extent that it is technically feasible," and we do not preempt its intrastate branding requirements, nor any similar requirements that other states may have enacted.[299]

129. Any inter-carrier branding arrangements under which an interstate operator services call made from an aggregator location would not be branded would violate Section 226 of the Act and Part 64 of our rules. We therefore caution interconnecting carriers that, in negotiating branding arrangements for operator services, they must insure that such arrangements are consistent with Federal laws and regulations requiring interstate OSPs to identify themselves.

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[295] *See* USTA reply at 6.

[296] *See* Bell Atlantic reply at 5; CBT reply at 4-5.

[297] PacTel reply at 15.

[298] *See First Report and Order* at section VIII .

[299] *See* AT&T Communications of Illinois, and LDDS Communications, Inc. d/b/a LDDS Metromedia Communications, Petition for a Total Local Exchange Wholesale Service Tariff from Illinois Bell Telephone Company d/b/a Ameritech Illinois and Central Telephone Company Pursuant to Section 13.505.5 of the Illinois Public Utilities Act, Illinois Commission, Dockets 95-0458 and 95-0531 (consol.), Hearing Examiner's Proposed Order, May 16, 1996, pp. 52-54.

D. Nondiscriminatory Access to Directory Assistance and Directory Listings

1. Definition of "Nondiscriminatory Access to Directory Assistance and Directory Listings"

a. Background

130. In the *NPRM*, the Commission interpreted the phrase "nondiscriminatory access to directory assistance and directory listings" to mean that the customers of all telecommunications service providers should be able to access each LEC's directory assistance service and obtain a directory listing on a nondiscriminatory basis, notwithstanding: (1) the identity of a requesting customer's local telephone service provider; or (2) the identity of the telephone service provider for a customer whose directory listing is requested.[300]

b. Comments

131. A number of commenters agree with our definition of "nondiscriminatory access to directory assistance and directory listings" as proposed in the *NPRM*.[301] Many commenters combine their discussions of what constitutes nondiscriminatory access for both operator services and directory assistance.[302] As with operator services, some commenters assert that a LEC is not obligated to ensure that a competing provider's customers have access to directory assistance and directory listings.[303] Bell Atlantic, for example, argues that "[t]he exchange carrier, naturally, can control only its part of the service, not what the other carrier provides."[304] CBT asks that we find that the nondiscriminatory access requirements only apply when a competing local service provider is using a LEC's local exchange services on a resale basis or when the competing provider is using a LEC's unbundled switch ports.[305]

132. Finally, certain interexchange carriers ask that we require that competing providers have access to the White Pages, Yellow Pages, and "customer guide" sections of directories, in order to satisfy the requirement of nondiscriminatory access to directory

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[300] *See NPRM* at para. 217.

[301] *See, e.g.*, AT&T comments at 9-10; SBC reply at 4; and Telecommunications Resellers Association comments at 7.

[302] *See, e.g.*, CBT comments at 6. *See, e.g.*, para. 113, *supra*.

[303] *See* Ameritech comments at 10, USTA comments at 6-7. *See also supra* para. 113.

[304] Bell Atlantic comments at 7.

[305] *See* CBT comments at 6, 7.

assistance and directory listings.[306] Sprint contends that "CLECs should be allowed to insert informational pages containing their business and repair numbers in the incumbent LEC's white and yellow pages directories at cost."[307] SBC strongly disagrees that section 251(b)(3) requires access to Yellow Pages, "customer guides," and informational pages, pointing out that the "competitive checklist" (section 271) provisions only require incumbent LECs to provide access to White Pages listings.[308]

c. Discussion

133. We conclude that we should adopt the definition of nondiscriminatory access to directory assistance services proposed in the *NPRM*, with the following modifications. Consistent with our conclusion in para. 101, *supra*, we have modified this definition to reflect that this duty is owed to competing providers of telephone exchange service and/or telephone toll service, and not to "all telecommunications carriers."[309] This duty does not apply if a LEC chooses not to offer directory assistance to its own customers.[310]

134. We agree that once a LEC permits a competitor nondiscriminatory access to directory assistance and directory listings, the LEC permitting the access is not responsible for ensuring that the competitor's customers are able to access these services. As with operator services, when a dispute arises as to the adequacy of the access received by the competitor's customers, the burden is on the LEC permitting access to the service to demonstrate with specificity: (1) that it is permitting nondiscriminatory access to directory assistance and directory listings; and (2) that the disparity in access is not caused by factors within its control. As in paragraph 114, *supra*, we conclude that the term "factors" is not confined to physical facilities, but also includes human and non-facilities elements such as staffing, maintenance and ordering.

135. The requirements for nondiscriminatory access to directory assistance and directory listings are intertwined. Requiring "nondiscriminatory access to directory listings" means that, if a competing provider offers directory assistance, any customer of that competing provider should be able to access any listed number on a nondiscriminatory basis, notwithstanding the identity of the customer's local service provider, or the identity of the

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[306] *See, e.g.*, AT&T comments at n.14.

[307] Sprint comments at 9-10.

[308] *See* SBC reply at 6-7 (citing 47 U.S.C. § 271(c)(2)(B)(vii)).

[309] *See supra* para. 101.

[310] *But see infra* paras. 141-145, wherein we require all LECs, regardless of whether or not they provide directory assistance to their customers, to share subscriber listings, in readily accessible formats, as an element of nondiscriminatory access.

telephone service provider for the customer whose directory listing is requested.[311] We conclude that the obligation to permit access to directory assistance and directory listings does not require LECs to permit access to unlisted telephone numbers, or other information that a LEC's customer has specifically asked the LEC not to make available.[312] In previous orders, such as those addressing nondiscriminatory access by interexchange carriers to Billing Name and Address (BNA) information, we have taken action to ensure that customer privacy is protected.[313] In this *Order*, we require that in permitting access to directory assistance, LECs bear the burden of ensuring that access is permitted only to the same information that is available to their own directory assistance customers, and that the inadvertent release of unlisted names or numbers does not occur.[314]

136. We find, as we did in paragraph 117, *supra*, that CBT's proposal to limit the application of section 251(b)(3) to competing providers of exchange and/or toll service who are providing services on a resale basis, or using an incumbent LEC's unbundled switch ports is unacceptable. We also take into account PacTel's comments in concluding that section 251(b)(3) does not require that a customer be able to access any LEC's directory assistance services, but only those services provided through its chosen service provider. When a customer contacts his or her provider's directory assistance services, the customer's provider can obtain access to the directory listings of other carriers; thus, the customer should be able to obtain any directory listing (other than listings that are protected or not available, such as unlisted numbers). We conclude, however, that a LEC that does not provide directory assistance to its own customers does not have to provide nondiscriminatory access to directory assistance to competing providers.

137. On the basis of the record before us, we conclude that there is no need for this Commission to state that the term "directory assistance and directory listings" includes the White Pages, Yellow Pages, "customer guides," and informational pages. As a minimum

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[311] *See infra* para. 141.

[312] *Cf.* 47 U.S.C. § 222(f)(3) [definition of "subscriber list information"], which is limited to *the listed names* of subscribers of a carrier.

[313] *See, e.g., Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards*, Third Order on Reconsideration, CC Docket No. 91-115, 11 FCC Rcd 6835 (1996); *see also Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards*, Second Report and Order, CC Docket No. 91-115, 8 FCC Rcd 4478 (1993).

[314] *See also Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, Notice of Proposed Rulemaking, CC Docket No. 96-115, FCC 96-221, (May 17, 1996).

standard, we find that the term "directory listing" as used in section 251(b)(3) is synonymous with the definition of "subscriber list information" in section 222(f)(3).[315]

2. Commission Action to Implement Nondiscriminatory Access to Directory Assistance and Directory Listings

a. Background and Comments

138. In the *NPRM*, the Commission sought comment on what action, if any, is necessary or desirable to implement the nondiscriminatory access to directory assistance and directory listings requirements of section 251(b)(3).[316] Several parties assert that there is no need for the Commission to adopt detailed rules addressing this issue.[317] In its comments, NYNEX described its current arrangements for making its directory assistance and directory listing services available to facilities-based and non-facilities-based carriers.[318]

139. Sprint and MFS urge the Commission to establish national rules requiring nondiscriminatory access to directory assistance and directory listings for all local service providers.[319] Furthermore, MCI recommends that the Commission establish requirements that ensure that "each provider of local service has access to directory listings of other providers, and that these directory listings are made available in readily usable format," and that these listings be provided "via tape or other electronic means, as is frequently the practice today between incumbent LECs whose service areas join."[320] PacTel and GTE urge the Commission to refrain from mandating access to underlying directory assistance databases.[321] GTE cites "serious technical and security concerns," while PacTel argues that (1) the plain language of section 251(b)(3) does not require access to the underlying databases, and (2) LECs are prohibited from disseminating certain directory listing information without customers'

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[315] The term "subscriber list information" at section 222(f)(3) means any information: (A) identifying the listed names of subscribers of a carrier and such subscribers' telephone numbers, addresses, or primary advertising classifications (as such classifications are assigned at the time of the establishment of such service), or any combination of such listed names, numbers, addresses or classifications; and (B) that the carrier or an affiliate has published, caused to be published, or accepted for publication in any directory format. 47 U.S.C. § 222(f)(3)(A), (B).

[316] *See NPRM* at para. 217.

[317] *See, e.g.*, Bell Atlantic comments at 6; GTE reply at 18; PacTel comments at 16.

[318] *See* NYNEX comments at 7-8.

[319] *See, e.g.*, MFS reply at 10; Sprint reply at 8.

[320] *See* MCI comments at 3, 9; *see also* MCI reply at 3.

[321] *See* GTE reply at 19; PacTel reply at 15.

permission in California and Nevada.[322] PacTel maintains that the intent of section 251(b)(3) is not to permit "unfettered access to all information on record."[323]

140. The Telecommunications Resellers Association states that "prompt and strong" Commission action is required to ensure compliance with nondiscriminatory access to directory assistance and directory listings.[324] The Florida Commission asserts that "[s]tates should be allowed to ensure compliance with the Act as it relates to these services as defined in the *NPRM*."[325]

b. Discussion

141. We conclude that section 251(b)(3) requires LECs to share subscriber listing information with their competitors, in "readily accessible" tape or electronic formats, and that such data be provided in a timely fashion upon request. The purpose of requiring "readily accessible" formats is to ensure that no LEC, either inadvertently or intentionally, provides subscriber listings in formats that would require the receiving carrier to expend significant resources to enter the information into its systems. We agree with MCI that "by requiring the exchange of directory listings, the Commission will foster competition in the directory services market and foster new and enhanced services in the voice and electronic directory services market."[326] Consistent with the definition of "subscriber list information" in section 222(f)(3), we do not require access to unlisted names or numbers.[327] Rather, we require the LEC providing the listing to share listings in a format that is consistent with what that LEC provides in its own directory.

142. We conclude that the fact that many LECs offer directory assistance and listings for purchase or resale to competitors, as NYNEX describes, does not obviate the need for any requirements in this area. Under the general definition of "nondiscriminatory access," competing providers must be able to obtain at least the same quality of access to these services that a LEC itself enjoys. Merely offering directory assistance and directory listing services for resale or purchase would not, in and of itself, satisfy this requirement, if the LEC,

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[322] *See* GTE reply at 19; PacTel reply at 15.

[323] PacTel reply at 15.

[324] *See* Telecommunications Resellers Association comments at 7.

[325] *See* Florida Commission comments at 5.

[326] MCI comments at 9.

[327] *See* 47 U.S.C. § 222(f)(3) for the definition of "subscriber list information."

for example, only permits a "degraded" level of access to directory assistance and directory listings.[328]

143. We further find that a highly effective way to accomplish nondiscriminatory access to directory assistance, apart from resale, is to allow competing providers to obtain read-only access to the directory assistance databases of the LEC providing access. Access to such databases will promote seamless access to directory assistance in a competitive local exchange market. We note also that incumbent LECs must provide more robust access to databases as unbundled network elements under section 251(c)(3).[329]

144. We do not agree with PacTel's contention that certain state laws restricting the types of information that LECs can disseminate preclude us from requiring access to directory assistance databases. It is not possible to achieve seamless and nondiscriminatory access to directory assistance without requiring access to the underlying databases. Consistent with our definition of nondiscriminatory access, the providing LEC must offer its competitors access of at least equal quality to that it receives itself. Competitors who access such LEC databases will be held to the same standards as the database owner, in terms of the types of information that they can legally release to directory assistance callers. The LEC that owns the database can take the necessary safeguards to protect the integrity of its database and any proprietary information, or carriers can agree that such databases will be administered by a third party. We note also that our holding does not preclude states from continuing to limit how LECs can use accessed directory information, *e.g.*, prohibiting the sale of customer information to telemarketers.[330] Rather, we conclude only that section 251(b)(3) precludes states from discriminating among LECs by imposing different access restrictions on competing providers, thereby allowing certain LECs to enjoy greater access to information than others.[331]

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[328] *See supra* paras. 101-105.

[329] *See supra* para. 118, for a discussion of the relationship between section 251(b)(3) and the requirements adopted in the *First Report and Order* mandating unbundled access to operator and directory assistance services.

[330] *But see* section 222(d)(3), which permits customer information to be used for telemarketing to the customer "...for the duration of the call, if such call was initiated by the customer and the customer approves of the use of such information to provide such service." 47 U.S.C. § 222(d)(3). *See also* our proceeding to clarify the obligations of carriers with regard to section 222(c) and 222(d). *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and other Customer Information*, CC Docket, No. 96-115, FCC 96-221 (May 17, 1996).

[331] *Cf.* 47 U.S.C. § 222(e), which requires telephone exchange service providers to "provide subscriber list information gathered in its capacity as a provider of such service on a timely and unbundled basis, under nondiscriminatory and reasonable rates, terms, and conditions, to any person upon request for the purpose of publishing directories in any format." *See* 47 U.S.C. § 222(f)(3) for the definition of "subscriber list information."

Accordingly, states may not impose rules that would allow a LEC to discriminate against competing providers.[332]

145. We are not adopting specific enforcement standards at this time. Disputes regarding nondiscriminatory access will be addressed under our Title II and Title V enforcement authority.[333]

3. Branding of Directory Assistance

a. Background and Comments

146. To the extent that interstate directory assistance services are within the definition of "operator services" in section 226(a)(7) of the Act,[334] the service provider is required to identify itself to consumers at the beginning of a call.[335] Parties raised the issue of whether the competing provider has the right to have resold directory assistance services of the LEC "branded" in its name, as an element of nondiscriminatory access under section 251(b)(3). Thus this issue is similar to that of branding of operator services in paras. 123-129, *supra*. The *NPRM* did not ask whether the branding of directory assistance should be required under 251(b)(3) but commenters raised this issue.

147. AT&T suggests adding a requirement that if an incumbent LEC brands its own directory services, the incumbent should ensure that other directory assistance service providers can also brand their services.[336] CBT argues that branding is impractical and should be left to intercarrier negotiations, stating that "call branding can be provided, though not without considerable added effort and expense, to facilities-based providers who route traffic from their networks to the incumbent LEC's network by trunk group. Providing branding for resold services at the line number level is extremely difficult within the limits of the public switched network. When dealing with multiple resellers, there is no simple method for the

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[332] *See First Report and Order* at section II for a discussion of the applicability of our section 251 rules to intrastate and interstate services.

[333] *See supra* para. 122. *See also* 47 U.S.C. § 208 [common carrier complaint authority] and 47 U.S.C. §§ 501 -510.

[334] 47 U.S.C. § 226(a)(7).

[335] *See* 47 U.S.C. § 226(a)(7), (b)(1). *See generally supra* paras. 123-129.

[336] *See* AT&T comments at n.12.

incumbent LEC to determine by individual line number which brand should be applied."[337] Bell Atlantic also suggests that this issue be left to carrier negotiations.[338]

b. Discussion

148. The record shows that this issue is a logical outgrowth of the issues related to nondiscriminatory access to directory assistance raised in the *NPRM* and thus should be addressed in this *Order*. As with operator services, we recognize the major role that branding can play in an environment where competing providers are reselling the directory assistance services of the providing LEC. Consistent with the requirements that we imposed on incumbent LECs in the *First Report and Order*, therefore, we conclude that a providing LEC's failure to comply with the reasonable, technically feasible request of a competing provider for the providing LEC to rebrand directory assistance services in the competing provider's name, or to remove the providing LEC's brand name, creates a presumption that the providing LEC is unlawfully restricting access to these services by competing providers.[339] This presumption can be rebutted by the providing LEC demonstrating that it lacks the capability to comply with the request of the competing provider.[340] Finally, as with operator services, we do not preempt any branding requirements that state commissions may have enacted for directory assistance services.

4. Alternative Dialing Arrangements for Directory Assistance

a. Background and Comments

149. In the *NPRM*, the Commission sought comment on whether the customers of competing providers of exchange and/or toll service would be able to access directory assistance by dialing '411' or '555-1212,' which are nationally-recognized numbers for directory assistance, or whether alternative dialing arrangements would be necessary.

150. No commenters recommended that we require different arrangements for dialing directory assistance. AT&T states that while alternative protocols may be permitted, no carrier should be required to use them.[341] Bell Atlantic states that "[n]o dialing arrangements for directory assistance other than 411 and 555-1212 are necessary. A facilities-based provider will be able to use these numbers and route its customers' calls in whatever way it

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[337] CBT reply at 5.

[338] *See* Bell Atlantic reply at 5.

[339] As with operator services, *supra*, we note that carriers must comply with the branding requirements of section 226, to the extent that their services are within the section 226 definitions. *See* 47 U.S.C. § 226.

[340] *See First Report and Order* at section VIII.

[341] *See* AT&T comments at 10.

chooses (to its own directory assistance, to that of the incumbent exchange carrier or to that or any other provider). When a non-facilities-based provider buys exchange service from the incumbent under section 251(c)(4), its customers get exactly what the incumbent's receive, 411 and 555-1212 access to directory assistance."[342]

b. Discussion

151. With respect to the ability of customers to reach directory assistance services through 411 or 555-1212 arrangements, we conclude that no Commission action is required now. No commenter has proposed that we require an alternative dialing arrangement. The record before us indicates that permitting nondiscriminatory access to 411 and 555-1212 dialing arrangements is technically feasible, and there is no evidence in the record that these dialing arrangements will cease.

E. Unreasonable Dialing Delay

1. Definition and Appropriate Measurement Methods

a. Background and Comments

152. Section 251(b)(3) prohibits unreasonable dialing delays.[343] The *NPRM* sought comment on what constitutes an unreasonable dialing delay for purposes of section 251(b)(3) and on appropriate methods for measuring and recording such delay.[344]

153. U S WEST contends that the phrase "unreasonable dialing delay," as it appears in section 251(b)(3), applies only to the provision of nondiscriminatory access to operator and directory assistance services.[345] GCI, on the other hand, asserts that the unreasonable dialing delay provision applies to both the dialing parity and nondiscriminatory access provisions of section 251(b)(3).[346] MFS, NYNEX and Sprint recommend that we define "dialing delay" to cover the period from when a user completes dialing to when the call is "handed off" to a connecting LEC, whenever multiple LECs are involved in call completion.[347] ALTS,

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[342] Bell Atlantic comments at 8-9.

[343] 47 U.S.C. § 251(b)(3).

[344] *See NPRM* at para. 218.

[345] U S WEST comments at 11.

[346] GCI reply at 2.

[347] *See* Sprint comments at 10; MFS reply at 8; NYNEX comments at 9.

however, suggests that we define "dialing delay" to cover the period from when the end user completes dialing to the point where a network response is first received.[348]

154. Several parties contend, however, that we should not adopt a definition of "dialing delay."[349] Bell Atlantic states that there is "no need to try to develop a definition of what constitutes 'unreasonable dialing delays.' To the extent that this ever becomes an issue, it is best handled with a specific factual record."[350]

155. Several parties recommend defining "unreasonable" as any delay that exceeds that of the providing LEC.[351] ACSI suggests that the Commission "declare a delay 'unreasonable' if the average access time for competing providers exceeds the average access time for the LEC itself," and that ". . . the LEC and competing providers should get equal priority in LEC call processing systems, which would result in identical dialing delays, on average, for LECs and competing providers."[352] Other parties argue that LECs should not be held responsible for unreasonable dialing delays that are not caused by their networks or are not within their control.[353]

b. Discussion

156. We conclude that section 251(b)(3) prohibits "unreasonable dialing delays" for local and toll dialing parity, and for nondiscriminatory access to operator services and directory assistance. The reference to "unreasonable dialing delay" is ambiguous because it is in a prepositional phrase at the end of section 251(b)(3), following references both to the duty to provide dialing parity and the duty to permit nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listings. In light of this ambiguity, and the absence of legislative history, we look to the purpose of section 251 and to the record to interpret the "unreasonable dialing delay" provision. Examining the statutory language in light of the plainly pro-competitive thrust of these section 251 requirements, we conclude that Congress intended the dialing delay prohibition to apply to both the obligation to provide dialing parity and the obligation to permit nondiscriminatory access to operator

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[348] ALTS comments at 6.

[349] *See, e.g.*, Bell Atlantic comments at 9, U S WEST comments at 11.

[350] Bell Atlantic comments at 9.

[351] *See, e.g.*, Excel comments at 8; Sprint comments at 11.

[352] ACSI comments at 10.

[353] *See, e.g.*, GTE comments at 19; USTA reply at 6-7.

services and directory assistance.[354] Further, commenters did not distinguish between dialing delay in dialing parity and nondiscriminatory access contexts.

157. We conclude that a "comparative" standard for identifying "unreasonable dialing delay" is necessary in order to ensure that, when competing providers obtain dialing parity and nondiscriminatory access to operator services and directory assistance, such access does not come with unreasonable dialing delays. We conclude, therefore, that the dialing delay experienced by the customers of a competing provider should not be greater than that experienced by customers of the LEC providing dialing parity, or nondiscriminatory access, for identical calls or call types. For the reasons stated below, we conclude that this "comparative standard" is more appropriate in this context than a specific technical standard.[355]

158. In our *Number Portability Order*,[356] we indicated that "at a minimum, when a customer switches carriers, that customer must not experience a greater dialing delay or call set up time . . . due to number portability, compared to when the customer was with the original carrier."[357] The standard that we are adopting for "unreasonable dialing delay" under section 251(b)(3) is consistent with the standard we adopted in the *Number Portability Order*.

159. We conclude that the statutory language on unreasonable dialing delays places a duty upon LECs providing dialing parity or nondiscriminatory access to operator services and directory assistance to process all calls from competing providers, including calls to the LEC's operator services and directory assistance, on an equal basis as calls originating from customers of the providing LEC. In other words, calls from a competing provider must receive treatment in the providing LEC's network that is equal in quality to the treatment the LEC provides to calls from its own customers. We recognize that LECs may have the technical ability to identify whether a call is originating from a competing provider (*e.g.*, by cross-referencing the Automatic Number Identification (ANI), or by identifying the connecting trunk group). Thus there may exist on the part of the providing LEC the ability to discriminate and to degrade service quality for a competing provider's customers by introducing unreasonable dialing delays.

160. For operator services and directory assistance calls, such dialing delay can be measured by identifying the time a call spends in queue until the providing LEC processes the call. We recognize that the time of arrival of a telephone call can be recorded (1) at the originating LEC's switch; (2) upon entering the operator services or directory assistance

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[354] 47 U.S.C. § 251(b)(3).

[355] *See infra* paras. 163-164, for a discussion of specific technical standards for dialing delay.

[356] *In the Matter of Telephone Number Portability*, First Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 95-116, FCC 96-286 (July 2, 1996) (*Number Portability Order*).

[357] *Id.* at para. 56.

queue; and (3) at the time of answering by the providing LEC's operators for such services. We believe that it is possible to compare the treatment of calls placed by customers of the competing provider with those of calls originating from the providing LEC's customers, and thus determine if unreasonable dialing delays are occurring. Such a comparison would hold all LECs responsible only for delays within their control.

161. In the event that a dispute arises between a competing provider and a providing LEC as to dialing delay, we conclude that the burden is on the providing LEC to demonstrate with specificity that it has processed the call on terms equal to that of similar calls originating from its own customers. Such "terms" include the amount of time a providing LEC takes to process incoming calls, the priority a LEC assigns to calls, and might also take into account the number of calls abandoned by the caller of the competing provider. Furthermore, to the extent that states have adopted specific performance standards for dialing delay between competing providers, we do not preempt such standards, and states may enact more detailed standards.

162. We do not believe that measuring "unreasonable dialing delay" from the period beginning when a caller completes dialing a call and ending when the call is delivered (or "handed off") by the LEC to another service provider is practical with respect to dialing parity or nondiscriminatory access. While we understand that such a measurement can be made, and is fully within the control of one LEC, prohibiting a providing LEC from introducing dialing delay in the originating segment of calls under its control benefits only the customers of the providing LEC. The providing LEC already has sufficient motivation to provide efficient service to its own customers. Finally, we conclude that the proposal to measure dialing delay from the completion of dialing to a network response (*e.g.*, when a caller receives busy-tone signalling information from the called line) is unsatisfactory, because it fails to isolate the segments of a call within an individual LEC's control.

2. Specific Technical Standard for Dialing Delay

a. Background and Comments

163. In the *NPRM*, the Commission asked commenters to identify a specific period of time that would constitute an "unreasonable dialing delay." NYNEX was the sole commenter proposing a quantitative measurement. In this regard, however, NYNEX recommends that the Commission should issue a *recommended* maximum period of delay rather than a mandatory standard.[358] NYNEX states that "an appropriate recommendation for this time period is that it should not exceed 5 seconds."[359] The majority of commenters urge the Commission not to

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[358] *See* NYNEX comments at 9-10.

[359] *Id.*

impose a specific technical dialing delay standard at this time.[360] For example, GTE states that "[n]umber portability, dialing parity and other newly required actions will undoubtedly affect network performance, including dialing delay, at least during a transition period. Any current determination of an unreasonable delay will be based on network designs that will bear little resemblance to the network structures of tomorrow."[361] Finally, the Illinois Commission states that it is currently studying the same issue for number portability in Chicago, and suggests that the Commission may wish to adopt the Illinois Commission's standard upon completion of its study.[362]

b. Discussion

164. We conclude that the record does not provide an adequate basis for determining a specific technical standard for measuring unreasonable dialing delays. Commenters do not address separately the dialing delay prohibition as it applies to each of the services covered by section 251(b)(3): local and toll dialing parity, and nondiscriminatory access to operator services and directory assistance. We thus conclude that, until dialing delay can be reliably measured after dialing parity is a reality, the "comparative" standard adopted in paragraph 157, *supra*, will provide a workable national rule for the industry. We intend to revisit the issue at a future date if we should find that our "comparative" standard is inadequate to ensure fair competition.

IV. NETWORK DISCLOSURE

165. Section 251(c)(5) of the 1996 Act requires incumbent LECs to "provide reasonable public notice of changes in the information necessary for the transmission and routing of services using that local exchange carrier's facilities or networks, as well as of any other changes that would affect the interoperability of those facilities or networks."

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[360] *See, e.g.*, Bell Atlantic comments at 9; MFS reply at 8.

[361] GTE comments at 19.

[362] *See* Illinois Commission comments at 70.

A. Scope of Public Notice

1. Definition of "Information Necessary for Transmission and Routing"

a. Background and Comments

166. In our *NPRM*, we tentatively concluded that "information necessary for transmission and routing" should be defined "as any information in the incumbent LEC's possession that affects interconnectors' performance or ability to provide services."[363]

167. Most commenters support the tentative conclusion in the *NPRM*.[364] For example, MFS asserts that our definition would "minimize the risk that an incumbent LEC could take actions inconsistent with [interconnection and interoperability]" and that the term "should be applied as broadly as possible."[365] MCI states that a broad definition is "necessary for new entrants to receive notice of technical changes."[366] Time Warner also asserts that "this broad-based definition . . . is critical to ensuring that [incumbent local exchange carriers] fulfill all of the obligations imposed upon them by Section 251(c)."[367]

168. Some, mostly smaller, incumbent LECs disagree with our proposed standard, stating that it is "too broad," "an onerous burden," "not necessary," and "may not be possible."[368] Other incumbent LECs claim that network disclosure requirements should be limited to "changes that affect the interconnection or interoperability of the network."[369] Their overarching concern is that the proposed definition's reference to "any information" would be interpreted so broadly that virtually any network-related information would fall within the ambit of the disclosure requirement.[370] Some incumbent LECs also express the fear that a broad interpretation of the statute "might expose [them] to unintended liability for giving

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[363] *NPRM* at para. 189.

[364] *See, e.g.*, ACSI comments at 11; ALTS comments at 2; AT&T comments at 23; Bell Atlantic comments at 10; GCI comments at 4; Illinois Commission comments at 59; MCI comments at 15; MFS comments at 12-13; Ohio Commission comments at 4; Telecommunications Resellers Association comments at 11; Time Warner comments at 3; U S WEST comments at 12.

[365] MFS comments at 12-13.

[366] MCI comments at 15.

[367] Time Warner comments at 3.

[368] GVNW comments at 1; Ameritech comments at 26; Rural Tel. Coalition comments at 2.

[369] Bell Atlantic reply at 9.

[370] GVNW comments at 1; Ameritech comments at 26.

information that the local exchange carrier is not qualified to provide" or that the [local exchange carrier] might be held liable for results of decisions that the interconnector made based upon this information."[371] These incumbent LECs claim that competing providers' informational needs would be fulfilled even if public disclosure were limited to "relevant interfaces or protocols."[372] USTA suggests an alternate definition: "all changes in information necessary for the transmission and routing of services using the local exchange carrier's facilities, or that affects interoperability."

169. According to some competing providers, narrowing the scope of information that must be publicly disclosed would preserve the information advantage that incumbent LECs possessed before the passage of the 1996 Act.[373] Also, AT&T notes that a narrowly constructed disclosure requirement would contradict the language of the statute that specifically identifies "changes that would affect the interoperability of those facilities or networks."[374] AT&T states that some information "is both necessary for proper transmission and routing and can affect the network's interoperability" although it is not directly relevant to the interconnection point.[375] AT&T presents five examples of technical changes that do not directly relate to the interconnection point but that nevertheless could have "profound" implications for competing service providers. These changes include those that (1) alter the timing of call processing; (2) require competing service providers to install new equipment, such as echo cancelers; (3) affect recognition of messages from translation nodes; (4) alter loop impedance levels, which could cause service disruptions; and (5) could disable a competing service provider's loop testing facilities.[376]

170. Some incumbent LECs suggest that network disclosure requirements should also apply to competing service providers.[377] MCI and MFS contend, however, that the plain language of the statute requires imposition of public disclosure requirements only upon incumbent LECs. MFS states that the duty to disclose change information was imposed upon incumbent local exchange carriers because they have sufficient "control over network standards to harm competition" and the "requisite size and market power to change their

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[371] GVNW comments at 1-2.

[372] Nortel states that the incumbent local exchange carrier should only "provide the interface information," and the competing service provider should then "perform its own 'reverse engineering' in developing its own products so as to be compatible with the interface." Nortel comments at 5.

[373] *See, e.g.*, Time Warner comments at 3-4.

[374] AT&T reply at 25-26.

[375] *Id.*

[376] AT&T reply at n.56.

[377] Ameritech comments at 29; BellSouth comments at 2; NYNEX comments at 15-16; Rural Tel. Coalition comments at n.4.

networks in a manner that stymies competition."[378] MFS argues that imposing notification requirements on competing service providers would be an "empty exercise" because "new entrants . . . can do little, if anything,to change their networks in a manner that adversely impacts the [incumbent LECs]."[379] MFS also argues that competing service providers have "powerful economic incentives" for maintaining compatibility with incumbent local exchange networks.[380]

b. Discussion

171. Section 251(c)(5) requires that information about network changes must be disclosed if it affects competing service providers' performance or ability to provide service. Requiring disclosure about network changes promotes open and vigorous competition contemplated by the 1996 Act. We find that additional qualifiers that restrict the types of information that must be disclosed, such as "*relevant* information or protocols," would create uncertainty in application and appear inconsistent with the statutory language. Timely disclosure of changes reduces the possibility that incumbent LECs could make network changes in a manner that inhibits competition. In addition, notice of changes to ordering, billing and other secondary systems is required if such changes will have an effect on the operations of competing service providers, because the proper operation of such systems is essential to the provision of telecommunications services.

172. We agree with MCI and MFS that the plain language of the statute requires imposition of public disclosure requirements only upon incumbent LECs.[381] In addition, we conclude that imposing this requirement upon competing service providers would not enhance competition or network reliability. While competing service providers must respond to incumbent LEC network changes, competing service providers, in general, are not in a position to make unilateral changes to their networks because they must rely so heavily on their connection to the incumbent LEC's network in order to provide ubiquitous service. Accordingly, competing service providers already face sufficient incentives to ensure compatibility of their planned changes with the incumbent LEC's network. In addition, if an incumbent LEC were permitted to obtain such information from a competing service provider, the incumbent LEC might be able to obtain the competing service provider's business plans and thereby stifle competition.[382]

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[378] MFS reply at 26.

[379] MFS reply at 26-27.

[380] *Id.*

[381] MCI reply at 7; MFS reply at 25, 26.

[382] NCTA asserts that incumbent LECs are "entirely capable of providing adequate notice of their network changes without 'full disclosure of competing service provider's operations and future plans.'" NCTA reply at 12.

173. We conclude that our disclosure standard is consistent not only with section 251(c)(5), but also with the requirements of the "all carrier rule"[383] and the scope of the *Computer III*[384] disclosure requirement, both of which have been applied to incumbent LEC activities for some time. In light of these preexisting requirements, we find that the standard we proposed in the NPRM is not burdensome but reasonable, providing sufficient disclosure to insure against anti-competitive acts as well as to ensure certain and consistent disclosure requirements.

174. We have considered the impact of our rules in this section on small incumbent LECs, including Rural Tel. Coalition's and GVNW's requests for a less inclusive definition of "information necessary for transmission and routing."[385] We do not adopt these proposals because we are unable to grant such leniency to small businesses and simultaneously ensure adequate information disclosure to facilitate the development of a pro-competitive environment for every market participant, including other small businesses. We note, however, that under section 251(f)(1) certain small incumbent LECs are exempt from our rules until (1) they receive a *bona fide* request for interconnection, services, or network elements; and (2) their state commission determines that the request is not unduly economically burdensome, is technically feasible, and is consistent with the relevant portions

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[383] Unless clearly specified otherwise, in this *Order*, we use the term "all carrier rule" to refer to the Commission's network disclosure rule contained in 47 C.F.R. § 64.702, as interpreted in the *Second Computer Inquiry*. The all carrier rule obligates "all carriers owning basic transmission facilities [to release] all information relating to network design . . . to all interested parties on the same terms and conditions, insofar as such information affects either intercarrier interconnection or the manner in which interconnected [customer-premises equipment] operates." *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), Memorandum Opinion and Order on Reconsideration*, 84 F.C.C.2d 50, 82-83 (1980), *further recon.*, 88 FCC 2d 512 (1981), *aff'd sub nom. Computer and Communications Indus. Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983). The all carrier rule also requires that "[w]hen such information is disclosed to the separate corporation it shall be disclosed and be available to any member of the public on the same terms and conditions." *See* 47 C.F.R. § 64.702; *Application of The Southern New England Tel. Co.*, 10 FCC Rcd 4558, 4559 n.23 (1995); *Competition in the Interstate Interexchange Marketplace*, Report and Order, 6 FCC Rcd 5880, 5911 n.270 (1991) (The all carrier rule obligates "all carriers to disclose, reasonably in advance of implementation, information regarding any new service or change in the network."); *Competition in the Interstate Interexchange Marketplace*, Report and Order, 6 FCC Rcd. 5880, 5911 n.270. (1991).

Another of the Commission's rules, 47 C.F.R. § 68.110(b), requires similar disclosure to customers of network changes "if such changes can be reasonably expected to render any customer's terminal equipment incompatible with telephone company communications facilities, or require modification or alteration of such terminal equipment, or otherwise materially affect its use or performance." We will refer to this rule specifically by number where necessary.

[384] *See infra* para. 204 and n.449.

[385] Rural Tel. Coalition comments at 2; GVNW comments at 1.

of section 254. In addition, certain small incumbent LECs may seek relief from our rules under section 251(f)(2).[386]

2. Definition of "Services"

a. Background and Comments

175. Commenters, including incumbent LECs, interexchange carriers, and industry organizations, unanimously support our tentative conclusion that the term "services," as used in section 251(c)(5), includes both telecommunications services and information services, as defined in sections 3(46) and 3(20), respectively.[387] Parties agree that it is reasonable to require that providers of both telecommunications and information services receive this information. ALTS points out that exclusion of information services or telecommunications services from our definition would be "needlessly restrictive."[388] BellSouth also notes that the inclusion of information services for public notice purposes should not vest information service providers with substantive rights under Section 251, except where they are also operating as a telecommunications carrier under the 1996 Act.[389]

b. Discussion

176. We conclude that the term "services" includes both telecommunications services and information services, as defined in sections 3(46) and 3(20) of the Act, respectively. Providers of both telecommunications services and information services may make significant use of the incumbent LEC's network in making these offerings. Accordingly, exclusion of either information services providers or telecommunications services providers would be needlessly restrictive. We also affirm that the inclusion of information services for public notice purposes does not vest information service providers with substantive rights under other provisions within section 251, except to the extent that they are also operating as telecommunications carriers.

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[386] For a discussion of the implications and operation of section 251(f), *see First Report and Order* at section XII.

[387] 47 U.S.C. § 153(20), (46). *See NPRM* at para. 189; ALTS comments at 2; Ameritech comments at 25; BellSouth comments at 3; District of Columbia Commission comments at 6-7; GCI comments at 4; Illinois Commission comments at 59; MCI comments at 15; MFS comments at 12; Telecommunications Resellers Association comments at 11; U S WEST comments at 12.

[388] ALTS comments at 2.

[389] BellSouth comments at 3.

3. Definition of "Interoperability"

a. Background and Comments

177. The Commission tentatively concluded that the term "interoperability," as used in section 251(c)(5), should be defined as "the ability of two or more facilities, or networks, to be connected, to exchange information, and to use the information that has been exchanged."[390] This definition of "interoperability" was taken from the *IEEE Standard Dictionary of Electrical and Electronics Terms*.[391] Commenters, including incumbent LECs, interexchange carriers, state commissions, and industry associations, are unanimous in their support for our tentative conclusion.[392] The Ohio Commission also suggests that we expand our definition of "interoperability" to "recognize that the exchange of traffic between an [incumbent local exchange carrier] and an interconnector must be seamless and transparent to both parties' end users."[393] No alternative definitions for the term "interoperability" were proposed by commenting parties.

b. Discussion

178. We define the term "interoperability" as "the ability of two or more facilities, or networks, to be connected, to exchange information, and to use the information that has been exchanged." As this definition of "interoperability" was taken from the *IEEE Standard Dictionary of Electrical and Electronics Terms*, we believe that this well established and widely accepted industry standard can be applied easily and consistently. We find that the concepts of seamlessness and transparency are already adequately incorporated into this definition's specific interoperability criteria, and that further exposition of these concepts is not necessary.

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[390] *NPRM* at para. 189.

[391] *See IEEE Standard Dictionary of Electrical and Electronics Terms* 461 (J. Frank ed. 1984).

[392] ALTS comments at 2; Ameritech comments at 25; AT&T comments at 23; District of Columbia Commission comments at 6-7; GCI comments at 4; Illinois Commission comments at 4; MCI comments at 15; MFS comments at 12-13; Ohio Commission comments at 4; Telecommunications Resellers Association comments at 12; U S WEST comments at 12.

[393] Ohio Commission comments at 4.

4. Changes that Trigger the Public Notice Requirement

a. Background and Comments

179. In the *NPRM*, we noted that "public notice is critical to the uniform implementation of network disclosure, particularly for entities operating networks in numerous locations across a variety of states."[394] We requested comment as to what changes should trigger the notice requirement.

180. Several commenters suggest that timely notice should be provided whenever an upcoming change in the incumbent LEC's network may affect the way in which a competing provider offers its service.[395] Examples of such changes include, but are not limited to, changes in transmission, signalling standards, call routing, network configuration and logical elements.[396] Also, commenters assert that public notice should be required when a change will affect the electronic interfaces, data elements, or transactions that support ordering, provisioning, maintenance and billing of the network facilities.[397] The Illinois Commission notes, however, that the types of changes that trigger public notice should not be "micro-defined" because overly specific trigger requirements could create situations in which carriers would not be required to provide public notice if a particular change has not been clearly identified.[398] ALTS also supports a broadly defined class of changes that trigger network disclosure requirements, asserting that some changes, such as those affecting provisioning and billing for a carrier's service, might not otherwise be reported adequately, resulting in service disruptions.[399]

181. Ameritech claims that disclosure obligations should only be triggered by a new or "substantially changed" network interface, or a change that "otherwise affects the routing or termination of traffic delivered to or from the incumbent LEC's network."[400] Ameritech also claims that changes "that do not impact interconnection and interoperability . . . do not need

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[394] *NPRM* at para. 190.

[395] ACSI comments at 11; ALTS comments at 2-3; AT&T comments at 23; Cox comments at 9-10; GCI comments at 5; Ohio Commission comments at 4; and Time Warner comments at 4.

[396] ACSI comments at 11.

[397] *See, e.g.*, AT&T comments at 24; Time Warner comments at 4.

[398] Illinois Commission comments at 59.

[399] ALTS comments at 2, 3.

[400] Ameritech comments at 26, 27.

to be disclosed at all."[401] AT&T observes, however, that public notice requirements should also apply to some changes that do not directly relate to the interconnect point.[402]

b. Discussion

182. We conclude that an incumbent LEC must provide public notice in accordance with the rules and schedules we adopt in this proceeding, once the incumbent LEC makes a decision to implement a change that either (1) affects competing service providers' performance or ability to provide service; or (2) otherwise affects the ability of the incumbent LEC's and a competing service provider's facilities or network to connect, to exchange information, or to use the information exchanged. We believe that a broad standard is appropriate, to reduce the possibility that incumbent LECs may fail to disclose information a competing service provider may need in order to maintain adequate interconnectivity and interoperability in response to incumbent LEC network changes. Examples of network changes that would trigger public disclosure obligations include, but are not limited to, changes that affect: transmission; signalling standards; call routing; network configuration; logical elements; electronic interfaces; data elements; and transactions that support ordering, provisioning, maintenance and billing. This list is not exclusive but exemplary; incumbent LECs are not exempted from public notice requirements for a particular change that is not included among these examples.

5. Types of Information to be Disclosed

a. Background

183. In the *NPRM*, we tentatively concluded that incumbent LECs should be required to "disclose all information relating to network design and technical standards, and information concerning changes to the network that affect interconnection."[403] We also tentatively concluded that incumbent LECs specifically must provide: (1) the date changes are to occur; (2) where changes are to be made or to occur; (3) the type of changes; and (4) the potential impact of changes; and that these four categories represented the "minimum information that a potential competitor would need in order to achieve and maintain efficient interconnection."[404]

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[401] *Id.*

[402] AT&T reply at 26 n.56.

[403] *NPRM* at para. 190. We referred, as an example, to the "All Carrier Rule," which requires public disclosure of "all information relating to network design and technical standards . . . [affecting] interconnection . . . prior to implementation and with reasonable advance notification." *See* note 383, *supra*.

[404] *NPRM* at para. 190.

b. Comments

184. A number of commenters agree with our tentative conclusions regarding the breadth of information that must be reported, as well as our minimum reporting requirements.[405] Ameritech, however, claims that our requirement is "too broad" and would "impose an onerous burden" on incumbent LECs, exceeding the statutory requirements of section 251(c)(5).[406] Ameritech asserts that "excessive exchange of information between competitors is inconsistent with . . . a competitive marketplace" and could spur "allegations of collusion and concerted action."[407] Cox and Time Warner, however, state that uniform public notice of sufficient information can attenuate anticompetitive behavior. ALTS, AT&T and MCI suggest that the information that must be disclosed should include, but should not be limited to, technical specifications and references to standards regarding transmission, signaling, routing and facility assignment as well as references to technical standards that are applicable to any new technologies or equipment, or which may otherwise affect interconnection.

185. A significant cross-section of commenters specifically advocates disclosure of the potential impact of changes.[408] For example, Cox notes that disclosure should, at a minimum, enable a competing service provider to understand: "(1) how its existing technical interconnection arrangements will be affected; and (2) how the form and content of the information passed between the interconnected networks will change."[409] ACSI clearly states that "the content of the notice should specifically identify . . . the impact of the change on current interconnection or access arrangements."[410]

186. Some incumbent LECs, however, take exception to our tentative conclusion to impose on them an obligation to make public disclosure of the potential impact of network

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[405] Illinois Commission comments at 60; ALTS comments at 3; AT&T comments at 23-24; District of Columbia Commission comments at 7; Excel comments at 10; GCI comments at 4-5; MCI comments at 15; MFS comments at 12-13; NCTA comments at 12; Telecommunications Resellers Association comments at 12.

[406] Ameritech comments at 26.

[407] *Id.*

[408] ACSI comments at 11; ALTS comments at 3; District of Columbia Commission comments at 7; Excel comments at 10; GCI comments at 5; MCI comments at 15; MFS comments at 12-13; Ohio Commission comments at 5; TCC reply at 23; Telecommunications Resellers Association comments at 12; Time Warner comments at 8.

[409] Cox reply at 13.

[410] ACSI comments at 11.

changes.[411] They argue that this obligation would require incumbent LECs to become "experts on the operations of other carriers," or impose a "duty to know what [an] interconnector's service performance abilities are."[412] Specifically, USTA expresses concern that this requirement "could be misconstrued as a duty to predict what the precise impact might be, or to educate a competitor on how to re-engineer their network."[413] Ameritech claims that this requirement is "unfair," and "of little or no value," and implies that this requirement creates a "general duty for [incumbent LECs] to operate their competitor's businesses or help them market their services."[414] BellSouth asserts that "the better approach would be to [disclose] information from which an interconnecting carrier would be able to determine for itself whether its service performance or abilities might be affected."[415] NYNEX alleges that "[s]uch proposals are over-broad and unnecessary to ensure . . . network interconnection/interoperability."[416] NYNEX rejects responsibility for evaluating the effect that changes it would make might have upon competing service providers and asserts that "there is no basis for changing the traditional responsibility of each carrier to maintain its own network and respond to technological and market changes."[417] NYNEX also claims that while it has the ability to "make an assessment of the likely impact of a technical change at the interface with a competitor's network," it would require "detailed knowledge of a competitor's network architecture" in order to calculate the impact a change may have on a competing service provider's performance.[418]

187. MCI and TCC suggest that an incumbent LEC should also be required to designate a contact for additional information in its public notice. PacTel argues, in response, that such a requirement would be "impossible to fulfill" because it would require an incumbent LEC to designate a "single omniscient individual."[419] MFS states that the public notice should also include: "(a) the charges that the incumbent LEC anticipates will apply to the carrier for the change; (b) the specific number of circuits affected if the change occurs at

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[411] Ameritech comments at 28; BellSouth comments at 3; GVNW comments at 3; NYNEX reply at 9; USTA reply at 11.

[412] BellSouth comments at 3. *See, e.g.*, Ameritech comments at 28; GVNW Comments at 3; NYNEX reply at 9.

[413] USTA reply at 11.

[414] Ameritech comments at 28.

[415] BellSouth comments at 3.

[416] NYNEX reply at 9.

[417] *Id.*

[418] NYNEX reply at 9 n.24.

[419] PacTel reply at 6-7.

the time of the notification; (c) the projected minimum, maximum, and average down times per affected circuit; (d) alternatives available to the interconnector;[420] and (e) any other information necessary to evaluate alternatives and effectuate necessary changes or challenges."[421] The Ohio Commission, in contrast, claims that information relating to network design should be excepted from public disclosure, and that incumbent LECs should only be obliged to disclose information regarding changes to existing interconnection arrangements.[422]

c. Discussion

188. We conclude that we should adopt a requirement of uniform public notice of sufficient information to deter anticompetitive behavior and that, at a minimum, incumbent LECs should give competing service providers complete information about network design, technical standards and planned changes to the network. Specifically, public notice of changes shall consist of: (1) the date changes are to occur; (2) the location at which changes are to occur; (3) types of changes; (4) the reasonably foreseeable impact of changes to be implemented, and (5) a contact person who may supply additional information regarding the changes. Information provided in these categories must include, as applicable, but should not be limited to, references to technical specifications, protocols, and standards regarding transmission, signaling, routing and facility assignment as well as references to technical standards that would be applicable to any new technologies or equipment, or that may otherwise affect interconnection.

189. We find that making available a contact person will simplify the public notification process and reduce the risk that the notifications will be misunderstood or misconstrued. Commenters have requested that public notices include a variety of specific information categories, some of which may not be covered by the specific categories identified in the *NPRM*. Such specific information, however, may be inapplicable, unnecessary or proprietary in some circumstances and inadequate or confusing in others. Accordingly, we require instead that incumbent LECs identify a contact person. Such a contact need not be "omniscient," but rather should be able to serve as an initial contact point for the sharing of information regarding the planned network changes.

190. Providing notice of the reasonably foreseeable potential impact of changes does not require incumbent LECs to educate a competitor on how to re-engineer its network, or to be experts on the operations of other carriers, or impose a duty to know the competing service provider's service performance or abilities. Rather, we intend that incumbent LECs perform

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[420] Although MFS does not elaborate on this requirement, we interpret this suggestion as a request that an incumbent LEC identify in its public notice a range of proposed competing service provider responses to the planned change that will maintain interconnectivity and interoperability of the carriers' networks.

[421] MFS comments at 14.

[422] Ohio Commission comments at 5.

at least rudimentary analysis of the network changes sufficient to include in its notice (where appropriate) language reasonably intended to alert those likely to be affected by a change of anticipated effects. We find that such cautionary language will be a valuable, but not burdensome, element of reasonable public notice.

191. We do not limit network disclosure to information pertinent to those changes in incumbent LEC network design or technical standards that will affect existing interconnection arrangements, as requested by the Ohio Commission. Such a limitation is neither consistent with the obligations imposed by section 251(c)(5) nor consistent with the development of competition. In formulating interconnection and service plans, both actual and potential competing service providers need information concerning network changes that potentially could affect anticipated interconnection, not just those changes that actually affect existing interconnection arrangements.

B. How Public Notice Should be Provided

1. Dissemination of Public Notice Through Industry Fora and Publications

a. Background

192. Section 251(c)(5) requires incumbent LECs to provide "reasonable public notice" of relevant network changes. In the *NPRM*, the Commission requested comment on how this notice should be provided. The Commission tentatively concluded that "full disclosure of the required technical information should be provided through industry fora or in industry publications."[423] The Commission stated that "this approach would build on a voluntary practice that now exists in the industry and would result in broad availability of the information."[424] The Commission sought comment on this tentative conclusion. The Commission also requested comment on whether a reference to information on network changes should be filed with the Commission and, if so, where that information should be located.

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[423] The Commission gave as examples the Network Operations Forum (NOF) and the Interconnection Carrier Compatibility Forum (ICCF). *NPRM* at para. 191.

[424] *NPRM* at para. 191.

b. Comments

193. Most commenters agree with our tentative conclusion in the *NPRM* that existing industry fora and publications are appropriate vehicles for public notice of network changes.[425] Bell Atlantic notes that "industry participants with an interest in new interfaces routinely monitor publications and announcements for disclosures."[426] Some incumbent LECs support the use of industry fora and publications because they are well established, already in place, reach the targeted audience, have worked effectively for a number of years, or allow for widespread dissemination.[427] USTA states that "voluntary practices can serve as a platform from which to implement this act."[428]

194. Several commenters, however, caution that industry fora and publications should not be the only vehicles used for the public dissemination of network change information[429] and request flexible disclosure methods.[430] Although MCI does not object to utilizing industry fora and publications, MCI cautions against over reliance on these vehicles because it "do[es] not believe that . . . parties affected by technical changes [will] receive information in sufficient detail, objectivity, and timeliness."[431] Many commenters indicate that additional disclosure vehicles are required because not all carriers participate in these fora on a regular basis (partly as a result of limited resources)[432] or because the BOCs, in the past, have used industry fora to limit competitors' access to full and timely information in order to put them at a competitive disadvantage.[433] Several commenters have noted the potential of the Internet

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[425] ALTS comments at 3-4; Ameritech comments at 28-29, reply at 17-18; AT&T comments at 24; Bell Atlantic comments at 10; Cox reply at 13; GCI comments at 5; Illinois Commission comments at 62; MCI comments at 15; MFS reply at 25; NCTA reply at 11; NYNEX comments at 15, reply at 10; PacTel comments at 7, reply at 6; Teleport comments at 11; Telecommunications Resellers Association at 12. *See also NPRM* at para. 191.

[426] Bell Atlantic also states that exchange carriers should be able to satisfy their disclosure obligation by indicating their intention to deploy specifications at the time that they are published by a standards organization. Bell Atlantic comments at 10-11.

[427] Ameritech reply at 17-18; GTE comments at 7.

[428] USTA comments at 11-12.

[429] *E.g.*, Cox reply at 12; MCI comments at 17; GVNW comments at 4; Rural Tel. Coalition comments at 3.

[430] *E.g.*, Rural Tel. Coalition comments at 3,5.

[431] MCI comments at 17-18.

[432] *See, e.g.*, Cox comments at 11, reply at 13; MCI comments at 17; GVNW comments at 4; Rural Tel. Coalition comments at 3.

[433] MCI comments at 17-18, reply at 7. Bell Atlantic refutes this allegation. Bell Atlantic reply at 10.

as a vehicle for providing public notice of network changes.[434] Others specifically suggest that incumbent LECs should be required to file technical change information with the Commission "in order to ensure a complete, reliable, and consistent body of information that all parties may utilize."[435] Some incumbent LECs, however, disagree, arguing that the Commission need not become a repository of disclosure notices because such Commission filings would be "redundant with existing industry functions and contrary to the Commission's current initiative to eliminate unnecessary filings."[436]

195. Bell Atlantic suggests that "direct disclosure to a mailing list of interconnectors should also be allowed."[437] MFS proposes extending direct mail notification to "any other carrier . . . who specifically requests such notice."[438] PacTel, however, claims that imposing these sorts of requirements would "impose excessive and unnecessary costs on [incumbent] LECs."[439]

196. BellSouth argues that no Commission rule is necessary because current voluntary practices are "sufficient to ensure that this information is broadly available."[440] Similarly, GVNW suggests that information should only be passed to competing service providers "case by case . . . as required."[441] Several commenters, however, disagree. Time Warner, for example, contends that "the Commission must adopt a uniform . . . rule which prescribes a specific method by which notification and disclosure must be provided" and that will allow interested parties to gain ready access to the information they require.[442]

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[434] *See, e.g.*, ALTS comments at 3-4; U S WEST comments at 14; MCI comments at 17; Time Warner comments at 10 n.12; MFS reply at 25; TCC reply at 24.

[435] MCI comments at 19; MFS comments at 13. *See also* Time Warner comments at 10 (establishing the Commission as a "central point of reference" could be less burdensome on incumbent LECs than other means of providing public notice).

[436] BellSouth comments at 4 n.11. *See also* NYNEX reply at 10; PacTel reply at 6.

[437] Bell Atlantic comments at 10.

[438] MFS comments at 14, reply at 25.

[439] PacTel reply at 6.

[440] BellSouth comments at 4.

[441] GVNW comments at 4.

[442] Time Warner comments at 9. *See also* AT&T reply at 27 n.58. (arguing that the very existence of such broad disagreement on this issue itself bespeaks the need for a uniform national rule and that the absence of a uniform public disclosure requirement would lead to "disparate application of a uniform federal statutory duty, unduly narrow interpretations of that duty by [independent local exchange carriers] . . . and competitive harm to new entrants").

197. The District of Columbia Commission asserts that state commissions may also require information to be filed at the state level, and may need the same information in order to comply with section 252. As such, state commissions could also be used to make information available to small competing service providers. AT&T, however, argues that there are no specific differences among the various states that are "material" to our network disclosure requirements.[443]

c. Discussion

198. We conclude that incumbent LECs may fulfill their network disclosure obligations either (1) by providing public notice through industry fora, industry publications, or on their own publicly accessible Internet sites; or (2) by filing public notice with the Commission's Common Carrier Bureau, Network Services Division, in accordance with the format and method requirements of the rules we are adopting in this proceeding. In either case, the public notice must contain the minimum information categories identified in paragraph 188, above. Incumbent LECs using public notice methods other than Commission filings must file a certification with the Common Carrier Bureau, Network Services Division, identifying the proposed change(s), stating that public notice has been given in compliance with this Order, identifying the location of the information describing the change and stating how the information can be obtained by interested parties. This certification must also comply with the rules we adopt in this proceeding.

199. As discussed above, we conclude that industry fora, industry publications, and the Internet may be used to make public disclosure of network changes and required technical information. We affirm our belief that "this approach would build on a voluntary practice that now exists in the industry and would result in broad availability of the information."[444] Reliance solely on voluntary participation in industry fora and publications, however, may inhibit the ability of some small carriers to disseminate or receive this information. Because of their more limited resources, some smaller incumbent LECs and competing service providers do not participate in these fora on a regular basis; nevertheless, all carriers, competing service providers, and potential competitors must have equal opportunities to provide and to receive change information on a national scale. We believe that wide availability of pertinent network change information effectively removes potential barriers to entry, which could otherwise frustrate the efforts of new competitors. As a consequence, we conclude that the Commission should function as a "backstop" source of information for other interested parties. Accordingly, in lieu of disclosure in industry fora, publications, or the Internet, an incumbent LEC may file network change information directly with the Commission. In the alternative, if an incumbent LEC chooses to provide public notice through one or more industry fora or publications, or the Internet, we require that it also file a certification with the Commission containing the information outlined above. We are

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[443] AT&T reply at n.59.

[444] *NPRM* at para. 191.

confident that even small incumbent LECs with limited resources will be able to use one of these alternatives to give public notice of network changes.

200. An incumbent LEC must maintain both the information disclosed in its public notice and any nondisclosed supporting information that is nevertheless relevant to the planned change, until the change is implemented. As discussed in paragraph 235, *infra*, once a change is implemented in the incumbent LEC's network, information on the change must be disclosed under the general interconnection obligations imposed by section 251(c)(2).

201. We find that information filed with the Commission under section 251(c)(5) should eventually be made available on the FCC Home Page or through other online access vehicles, such as "LISTSERV" subscription mailings or others, and we intend to explore this option fully for the future. In addition, we will explore vigorously the possibility that hypertext links from the Commission Home Page to incumbent LEC Internet sites could both facilitate public notice and centralize access to change information. We find that direct mail notification alone does not comport with our interpretation of "public notice" as used in this proceeding, because such direct mailings do not provide notice to the "public," but rather provide individual notice to a selected group of recipients. Such mailings could, however, supplement other methods of notification.

202. We also address the impact on small incumbent LECs. We agree with GVNW[445] and Rural Tel. Coalition[446] that we can mitigate the impact of our rules on small incumbent LECs by allowing public notice to be given at several alternative locations. Because many of these carriers lack the resources to participate in industry fora, we have also provided low cost alternatives, including Internet postings or Commission filings. We expect that our requirement that either public notice or certification be filed with the Commission will allow small entities, both incumbent LECs and new entrants, to locate network change information quickly and inexpensively. In any event, under section 251(f)(1), certain small incumbent LECs are exempt from our rules until (1) they receive a *bona fide* request for interconnection, services, or network elements; and (2) their state commission determines that the request is not unduly economically burdensome, is technically feasible, and is consistent with the relevant portions of section 254. In addition, certain small incumbent LECs may seek relief from our rules under section 251(f)(2).[447]

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[445] GVNW comments at 4.

[446] Rural Tel. Coalition comments at 3,5.

[447] For a discussion of the implications and operation of section 251(f), *see First Report and Order*, section XII.

2. When Should Public Notice of Changes Be Provided?

a. Background

203. Section 251(c)(5) requires an incumbent LEC to provide "reasonable public notice" of certain changes to its network. In the *NPRM*, we tentatively concluded that this statutory language requires incumbent LECs: (1) to provide notice of these changes within a "reasonable" time in advance of implementation; and (2) to make the information available within a "reasonable" time if responding to an individual request.[448] We sought comment on what constitutes a reasonable time in each of these situations, and on whether the Commission should adopt a specific timetable for disclosure of technical information.

204. In the *NPRM*, we specifically sought comment on whether we should adopt a disclosure timetable similar to that adopted by the Commission in the *Computer III* proceeding.[449] In Phase II of that proceeding, the Commission required AT&T and the BOCs to disclose information about network changes or new network services that affect the interconnection of enhanced services with the network at two points in time.[450] First, these carriers were required to disclose such information at the "make/buy" point -- that is, when the carrier decides to make itself, or to procure from an unaffiliated entity, any product the design of which affects or relies on the network interface.[451] Second, carriers were required to release publicly all technical information at least twelve months prior to the introduction of a new service or network change that would affect enhanced service interconnection with the network.[452] If a carrier could introduce a new service between six and twelve months of the

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[448] *NPRM* at para. 192.

[449] *Amendment of Section 64.702 of the Commission's Rules and Regulations (Computer III), Phase I*, 104 F.C.C.2d 958 (1986) (*Phase I Order*), *recon.*, 2 FCC Rcd 3035 (1987) (*Phase I Recon. Order*), *further recon.*, 3 FCC Rcd 1135 (1988) (*Phase I Further Recon. Order*), *second further recon.*, 4 FCC Rcd 5927 (1989) (*Phase I Second Further Recon.*), *Phase I Order and Phase I Recon. Order vacated, California v. FCC*, 905 F.2d 1217 (9th Cir. 1990) (*California I*); *Phase II*, 2 FCC Rcd 3072 (1987) (*Phase II Order*), *recon.*, 3 FCC Rcd 1150 (1988) (*Phase II Recon. Order*), *further recon.*, 4 FCC Rcd 5927 (1989) (*Phase II Further Recon. Order*), *Phase II Order, vacated, California I*, 905 F.2d 1217 (9th Cir. 1990); *Computer III Remand Proceedings*, 5 FCC Rcd 7719 (1990) (*ONA Remand Order*), *recon.*, 7 FCC Rcd 909 (1992), *pets. for review denied, California v. FCC*, 4 F.3d 1505 (9th Cir. 1993) (*California II*); *Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards*, 6 FCC Rcd 7571 (1991) (*BOC Safeguards Order*); *BOC Safeguards Order, vacated in part and remanded, California v. FCC*, 39 F.3d 919 (9th Cir. 1994) (*California III*), *cert. denied*, 115 S.Ct. 1427 (1995).

[450] *Phase II Recon. Order*, 3 FCC Rcd at 1164. Although the Ninth Circuit vacated the *Phase II Recon. Order*, the Commission reimposed the network disclosure requirements on remand. *See BOC Safeguards Order*, 6 FCC Rcd at 7602-7604.

[451] *Phase II Recon. Order*, 3 FCC Rcd at 1164.

[452] *Id.* at 1164-65.

make/buy point, public disclosure was permitted at the make/buy point, but in no event could the carrier introduce the service earlier than six months after the public disclosure.[453]

205. The disclosure obligations imposed by section 251(c)(5) are broader than those adopted in the *Computer III* proceeding. While *Computer III* applies only to the BOCs and to AT&T, section 251(c)(5) imposes disclosure requirements on all incumbent LECs. Furthermore, while the *Computer III* disclosure requirements apply only to technical information related to new or modified network services affecting the interconnection *of enhanced services* to the BOC networks, section 251(c)(5) mandates disclosure of a much broader spectrum of information.[454] Accordingly, we sought comment in the *NPRM* on whether the Commission should adopt a timetable comparable to that imposed in *Computer III* for section 251(c)(5) network disclosure purposes and, if so, how such a timetable should be implemented.

b. Comments

206. Most commenters express support for our tentative conclusion that section 251(c)(5) requires incumbent LECs to disclose publicly information on network changes within a reasonable time in advance of implementation.[455] No commenters suggest that the timing of disclosure is not governed by section 251(c)(5)'s "reasonableness" standard, although at least two commenters appear to indicate that it would be reasonable to implement network changes immediately upon disclosure.[456] Commenters also support our tentative conclusion that an incumbent LEC must make this information available within a "reasonable" time if responding to an individual request.[457] Time Warner requests a concrete standard in this area and suggests that the Commission should indicate that, once an incumbent LEC has released a public notice of change under section 251(c)(5), it must respond to individual requests for detailed, technical information concerning network changes under section 251(c)(5) within ten business days of receiving the request.[458]

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[453] *Id.* at 1165.

[454] *See* discussion of the definitions of "information necessary for the transmission and routing of services" and "interoperability," *supra*.

[455] *See, e.g.*, Ameritech comments at 29; GCI comments at 5; MCI comments at 15; Time Warner comments at 6; U S WEST reply at 1.

[456] BellSouth argues that "the Commission should permit the offering of the new interface immediately upon the disclosure of the requisite information." BellSouth comments at 5; *see also* Nortel comments at 4.

[457] *See, e.g.*, MCI comments at 15.

[458] Time Warner comments at 11.

207. Commenters were split on whether we should adopt a specific disclosure timetable for section 251(c)(5) purposes. Several commenters[459] oppose the adoption of a specific timetable, primarily arguing that: (1) any regulations adopted under section 251(c)(5) should define only minimum guidelines, allowing the states flexibility under section 251(d)(3) to adopt more stringent disclosure requirements dictated by local conditions; (2) a fixed disclosure timetable will needlessly or arbitrarily delay the introduction of new services or technical advances; (3) overly long advance disclosure periods will put the incumbent LECs at a competitive disadvantage because competitors will be able to bring planned services to market more quickly; (4) the industry already has in place detailed disclosure guidelines that are widely followed on a voluntary basis and that obviate the need for independent Commission examination of this issue; and (5) the Commission's existing "all carrier" rule, which contains a flexible standard, adequately addresses the obligations imposed by section 251(c)(5).[460] GVNW warns that the interval from the make/buy decision to in-service for small LECs is often less than twelve months and states that the Commission should not require technology to be implemented at a slower pace than is technically feasible merely to satisfy a notice requirement.[461] Commenters also argue that carriers already face powerful incentives to ensure that their networks interconnect properly because the reputation of both the incumbent LEC and the interconnecting LEC are at stake if service fails.[462] In addition, BellSouth claims that section 251(c)(5) is "self-effectuating and needs no interpretive regulations."[463]

208. Several other commenters argue that, while a disclosure timetable may be necessary, the *Computer III* requirements are too rigid. The District of Columbia Commission notes that any eventual disclosure timetable must balance "the need to ensure the earliest possible disclosure of information needed by competitors [against] the need to impose the least administrative burden on" incumbent LECs.[464] Accordingly, the District of Columbia Commission maintains that state commissions should be afforded flexibility to set timetables that are appropriate in light of local conditions.[465] Several commenters note existing industry notification timing standards adopted and issued by the Industry Carriers Compatibility Forum

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[459] *See, e.g.*, Ameritech comments at 29; BellSouth comments at 2, 5; District of Columbia Commission comments at 6, 7-8; GVNW comments at 5; Bell Atlantic reply at 8-9.

[460] The requirements of the all carrier rule are discussed in note 383 *supra*.

[461] GVNW comments at 4.

[462] *See, e.g.*, Ameritech comments at 30.

[463] BellSouth comments at 1.

[464] District of Columbia Commission comments at 8.

[465] *Id.*

("ICCF")[466] and argue that widespread industry use of these standards has obviated the need for an additional Commission-imposed timetable.[467] MCI, however, cautions that these existing industry guidelines are inadequate because industry fora, in general, have historically been controlled by the RBOCs.[468] U S WEST supports disclosure at the "make/buy" point, but argues that additional notice should not be required for deployment of standard interfaces and services.[469] While MCI supports adoption of the *Computer III* timetable in this proceeding, it requests that, in addition: (1) we impose a mandatory 6-month disclosure period for network changes that can be implemented within 6 months of the "make/buy" point; and (2) we clarify that incumbent LECs must disclose relevant information they discover after services have been introduced, if such information would have been subject to prior disclosure.[470] AT&T also supports the general parameters of the *Computer III* timetable, but requests that we specifically impose a one year minimum advance disclosure obligation on changes to network elements or operations support system technology.[471] Similarly, while ACSI notes that the *Computer III* timetable is a "useful starting place," it argues for a minimum one-year notice period for modification of the physical form of interconnection, with an additional 6 month period in which use of the changes by a competing service provider is permissive only.[472]

209. Cox argues that disclosure should be made at the "earliest possible time" and, in particular, at the time the decision is made internally to implement a change, with the "make/buy" point being considered the "absolute latest date" on which disclosure is permitted.[473] In addition, Cox requests that we obligate incumbent LECs to disclose any unimplemented network changes that are subject to the section 251(c)(5) notice requirement at the outset of interconnection negotiations.[474]

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[466] Industry Carriers Compatibility Forum, *Recommended Notification Procedures to Industry for Changes in Access Network Architecture*, ICCF 92-0726-004, Rev. 2 (Jan. 5, 1996).

[467] USTA comments at 13; NYNEX comments at 16-17; SBC comments at 14.

[468] MCI reply at 7.

[469] U S WEST comments at 13.

[470] MCI comments at 20-21.

[471] AT&T comments at 25.

[472] ACSI comments at 12.

[473] Cox comments at 10-11.

[474] *Id.* at 11.

210. MFS proposes a tripartite scheme, loosely based on the *Computer III* timetable, that classifies certain changes as "major," "location," or "minor."[475] "Major" changes, would be defined as those "introducing any change in network equipment, facilities, specifications, protocols, or interfaces that will require other parties to make any modification to hardware or software in order to maintain interoperability." Major changes would be subject to 18 months advance notice. "Location" changes would be defined as those "that require changes in the geographic location to which traffic is routed, or at which unbundled network elements can be obtained, but [that] do not otherwise change the manner of interconnection or of access"; such changes could be implemented on 12 months notice. "Minor" changes, including those in "numbering, routing instructions, signalling codes, or other information necessary for the exchange of traffic that do not require construction of new facilities or changes in hardware or software" could be made upon notice in accord with the time intervals prescribed by the ICCF.[476]

211. Many commenters recognize the need for a concrete disclosure timetable. AT&T argues that the broad disagreement among commenters itself is evidence that section 251(c)(5) is not self-effectuating.[477] AT&T opposes the state-by-state approach advocated by the District of Columbia Commission, as well as the case-by-case approach advocated by Rural Tel. Coalition, because these approaches could lead to the disparate application of the uniform statutory duty imposed by section 251(c)(5). AT&T notes that the record does not reflect any material conditions that vary among states or justify differing rules. In addition, AT&T disputes the applicability of the ICCF timetable, since that document sets forth only guidelines to be used by the independent LECs in notifying the BOCs of network changes.[478]

212. Of the commenters supporting concrete federal standards, most support the adoption of the *Computer III* disclosure timetable.[479] PacTel notes that existing Commission disclosure requirements are familiar to the industry and adequate to meet the requirements of section 251(c)(5); accordingly it supports the establishment of "safe harbor" rules based on *Computer III* and the disclosure requirements contained in our existing rules.[480] As discussed above, although it advocates certain revisions, U S WEST agrees that "disclosure pursuant to the Computer [III] Rules would seem to satisfy the requirements of the [1996] Act."[481] GTE

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[475] MFS comments at 15-16.

[476] These intervals are prescribed in the ICCF *Recommended Notification Procedures*. *See* note 466 *supra*.

[477] AT&T reply at 27.

[478] *Id.*

[479] *See, e.g.*, Teleport comments at 11; GCI comments at 5; AT&T reply at 27.

[480] PacTel comments at 5. *See* 47 C.F.R. §§ 64.702(d)(2), 68.110(b).

[481] U S WEST comments at 12-13.

notes that the "make/buy" point is an appropriate disclosure trigger because it ensures both the delivery of timely information to parties that use the networks and the promotion of carriers' development efforts to support network innovation.[482]

213. Several commenters urge us to adopt rules prohibiting an incumbent LEC from disclosing network changes to certain preferred entities, including long distance or equipment manufacturing affiliates, prior to public disclosure.[483]

c. Discussion

214. We find that it would be unreasonable to expect other telecommunications carriers or information services providers to be able to react immediately to network changes that the incumbent LEC may have spent months or more planning and implementing; accordingly we reject requests to permit incumbent LECs to implement changes immediately on disclosure. In order to clarify incumbent LECs' obligations to disclose these changes a "reasonable time in advance of implementation," we adopt a disclosure timetable based on that developed in the *Computer III* proceeding. Under this timetable, incumbent LECs will be required to disclose planned changes, subject to the section 251(c)(5) disclosure requirements, at the "make/buy" point,[484] but a minimum of twelve months before implementation. If the planned changes can be implemented within twelve months of the make/buy point, then public notice must be given at the make/buy point, but at least six months before implementation.

215. With respect to changes that can be implemented within six months of the make/buy point, incumbent LECs may wish to provide less than six months notice. In such a case, the incumbent LEC's certification or public notice filed with the Commission, as applicable, must also include a certificate of service: (1) certifying that a copy of the incumbent LEC's public notice was served on each provider of telephone exchange service that interconnects directly with the incumbent LEC's network a minimum of five business days in advance of the filing; and (2) providing the name and address of all such providers of local exchange service upon which the notice was served. The Commission will issue public notice of such short-term filings. Such short term notices will be deemed final on the tenth business day after the release of the Commission's public notice unless a provider of information services or telecommunications services that directly interconnects with the incumbent LEC's network files an objection to the change with the Commission and serves it on the incumbent LEC no later than the ninth business day following the release of the Commission's public notice. If such an objection is filed, the incumbent LEC will have the opportunity to respond within an additional five business days and the Common Carrier

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[482] GTE reply at 7-8 and comments cited at 7 n.15.

[483] *See, e.g.*, Time Warner comments at 8; NCTA reply at 12; Ohio Consumer's Council reply at 5-6.

[484] The definition of the "make/buy" point for section 251(c)(5) purposes is discussed *infra* at paras. 216-217.

Bureau, Network Services Division, will issue, if necessary, an order determining the reasonable public notice period.

i. The Section 251(c)(5) Timetable

216. Without adequate notice of changes to an incumbent LEC's network that affect the "information necessary for the transmission and routing" of traffic, a competing service provider may be unable to maintain an adequately high level of interoperability between its network and that of the incumbent LEC. This inability could degrade the quality of transmission between the two networks or, in a worse case, could interrupt service between the two service providers.[485] Under the rules we adopt today, incumbent LECs must disclose changes subject to section 251(c)(5) at the "make/buy" point, *i.e.*, the time at which the incumbent LEC decides to make for itself, or procure from another entity, any product the design of which affects or relies on a new or changed network interface,[486] but at least twelve months in advance of implementation of a network change. In *Computer III*, the Commission defined "product" in the enhanced services context to be "any hardware or software for use in the network that might affect the compatibility of enhanced services with the existing telephone network, or with any new basic services or capabilities."[487] We believe that this definition can be used to craft a definition of "product" for purposes of section 251(c)(5). Accordingly, for purposes of network disclosure under section 251(c)(5), we define "product" to be "any hardware or software for use in an incumbent LEC's network or in conjunction with an incumbent LEC's facilities that, when installed, could affect the compatibility of the network, facilities or services of an interconnected provider of telecommunications or information services with the incumbent LEC's network, facilities or services."

217. We recognize that some network changes that affect interconnection, *e.g.*, some location changes, may not require an incumbent LEC to make or buy any products. Disclosure of such changes, however, may be required under section 251(c)(5). For purposes of section 251(c)(5), therefore, we clarify that the "make/buy" point includes the point at which the incumbent LEC makes a definite decision to implement a network change in order to begin offering a new service or change the way in which it provides an existing service. Such a "definite decision" requires the incumbent LEC to move beyond exploration of the

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[485] Because the incumbent LECs control the vast majority of both facilities and customers in most markets, the impact of such difficulties, at least at present, would be felt most acutely by a competing service provider.

[486] *BOC Safeguards Order*, 6 FCC Rcd at 7603. The Commission has stated that, "make/buy applies not only to a carrier's decision to make or buy products to implement a change in the network, but also to any decision to make or buy products that would rely on such changes." *Phase II Order*, 2 FCC Rcd at 3087. The precise definition of the "make/buy" point has been clarified in some detail. *See, e.g., id.*; *Phase I Order*, 104 F.C.C.2d at 1080-86; *Computer and Business Equip. Mfrs. Assoc. Petition for Declaratory Ruling Regarding Section 64.702(d)(2) of the Commission's Rules and the Policies of the Second Computer Inquiry*, Report and Order ("*CBEMA Order*"), 93 F.C.C.2d 1226, 1243-44 (1983).

[487] *Phase I Order*, 104 F.C.C.2d at 1084.

costs and benefits of a change or the feasibility of a change. Instead, a "definite decision" is reached when the incumbent LEC determines that the change is warranted, establishes a timetable for anticipated implementation, and takes the first step toward implementation of the change within its network.[488]

218. We recognize that many changes to an incumbent LEC's network that are subject to disclosure under section 251(c)(5) can be fully implemented less than twelve months after the make/buy point. Accordingly, if the service using the network changes can be initiated within twelve months after the make/buy date, public notice must be given on the make/buy date, but at least six months before implementation of the planned changes.

219. We agree with several commenters that competing service providers should not require a full six months to respond to some categories of relatively minor network changes and that we would needlessly slow the pace of technical advance were we to require a full six months notice in such a case. As evidence of this fact, several commenters have submitted or referred us to industry guidelines developed by ICCF, which detail recommended notice periods of 45 days to six months for certain network changes.[489] Based on the record before us, we agree that six months may be too long a minimum in some circumstances. We conclude, however, that neither the ICCF guidelines nor any other categorization scheme adequately encompasses every potential change affecting interconnection that an incumbent LEC may wish to make to its network. In addition, for changes that can be implemented in less than six months, the length of time required for notice to be considered "reasonable" may vary considerably based on advances in technology, the specific implementation plan developed by an incumbent LEC, the particular capabilities of interconnecting carriers to adapt, and the willingness of the incumbent LEC to be forthcoming with information. Based on these considerations, we find that a fixed timetable for such short-term notices would not be appropriate.

220. Accordingly, with respect to changes subject to section 251(c)(5) disclosure that the incumbent LEC wishes to implement on less than six months' notice, we require that the incumbent LEC's Commission filing, whether certification or public notice, also include a certificate of service: (1) certifying that a copy of the incumbent LEC's public notice was served on each provider of telephone exchange service that interconnects directly with the incumbent LEC's network a minimum of five business days in advance of the filing; and (2) providing the name and address of all such providers of local exchange service upon which the notice was served. Such filings must be clearly titled "Short Term Public Notice (or Certification of Short-Term Public Notice) Pursuant to Rule 51.333(a)."

221. The Commission will issue a public notice of such short-term filings separate from its public notice of other section 251(c)(5) filings. Unlike six-month or twelve-month

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[488] *Cf. Phase II Order*, 2 FCC Rcd at 3087.

[489] ICCF *Recommended Notification Procedures*. *See supra* note 466.

notices, certain interested parties will have an opportunity to file objections to such short-term public notices. Specifically, short term notices will be deemed final on the tenth business day after the release of the Commission's public notice unless a provider of information services or telecommunications services that directly interconnects with the incumbent LEC's network files an objection to the change with the Commission and serves it on the incumbent LEC no later than the ninth business day following the release of the Commission's public notice. Such an objection must state: (1) specific reasons why the objector is unable to implement adjustments to accommodate the incumbent LEC's changes by the date the incumbent LEC has specified, including specific technical information, questions, or other assistance required that would allow the objector to accommodate those changes; (2) specific steps the objector is taking to implement changes to accommodate the incumbent LEC's changes on an expedited basis; (3) the earliest possible date by which the objector anticipates that it can accommodate the incumbent LEC's changes, assuming it receives the assistance requested in item (1) (not to exceed six months from the date the incumbent LEC gave its original public notice); (4) the affidavit of the objector's president, chief executive officer, or other corporate officer or official with suitable authority to bind the corporation and knowledge of details of the objector's inability to adjust its network on a timely basis that he or she has read the objection, that the statements contained in it are true, that there is good ground to support the objection, and that it is not interposed for purposes of delay; and (5) any other information relevant to the objection. Because the power to interpose such objections could vest competing service providers with extensive power to delay implementation of changes, we caution competing service providers that we will not hesitate to intervene where necessary to ensure that objections are not posed merely to delay implementation of incumbent LEC network changes and that abuse of the Commission's processes for such a purpose would expose a competing service provider to sanctions.[490]

222. If one or more objections are filed, the incumbent LEC will have five additional business days (*i.e.*, until no later than the fourteenth business day following the release of the Commission's public notice) within which to file a response to the objection(s) and serve it on all objectors. Such a response shall: (1) include information responsive to the allegations and concerns identified by objectors; (2) state whether the implementation date(s) proposed by the objector(s) would be acceptable; (3) indicate any specific technical assistance that the incumbent LEC is willing to give to the objector(s); and (4) state any other information relevant to the incumbent LEC's response. In the case of such contested short-term public notices, the Common Carrier Bureau will issue an Order fixing a reasonable public notice period. In the alternative, if the incumbent LEC does not file a response within the five-day time period allotted, or if the response accepts the latest date stated by an objector in response to item (3) of its objection, then the incumbent LEC's public notice shall be deemed amended to specify implementation on the latest date stated by an objector in item (3) of its objection without further Commission action.

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[490] *See* 47 C.F.R. §§ 1.17, 1.52.

223. At the make/buy point, incumbent LEC plans should be sufficiently developed that the incumbent LEC could provide adequate and useful information to competing service providers. At earlier stages of the planning process, options are still being explored and alternatives weighed. Disclosure at such an early stage could cause interconnecting carriers to waste resources in an effort to respond to network changes that may not occur or that occur ultimately in a significantly different way. As the process of implementing the planned changes into the network goes forward, specific information may also require revision. Accordingly, we require an incumbent LEC to keep its public notice information complete, accurate, and up-to-date in whatever forum it has chosen for disclosure.

224. We agree with several commenters that incumbent LECs should not make preferential disclosure to selected entities prior to disclosure at the make/buy point. Accordingly, we prohibit disclosure to separate affiliates, separated affiliates,[491] or unaffiliated entities (including actual or potential competing service providers), until the time of public notice.

ii. Other Disclosure Proposals

225. We find that section 251(d)(3) does not require the Commission to preserve state authority over the timing of public notice of changes to the "information necessary for the transmission and routing" of traffic. Section 251(d)(3) prevents the Commission from "preclud[ing] the enforcement of any [state commission] regulation, order or policy," to the extent that such regulation, order or policy "establishes [LEC] access and interconnection obligations,"[492] is "consistent with the requirements of [section 251]"[493] and does not "substantially prevent implementation of this section and the purposes of this part."[494]

226. Public notice requirements that varied widely from state to state could subject both incumbent LECs and potential competing service providers to burdensome, duplicative, and potentially inconsistent obligations that would impermissibly hamper the achievement of the goals of section 251. Such varied filings requirements would obligate incumbent LECs to file in, and potential interconnecting carriers to canvass, a multitude of state-level fora in order to glean information concerning network changes. Incumbent LECs that operate in multiple states could be required to disclose a single network-wide change piecemeal in a variety of state filings; interconnecting carriers would then need to retrieve the information, also piecemeal, from many different locations. Neither section 251(c)(5) nor a fixed disclosure timetable limits the range of network changes an incumbent LEC might make;

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[491] 47 U.S.C. § 274.

[492] 47 U.S.C. § 251(d)(3)(A).

[493] 47 U.S.C. § 251(d)(3)(B).

[494] 47 U.S.C. § 251(d)(3)(C).

rather incumbent LECs remain free to make any otherwise permissible change upon appropriate notice. Accordingly, particularly with respect to entities whose operations span several states, clear, national rules are essential to the uniform implementation of network disclosure.[495]

227. Several commenters argue that a fixed disclosure timetable will needlessly or arbitrarily delay the introduction of technical advances or new services. It is our intention in this proceeding, however, to develop disclosure rules that minimize unnecessary delay by providing competing service providers with adequate, but not excessive, time to respond to changes to an incumbent LEC's network that affect interconnection. The primary concern reflected in section 251(c)(5) is continued interconnection and interoperability. If proper planning occurs, however, the delay associated with this goal should be minimal.

228. At least one commenter argues that, because incumbent LECs and competing service providers have a common interest in ensuring that their networks function together properly -- an interest that removes incentives to withhold vital interconnection information and obviates the need for fixed, enforceable advance disclosure obligations[496] -- any fixed timetables for disclosure should be negotiated between carriers as part of individual interconnection agreements. We disagree. The mere fact that interconnection failures can adversely affect both an incumbent LEC and a competing service provider does not remove the incumbent LEC's incentives to delay release of information concerning network changes solely in order to inconvenience its competitors. The impact of such failures would fall disproportionately on the competing service provider because, at least in the near term, the incumbent LEC's network will connect most of the customers in its service area directly, without using any facilities of a competing service provider. Indeed, we believe that this is the reason that Congress chose to place this obligation on incumbent LECs only and not on all LECs. In addition, notice of network changes provided to an interconnecting carrier, pursuant to a privately negotiated agreement, will not necessarily be provided to members of the *public* who are not parties to the specific agreement.[497] Accordingly, while carriers may negotiate individual notice arrangements (consistent with the preferential disclosure prohibitions discussed in paragraph 224, above) as part of private interconnection agreements, we are unable to rely on such private notice to satisfy section 251(c)(5)'s duty to provide reasonable *public* notice.

229. Although advance disclosure periods will place competing service providers on notice of certain products and services the incumbent LECs intend to bring to market, we do

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[495] *See* NCTA comments at 12.

[496] Ameritech comments at 30, reply at 17.

[497] Although the contents of privately negotiated interconnection agreements themselves must be disclosed to the public through state level filings, *see* 47 U.S.C. § 252(h), information exchanged pursuant to the terms of such an interconnection agreement might not be provided at all to this Commission, state commissions or the public.

not believe that this information will automatically translate into a competitive advantage for the competing service providers. The incumbent LEC's network disclosure obligations are intended to allow competing service providers to make required changes to their own networks in order to maintain interoperability and uninterrupted, high quality service to the public. These obligations are designed to prevent incumbent LECs from using their currently substantial percentages of subscribers and highly developed networks anticompetitively to prevent the entry of potential competitors.

230. Several commenters have argued that existing practices under industry issued, ICCF guidelines[498] or the Commission's "all carrier" rule,[499] satisfy the requirements of section 251(c)(5) and that no further Commission action is necessary. We disagree. The guidelines that commenters bring to our attention are neither compulsory nor enforceable at the Commission. We cannot rely on continued goodwill among carriers that soon may be locked in competition to assure timely disclosure of network changes. Similarly, we cannot trust in the "mutually satisfactory arrangements for timely information exchange" that GVNW alleges IXCs and small LECs reached to ease the conversion to equal access.[500] Our new rules, and the new market dynamics, may not produce such agreements.

231. While we are aware of no specific complaints concerning the functioning of the "all carrier rule," the advent of competition for basic telephone service in the local market will require rules that are specific, easily enforced and very clear. In this respect, we believe that the all carrier rule standard lacks adequate specificity to function efficiently in the section 251 context. Requiring carriers to litigate the meaning of "reasonable" notice through our complaint process on a case-by-case basis might slow the introduction and implementation of new technology and services, and burden both carriers and the Commission with potentially lengthy, fact-specific enforcement proceedings. A fixed timetable will create a clear, specific standard that will be more easily and quickly enforceable and that will better facilitate the development of competition and serve the public interest.

232. At least one commenter urges us to adopt the *Computer III* timetable merely as a "safe harbor" provision.[501] If we were to do so, however, we would open the notice process to many of the same risks that lead us to reject the all carrier rule. Under "safe harbor" rules, competing service providers' notice complaints could become bifurcated into an initial inquiry as to whether an incumbent LEC met the safe harbor provisions of the timetable. If the answer were in the negative, a second, fact-specific inquiry as to whether notice was nevertheless reasonable, would then follow. The delay in resolving such disputes would not

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[498] ICCF *Recommended Notification Procedures*. *See supra* note 466.

[499] *See supra* n.383.

[500] GVNW comments at 5.

[501] PacTel comments at 6.

serve the public interest. We believe the better course is to adopt a binding, fixed standard applicable to notice by all incumbent LECs.

233. MFS's proposed regulatory structure based on a tripartite scheme, classifying changes as "major," "location," or "minor," subject to advance disclosure of 18 months, 12 months, and according to industry standards, respectively, is flawed in several respects. Initially, section 251(c)(5) disclosure applies to a broad spectrum of potential network changes and we are not confident that MFS's definitions, or any similar definitions, could adequately capture and clarify every potential alteration affecting interconnection that an incumbent LEC could make to its network. Categorization debates would inevitably arise among carriers concerning the status of specific, planned changes. Reasonable public notice is a function of the length of time an incumbent LEC will take to implement a change and the length of time an interconnecting carrier will need to respond. Fixed 18-month and 12-month disclosure periods will not be flexible enough to take advantage of advances in technology that may permit increasingly rapid implementation of and reaction to network changes. Also, we find that the extended notice periods MFS proposes are too long. MFS provides no evidence or explanation to support its assertion that competing service providers will need a minimum of 18 months notice of major changes,[502] and the record contains broad support for the 12 month notice period from *Computer III*.[503] While we intend that competing service providers have adequate notice of planned network changes, we acknowledge the valid concerns of some commenters that overextended advance notification intervals could needlessly delay the introduction of new services, provide the interconnecting carrier with an unfair competitive advantage, or slow the pace of technical innovation.[504]

iii. Application to Network Changes in Progress

234. On the effective date of the rules implementing incumbent LECs' network disclosure obligations under section 251(c)(5), some incumbent LECs may be implementing network changes that the new rules otherwise would have required them to disclose. With respect to these changes, we do not perceive a need to delay implementation, and no commenter has requested that we do so. We do require, however, that incumbent LECs give public notice of such changes as soon as it is practical, and that notice in accordance with the section 251(c)(5) network disclosure rules be given: (1) before the incumbent LEC begins

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[502] *Cf.* NYNEX reply at 10-11 (Such a long notice period would "hamstring technological progress and deny customer benefits"); U S WEST reply at 2-3.

[503] *See, e.g.*, AT&T comments at 24-25 (Noting that the time periods from *Computer III* are familiar to incumbent LECs and a one-year minimum for certain changes would be sufficient advance notice to alternative LECs); MCI comments at 16 (agreeing 12 months advance notice is sufficient); Cox comments at 11 ("The proposal in the [*NPRM*] represents the minimum possible standard for disclosure").

[504] *Cf. Phase II Order*, 2 FCC Rcd at 3087 ("[W]hile we believe enhanced service providers are entitled to receive network information on a timely basis, we are also concerned that premature disclosure of this information could impair carriers' development efforts and inhibit network innovation").

offering service using the changes to its network: and (2) no later than 30 days after the effective date of the rules adopted in this Order.

235. We similarly find no need to adopt rules obligating incumbent LECs to make any formal, initial public disclosure of comprehensive information concerning their networks to provide background information against which connecting carriers could then evaluate changes. In the *First Report and Order*, we have concluded that, under section 251(c)(2), incumbent LECs are under an obligation to provide, interconnection for purposes of transmitting and routing telephone exchange traffic alone. exchange access traffic alone, or both.[505] Implicit in this obligation under section 251(c)(2) is the obligation to make available to requesting carriers information indicating the location and technical characteristics of incumbent LEC network facilities. Accordingly, actual or potential competing service providers needing this type of baseline information may request it from the incumbent LEC under section 251(c)(2); subsequent changes to this information will be addressed by the section 251(c)(5) rules we adopt today.

iv. Small Business Considerations

236. We have considered the impact of our rules on small incumbent LECs. We agree with GVNW that many network changes may not require twelve months advance disclosure. Accordingly, we have provided for six month, or shorter, notice periods, when such changes can be accomplished quickly. In addition, we note that, under section 251(f)(1), certain small incumbent LECs are exempt from our rules until (1) they receive a *bona fide* request for interconnection, services, or network elements; and (2) their state commission determines that the request is not unduly economically burdensome, is technically feasible, and is consistent with the relevant portions of section 254. In addition, certain small incumbent LECs may seek relief from our rules under section 251(f)(2).[506]

C. Relationship with other Public Notice Requirements and Practices.

1. Relationship of Sections 273(c)(1) and 273(c)(4) with Section 251(c)(5).

a. Background

237. Section 273(c)(1) requires each BOC to maintain and file with the Commission "full and complete information with respect to the protocols and technical requirements for connection with and use of its telephone exchange facilities," in accordance with Commission

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[505] *First Report and Order* at section IV.

[506] For a discussion of the implications and operation of section 251(f), *see First Report and Order*, section XII.

rules.[507] Section 273(c)(4) obligates the BOCs to provide timely information on the planned deployment of telecommunications equipment to interconnecting carriers providing telephone exchange service.[508] We sought comment in the *NPRM* on the relationship between these sections and the network disclosure obligations contained in section 251(c)(5).[509]

b. Comments

238. Ameritech states that the requirements of section 251(c)(5) "should be reconciled with [the] related obligations" set forth in section 273(c)(1) and 273(c)(4)."[510] Bell Atlantic suggests that sections 251(c)(5) and 273(c)(1) cover the same type of technical information.[511] Bell Atlantic further recommends that we find that "timely" release of the information covered by section 273(c)(4) means that the information should be made available "a sufficient time in advance that the competing service providers may make any necessary changes to their networks."[512] SBC comments that the disclosure obligations imposed by sections 251(c)(5), 273(c)(1), and 273(c)(4) are "substantially similar."[513] MCI argues that section 273(c)(1) imposes on the RBOCs substantially the same information disclosure obligations that 251(c)(5) imposes on the incumbent LECs in general, with the exception that 273(c)(1) explicitly obligates the RBOCs to file the information with the Commission.[514] MCI further argues that section 273(c)(4)'s "timely" disclosure requirement goes beyond that contained in section 251(c)(5).[515]

239. USTA suggests that "there is no basis to impose different requirements on the BOCs for purposes of compliance with section 273(c)(1) than those they are required to follow for section 251(c)(5). This is in fact one area in which uniformity would provide a benefit to the industry and would be administratively simple."[516] In contrast, the Rural Tel.

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[507] 47 U.S.C. § 273(c)(1). The Commission will address section 273 in a separate rulemaking proceeding.

[508] 47 U.S.C. § 273(c)(4).

[509] *NPRM* at para. 193.

[510] Ameritech comments at 31.

[511] Bell Atlantic comments at 12.

[512] *Id.* Bell Atlantic advocates the same "reasonable advance notice" standard for use in connection with section 251(c)(5).

[513] SBC comments at 13-14.

[514] MCI comments at 19.

[515] *Id.*

[516] USTA comments at 13.

Coalition argues that the requirements of section 273 apply only to the BOCs and "are not expected to correlate with the requirements of 251(c)(5) that apply to all incumbent LECs."[517] The Rural Tel. Coalition states that the Commission should fashion flexible notice requirements under these sections, recognizing differences in size, market power, and ability to impact competing service providers' operations that exist among the BOCs and independent LECs, and competing service providers.[518] AT&T also disagrees with USTA, arguing that the Commission filing contemplated by section 273(c)(1) is more detailed than the disclosure mandated in section 251(c)(5).[519]

c. Discussion

240. Because the BOCs clearly meet the 1996 Act's definition of an "incumbent LEC,"[520] the minimum disclosure requirements of section 251(c)(5) apply to the BOCs. We will address the specific implications of section 273, including the question whether section 273 imposes additional disclosure requirements on the BOCs, in a separate rulemaking proceeding.

2. Relationship of Sections 251(a) and 251(c)(5) with Section 256.

a. Background

241. Section 251(a) sets forth general duties of telecommunications carriers, including the duty to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers, and the duty not to install network features, functions or capabilities that do not comply with the guidelines and standards established pursuant to section 255[521] and 256.[522] Section 251(c)(5) sets forth the duty of all incumbent LECs to provide reasonable public notice of changes in the information necessary for the transmission and routing of services using the incumbent LEC's network.[523] The goal of section 256, entitled "Coordination for Interconnectivity," is "to promote nondiscriminatory accessibility by the broadest number of users and vendors of communications products and services to public telecommunications networks used to provide telecommunications service" and defines the

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[517] Rural Tel. Coalition comments at 4.

[518] *Id.* at 4-5.

[519] AT&T comments at 24, reply at 28.

[520] 47 U.S.C. § 251(h).

[521] Section 255, "Access by Persons with Disabilities," will be addressed in a separate rulemaking proceeding.

[522] 47 U.S.C. § 251(a).

[523] 47 U.S.C. § 251(c)(5).

Commission's role in achieving this goal.[524] In the *NPRM*, we sought comment on the relationship of sections 251(a) and 251(c)(5) with section 256.[525]

b. Comments

242. We received few comments on this issue. USTA states that, "in developing oversight procedures for public telecommunications network interconnectivity standards under Section 256, the Commission can assist in alerting the industry to general types of technology changes which may lead to specific upgrades or modifications by individual carriers."[526] In addition, USTA notes that all telecommunications carriers are obligated by section 251(a)(2) to comply with standards prescribed under sections 255 and 256 and, accordingly, cautions that the section 256 process should be conducted with carriers' section 251(a)(2) obligations in mind.[527] USTA therefore suggests the possibility that an industry group could develop a set of uniform guidelines for use by all carriers in providing notice of changes that could affect interconnection or interoperability.[528]

243. Ameritech comments that section 251(c)(5) is only one part of the overall regulatory structure for coordinating network planning by the industry and facilitating interconnection and interoperability.[529] Based on this analysis, Ameritech argues that the notification obligations section 251(c)(5) imposes should be extended to all LECs under section 256.[530]

c. Discussion

244. Section 251(a)(2) imposes a duty on all telecommunications carriers to act in ways that are not inconsistent with any guidelines and standards established under section 256. Section 251(c)(5) imposes network disclosure obligations on incumbent LECs that are related to the goals of section 256, inasmuch as section 251(c)(5) sets forth one specific procedure to promote interconnectivity. We do not decide here whether compliance with section 251(c)(5) is sufficient to satisfy section 256, however. The Network Reliability and Interoperability Council will develop recommendations to the Commission on the implementation of section

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[524] 47 U.S.C. § 256.

[525] *NPRM* at para. 193.

[526] USTA comments at 13.

[527] *Id.* at 13-14.

[528] *Id.* at 14.

[529] Ameritech comments at 31.

[530] *Id.*

256.[531] We intend to address carrier and Commission obligations under section 256 in a future rulemaking proceeding.

D. Enforcement and Safeguards

1. Enforcement Mechanisms

a. Background and Comments

245. In the *NPRM*, we sought comment on what enforcement mechanism, if any, we should use to ensure compliance with the section 251(c)(5) public notice requirement.[532] Bell Atlantic, in conjunction with its advocacy of a flexible disclosure standard based on "reasonableness," suggests that the Commission review complaints of premature implementation on a case-by-case basis and, where necessary, issue cease-and-desist orders.[533] Ameritech and GTE argue that no specific, additional enforcement mechanisms are necessary, because there is no evidence that existing industry practices are producing network conflicts or hardships, or are otherwise not working.[534] U S WEST suggests that, if carriers fail to make timely disclosure, additional enforcement options can be considered in the future.[535] In contrast, NCTA states that we must adopt meaningful sanctions to enforce our new network disclosure rules, including significant monetary sanctions whenever a competitor's service is disrupted because of an incumbent LEC's failure to comply with the notice requirements.[536] Cox argues that any incumbent LEC found to violate section 251(c)(5)'s disclosure requirements should be required to inform all affected customers of interconnecting carriers that the incumbent LEC's actions caused any adverse effects attributable to the improperly disclosed network changes.[537]

246. MFS states that the Commission should adopt rules that would: (1) require each incumbent LEC to respond to Commission questions regarding the information previously

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[531] At its meeting on July 15, 1996, the Network Reliability and Interoperability Council discussed (1) barriers to interconnectivity; (2) how the FCC most efficiently can oversee network planning to assure interoperability; (3) need for standards-setting; and (4) the overall reliability of networks. *See Communications Daily*, June 11, 1996 (announcing July 15 meeting); *Public Notice, NYNEX CEO Seidenberg to Head New Network Reliability and Interoperability Council*, 1996 WL 185795 (F.C.C. Apr. 18, 1996).

[532] *NPRM* at para. 193.

[533] Bell Atlantic comments at 12.

[534] Ameritech comments at 29; GTE reply at 10.

[535] U S WEST reply at 3.

[536] NCTA comments at 12.

[537] Cox comments at 12.

made available regarding any network changes within the scope of section 251(c)(5), and to supplement the information if requested by the Commission; (2) establish a procedure for temporarily blocking any proposed network change until the Commission has time to investigate any alleged violations, with respect to either provision of notice, or the nature of the network change; and (3) allow the Commission, for good cause, to issue an order, without prior notice or hearing, requiring an incumbent LEC to cease and desist from making any specified changes for a period of up to 60 days to permit Commission investigation of alleged violations.[538] Time Warner suggests that any failure to comply with the rules we establish should be addressed through our existing section 208 complaint process.[539]

b. Discussion

247. It is essential to the development of local competition that incumbent LECs comply with the network disclosure obligations of section 251(c)(5). Even if a competing provider of local exchange service had made significant inroads into the incumbent LEC's customer base, it would have to transmit a substantial number of its customers' calls to the incumbent LEC's network for termination. If these calls cannot be terminated reliably, customers will be more reluctant to use the competing provider's services.

248. We recognize the importance of compliance with our network disclosure rules, and note that many of the specific enforcement sanctions offered by commenters may have merit. The commenters' suggestions indicate a belief that the Commission should delay or prohibit the implementation of changes if we receive sufficiently credible allegations of notice violations. Our existing enforcement authority would permit us to impose such a sanction and we will not hesitate to do so in appropriate circumstances. The Commission, however, also has a range of other penalties it could impose to ensure incumbent LEC compliance with the network disclosure rules. The record currently before us does not reveal a need for us to mandate specific enforcement procedures in the section 251(c)(5) context. Rather, we will intervene in appropriate ways if necessary to ensure adequate disclosure of public notice information, should sanctions become necessary to encourage full compliance with our network disclosure rules.[540] In addition, we intend to explore how we can increase the efficiency of the current section 208 formal complaint process in a separate rulemaking proceeding.

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[538] MFS comments at 16. MFS does not explain what type of network change might require Commission investigation or what type or level of allegations we should considered sufficient in issuing cease and desist orders.

[539] Time Warner comments at 11.

[540] *See, e.g.*, 47 U.S.C. §§ 154(i), 154(j), 206-209, 218; 47 C.F.R. §§ 0.91, 0.291.

2. Protection of Proprietary Information, Network and National Security

a. Background and Comments

249. In the *NPRM*, we sought comment on the extent to which safeguards may be necessary to ensure that information regarding network security, national security and the proprietary interests of manufacturers and others is not compromised by the section 251(c)(5) network disclosure process.[541]

250. BellSouth states that, to address these concerns, the Commission should permit disclosing incumbent LECs to require the recipient of such information to execute a confidentiality agreement, which could be drafted to include liquidated damages, indemnification, or other appropriate remedial provisions.[542] In addition, BellSouth requests that the Commission confirm that incumbent LECs are not obligated to disclose proprietary information of third parties, but may instead require competing service providers to negotiate directly with the third party for access.[543]

251. GVNW suggests that we limit incumbent LEC disclosure only to references to industry and manufacturers' specifications that are widely available, and to other information required to interconnect at the interface, which would reduce the amount of proprietary or sensitive information that would be subject to disclosure.[544] In addition, GVNW and the Rural Tel. Coalition state that an incumbent LEC should not be obligated to disclose the specific location of physical plant facilities except under strict nondisclosure agreements, in order to preserve the LEC's competitive position and protect against potential terrorist disruptions.[545]

252. Noting that the telecommunications equipment market is competitive, Nortel states that a manufacturer would be seriously disadvantaged if its proprietary information were disclosed to competitors.[546] In addition, Nortel argues that, in such a case, manufacturers

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[541] *NPRM* at para. 194.

[542] BellSouth comments at 5. *See* Illinois Commission comments at 63.

[543] *Id.* at 6.

[544] GVNW comments at 5. Ameritech advocates a similar narrowing of the disclosure obligation. Ameritech comments at 26 n.52.

[545] *Id.*; Rural Tel. Coalition comments at 4.

[546] Nortel comments at 3; Motorola, Inc. reply at 5. Citing similar concerns, GTE urges us to strike a balance between the information necessary to ensure seamless interconnection and the protection of proprietary information. GTE comments at 6.

would face substantially reduced incentives to develop advanced products.[547] Motorola, Inc., expresses its agreement with both BellSouth and Nortel[548] and comments that disclosure of proprietary information may undermine the competitive position of U.S. manufacturers in the global market.[549] Motorola, Inc., also asks us to clarify that no disclosure is required of technical information at "testing" or "trial" stages,[550] where typically a carrier is evaluating new technology in the field.[551]

253. Sprint, in *ex parte* comments, states that nondisclosure agreements related to the marketing of new services that will be available from both carriers may be appropriate.[552] Sprint also notes, however, that many routine network upgrades, such as establishment of new central offices, remote offices, or tandems, elimination of tandem locations, changes in the incumbent LEC's SS 7 network, and basic software upgrades, may not require the use of nondisclosure agreements.[553] While agreeing that network and national security issues deserve the highest attention, Teleport expresses concern that proprietary interest claims could be used to keep essential network interconnection information from potential competitors.[554]

b. Discussion

254. Having reviewed the record, we conclude that the judicious use of nondisclosure agreements will help protect incentives to develop innovative network improvements, and will also protect against potential threats to both national and network security by limiting the flow of detailed information concerning the operation of the national telecommunications network.[555] Accordingly, we will permit the use of nondisclosure agreements, subject to certain restrictions.

255. Incumbent LECs have a statutory obligation to provide "reasonable public notice of changes in the information necessary for the transmission and routing of services using that

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[547] *Id.*

[548] Motorola, Inc. comments at n.4.

[549] Motorola, Inc. reply at n.5.

[550] *Id.* at 6.

[551] *Id.*

[552] *Ex parte* letter from Jay C. Keithley, Sprint, to Mr. William F. Caton, Acting Secretary, Federal Communications Commission, filed in CC Docket No. 96-98, June 26, 1996, at 2.

[553] *Id.*

[554] Teleport comments at 12.

[555] Should these agreements prove inadequate for this purpose, we would revisit this issue.

[incumbent LEC's] facilities or network, as well as of any other changes that would affect the interoperability of those facilities and networks,"[556] as defined in this proceeding. Under another provision of the 1996 Act, however, the BOCs and any entities that they own or otherwise control must protect "the proprietary information submitted for procurement decisions from release not specifically authorized by the owner of such information."[557] Thus a rule requiring a BOC to provide change information publicly, without any provision for the use of a nondisclosure agreement, could place a BOC in the position of having to choose between compliance with the Commission's rule and compliance with section 273(e)(5). We also find that requiring disclosure to the public of competitively sensitive, proprietary, or trade secret information without allowing for the possible use of nondisclosure agreements would be inconsistent with section 251(c)(5)'s requirement that incumbent LECs provide "*reasonable* public notice" (emphasis added). It would not be "reasonable" to require such disclosures because they have significant implications with respect to network and national security, as well as the development of competition and innovative network improvements. Accordingly, we find that section 251(c)(5) requires incumbent LECs to provide notice of planned changes to the public sufficient to allow an interested party to assess the possible ramifications of the change and evaluate whether it needs to seek disclosure of additional information. The five categories of information disclosure we mandate here will meet this standard.

256. We do not anticipate that the minimum public notice requirements we are adopting will obligate carriers to disclose competitively sensitive, proprietary, or trade secret information in the public arena. In addition, despite the concerns of Motorola, Inc., Nortel, and others, we do not anticipate that the level of information required by a competing service provider either to transmit and to route services, or to maintain interoperability will, in the ordinary case, include proprietary information. In the event that such information is required, however, an incumbent LEC's public notice must nevertheless identify the type of change planned in sufficient detail to place interested persons on notice that they may potentially be affected, and must state that the incumbent LEC will make further information available to persons signing a nondisclosure agreement. We believe that suitably fashioned nondisclosure agreements can appropriately balance the competing service provider's need for knowledge of network changes with the interests of the incumbent LEC and equipment manufacturers in retaining control of proprietary information.

257. Accordingly, to the extent that otherwise proprietary or confidential information of an incumbent LEC falls within the scope of the network disclosure obligation of section 251(c)(5), it must be provided by that incumbent LEC on a timely basis. If an interconnecting carrier or information service provider requires genuinely proprietary information belonging to a third party in order to maintain interconnection and interoperation with the incumbent LEC's network, the incumbent LEC is permitted to refer the competing service provider to the owner of the information to negotiate directly for its release. While

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[556] 47 U.S.C. § 251(c)(5).

[557] 47 U.S.C. § 273(e)(5).

the incumbent LEC might represent the most expedient source of the required information, third parties would be less able to protect themselves from misuse of their proprietary information and preserve potential remedies if the incumbent LEC were to disclose directly a third party's proprietary information directly in response to a request.

258. We are concerned that protracted negotiation periods over the terms of a suitable nondisclosure agreement, or the payment of fees or royalties, could consume a significant portion of a competing service provider's notice period. The rules we adopt today require that, except under short-term public notice procedures, an incumbent LEC must give public notice of network changes a minimum of either six months or twelve months in advance of implementation. We find that these periods will provide adequate notice to interconnecting carriers and information service providers, to ensure that a high level of interconnectivity and interoperability can be maintained between networks. These periods, however, are not excessive and will not allow excessive time for the negotiation of the terms of nondisclosure agreements. Because section 251(c)(5) places an affirmative obligation on the incumbent LEC to ensure reasonable public notice of changes to its network, we require that disclosure of information designated by the incumbent LEC as proprietary, whether owned by the incumbent LEC or a third party, be accomplished on appropriate terms as soon as possible after an actual or potential competing service provider makes a request to the information owner for disclosure. Specifically, upon receipt by the incumbent LEC of a competing service provider's request for disclosure of confidential or proprietary information, the applicable public notice period will be tolled to allow the interested parties to agree on suitable terms for a nondisclosure agreement. This tolling is consistent with the incumbent LEC's public notice obligations and will preserve the competing service provider's ability to implement required changes in its own network to accommodate those planned by the incumbent LEC. In accordance with its obligation to keep the public notice information complete, accurate, and up-to-date, the incumbent LEC must, if necessary, amend its public notice: (1) on the date it receives a request from a competing service provider for disclosure of confidential or proprietary information, to state that the notice period is tolled; and (2) on the date the nondisclosure agreement is finalized, to specify a new implementation date.

259. Given these incentives, we conclude that it is unnecessary either to adopt a precise definition of "competitively sensitive" or "proprietary" information, or to mandate the terms of nondisclosure agreements. The *Computer III* rules, upon which we have modeled the disclosure timetable for use in the section 251(c)(5) context, explicitly permit the use of nondisclosure agreements in connection with carrier disclosure of planned changes to the enhanced services industry at the "make/buy" point.[558] In that proceeding also, the Commission explicitly rejected requests to prescribe a specific type of agreement, instead holding that:

> we do not think it necessary or helpful for us to dictate the terms of these private agreements. Nondisclosure agreements are widely used in

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[558] *Phase II Order*, 2 FCC Rcd at 3092.

telecommunications, as well as in other fields. We believe it better to leave the exact specifications of the terms of such agreement to the parties. We would of course be prepared to intervene should parties bring to our attention evidence of noncompliance with the requirements established in this proceeding.[559]

Although we recognize that legitimate concerns exist regarding the security of proprietary information, the potential exists for some incumbent LECs to use such concerns as either a shield against the entry of competitors into their markets, or a sword to hamper the competitor's business operations. We emphasize that incumbent LECs are required to provide adequate access to even proprietary information if a competing service provider needs that information to make adjustments to its network to maintain interconnection and interoperation.

260. We agree with Motorola, Inc., that market and technical trials are not subject to disclosure under section 251(c)(5). Trials are not considered regular service and, because the validity of the incumbent LEC's trial results rests, in part, on successful interconnection, the incumbent LEC has sufficient incentives ensure that competing service providers receive adequate information. Notice of trials may be given, as needed, on a private, contractual basis.

V. NUMBERING ADMINISTRATION

261. The Commission has repeatedly recognized that access to telephone numbering resources is crucial for entities wanting to provide telecommunications services because telephone numbers are the means by which telecommunications users gain access to and benefit from the public switched telephone network.[560] In enacting the 1996 Act, Congress also recognized that ensuring fair and impartial access to numbering resources is a critical component of encouraging a robustly competitive telecommunications market in the United States. Congress has required the Commission to designate an impartial administrator of telecommunications numbering and has conferred upon the Commission exclusive jurisdiction over those portions of the North American Numbering Plan (NANP) that pertain to the United States.[561]

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[559] *Id.* at 3092-93.

[560] *See Administration of the North American Numbering Plan*, CC Docket No. 92-237, Report and Order, 11 FCC Rcd 2588, 2591 (1995) (*NANP Order*).

[561] 47 U.S.C. § 251(e)(1).

A. Designation of an Impartial Number Administrator

1. Background

262. Section 251(e)(1) requires the Commission to "create or designate one or more impartial entities to administer telecommunications numbering and to make such numbers available on an equitable basis."[562] In the *NPRM*, we tentatively concluded that action taken by the Commission in its July 1995 *NANP Order* satisfied this requirement.[563] In that *Order*, the Commission directed that functions associated with NANP administration be transferred to a new administrator of the NANP, unaligned with any particular segment of the telecommunications industry. In the *NPRM*, we sought comment on whether this action satisfied the Section 251(e)(1) requirement that we designate an impartial administrator.

2. Comments

263. There is nearly unanimous agreement that action taken by the Commission in the *NANP Order* satisfies the requirement of Section 251(e)(1).[564] GTE states that the *NANP Order* "will ensure that numbering mechanisms are applied in a carrier-neutral fashion, consistent with the objectives of the 1996 Act."[565] Parties, contending that number administration now performed by Bellcore potentially disadvantages non-BOC providers of telecommunications services by delay or denial of numbering resources to them, nevertheless urge the Commission to move quickly to implement the *NANP Order* fully.[566] Moreover, some argue that to give the *NANP Order* full effect, the North American Numbering Council (NANC) must be convened promptly.[567] CTIA states that until that time, "contentious numbering issues will either go unresolved, leading to additional pressure on already burdened numbering resources, or these issues will be resolved by the remnant of a monopoly era

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[562] *Id.*

[563] *See NANP Order*. The *NANP Order* was initiated in response to Bellcore's stated desire to relinquish its role as NANP administrator. *See* Letter from G. Heilmeier, President and CEO, Bellcore to the Commission (Aug. 19, 1993). Bellcore, however, will continue performing its NANP Administration functions until those functions are transferred to a new NANP administrator pursuant to the *NANP Order*.

[564] *See, e.g.*, Ameritech comments at 22; District of Columbia Commission comments at 1; GCI comments at 5; NYNEX comments at 18; AT&T reply at 2-3.

[565] *See, e.g.*, GTE reply at 34.

[566] *See, e.g.*, CTIA comments at 4; MCI comments at 10.

[567] *See, e.g.*, AT&T comments at 11. The North American Numbering Council (NANC) is a Federal Advisory Committee created for the purpose of addressing and advising the Commission on policy matters relating to administration of the NANP. NANC will provide the Commission advice reached through consensus to foster efficient and impartial number administration.

system."[568] One commenter, Beehive, argues that the *NANP Order* does not meet the requirements of Section 251(e)(1) because it does not address toll free number administration.[569]

3. Discussion

264. We conclude that the action taken in the *NANP Order* satisfies the section 251(e)(1) requirement that the Commission create or designate an impartial numbering administrator. The *NANP Order* requires that functions associated with NANP administration be transferred to a new NANP administrator. In the *NANP Order*, the Commission articulated its intention to undertake the necessary procedural steps to create the NANC.[570] Additionally, it directed the NANC to select as NANP administrator an independent, non-government entity that is not closely associated with any particular industry segment.[571] These actions satisfy section 251(e)(1).

265. Commenters' arguments that we have not fulfilled our duty pursuant to section 251(e)(1) because the NANC has not been convened and has not selected a new NANP administrator are not persuasive. In the *NANP Order*, we required that there be a new, impartial number administrator and established the model for how that administrator will be chosen. We thus have taken "action necessary to establish regulations" leading to the designation of an impartial number administrator as required by section 251(e)(1).

266. We disagree with Beehive's contention that the *NANP Order* does not meet the requirements of section 251(e)(1) because it does not address toll free number administration. In the *NANP Order*, we directed the NANC to provide recommendations on the following question: "What number resources, beyond those currently administered by the NANP Administrator should the NANP Administrator administer?"[572] Our purpose in directing NANC to address this question was to develop a record with respect to commenters' suggestions that the new administrator assume additional responsibilities beyond those of the current NANP administrator, if necessary, to facilitate competition in telecommunications services. By asking this question and seeking recommendations from the NANC, we set into motion a process designed to foster competition in *all* telecommunications services, including toll free, through neutral numbering administration. While the *NANP Order* outlines broad objectives for number administration for all telecommunications services, the specific details

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[568] *See, e.g.*, CTIA comments at 4.

[569] Beehive comments at 2-4.

[570] *NANP Order*, 11 FCC Rcd at 2608.

[571] *Id.* at 2610, 2614, 2617.

[572] *Id.* at 2610.

of implementation for toll free services are addressed in the ongoing toll free proceeding, CC Docket No. 95-155.

B. Delegation of Numbering Administration Functions

267. In this section, we address the role of state public utility commissions in numbering administration. We authorize states to perform the task of implementing new area codes subject to our numbering administration guidelines contained in the *Ameritech Order* and further clarified in this *Order*. We also incorporate the petition for declaratory ruling, the application for review, and the record in that proceeding and address the Texas Commission's pleadings regarding its plan for area code relief in Dallas and Houston which includes wireless overlays. We view prompt examination of the Texas Commission's plan as necessary because the area codes currently assigned to these cities have already reached exhaust.[573]

1. Delegation of Matters Related to Implementation of New Area Codes

a. Background

268. Section 251(e)(1) confers upon the Commission "exclusive jurisdiction over those portions of the North American Numbering Plan that pertain to the United States," but states that "[n]othing in this paragraph shall preclude the Commission from delegating to state commissions or other entities all or any portion of such jurisdiction."[574] In response to this provision, the Commission tentatively concluded in the *NPRM* that it should authorize state commissions to address matters involving the implementation of new area codes so long as they act consistently with the Commission's numbering administration guidelines.[575]

b. Comments

269. Most parties contend that the Commission should "retain [its] plenary authority over all facets of [numbering] administration with delegation to states of only certain limited

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[573] Area code exhaust occurs when nearly all of the NXXs in a given numbering plan area (NPA) have been consumed. Area code exhaust is a subset of number exhaust, which describes the situation in which numbers used for any purpose to support telecommunications services are consumed. NPAs are known commonly as area codes. The second three digits of a telephone number are known as the NXX code or Central Office code (CO code). Typically there are 792 NXX codes available for assignment in an area code (every possible combination of three digits excluding numbers beginning with a 0 or 1 and numbers ending with 11).

[574] 47 U.S.C. § 251(e)(1).

[575] *NPRM* at para. 256.

functions."[576] PageNet urges that any delegation "should be clearly defined as to scope, review standards, and decision time limits."[577] Similarly, Time Warner recommends that any such delegation be accomplished in conformity with the Commission's guidelines.[578] Bell Atlantic/NYNEX Mobile, while stating that states may be in the best position to implement area code relief tailored to the particular needs of their residents, warns that the Commission must intervene promptly when any state "departs from federal numbering policies prohibiting discrimination against any type of carrier."[579]

270. While some commenters argue that the *Ameritech Order* strikes a "proper jurisdictional balance," permitting state commissions to make initial determinations regarding area code administration, subject to Commission review," others request further clarification of the federal and state role in numbering.[580] The Texas Commission specifically requests that the "FCC clarify the states' roles in number administration by expanding on statements in the *Ameritech Order* and elsewhere regarding the balance of authority between the FCC and the states."[581]

c. Discussion

271. We retain our authority to set policy with respect to all facets of numbering administration in the United States. By retaining authority to set broad policy on numbering administration matters, we preserve our ability to act flexibly and expeditiously on broad policy issues and to resolve any dispute related to numbering administration pursuant to the 1996 Act. While we retain this authority, we note that the numbering administration model established in the *NANP Order* will allow interested parties to contribute to important policy recommendations.

272. We authorize the states to resolve matters involving the implementation of new area codes. State commissions are uniquely positioned to understand local conditions and what effect new area codes will have on those conditions. Each state's implementation method is, of course, subject to our guidelines for numbering administration, including the guidelines enumerated in the *Ameritech Order* and in this *Order* as detailed below. We note

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[576] ALTS comments at 8; *See also* Frontier comments at 5; GCI comments at 5; Indiana Commission Staff comments at 3; NYNEX comments at 18.

[577] PageNet comments at 6.

[578] Time Warner comments at 18.

[579] Bell Atlantic/NYNEX Mobile reply at 2.

[580] *See Ameritech Order*, 10 FCC Rcd 4596. *See, e.g.*, AT&T reply at 7; Bell Atlantic comments at 9; Pennsylvania Commission comments at 5; ACSI comments at 12.

[581] Texas Commission comments at 6.

that this authorization for states to resolve matters involving implementation of new area codes is effective immediately. Because of the need to avoid disruption in numbering administration, there is good cause for this action pursuant to 5 U.S.C. 553 § (d)(3). Some states have implemented new area codes prior to our release of this order. We ratify their actions insofar as they are consistent with these guidelines.

2. Area Code Implementation Guidelines

a. Background

273. When almost all of the central office (CO) codes in an area code are consumed, a new area code must be assigned to relieve the unmet demand for telephone numbers. Prior to the enactment of the 1996 Act, state commissions approved plans developed and proposed by the LECs, as CO code administrators, for implementing new area codes. New area codes can be implemented in three ways. Traditionally, states have preferred to implement new area codes through a geographic split, in which the geographic area using an existing area code is split into two parts, and roughly half of the telephone customers continue to be served through the existing area code and half must change to a new area code. States can, however, simply require a rearrangement of existing area code boundaries to accommodate local needs. The third method available to them is called an area code overlay, in which the new area code covers the same geographic area as an existing area code; customers in that area may thus be served through either code.

274. In the *Ameritech Order*, the Commission recognized the states' role in area code relief, attempted to clarify the balance of jurisdiction over numbering administration between the Commission and the states, and enumerated guidelines governing number administration. Additionally, the *Ameritech Order* declared that Ameritech's proposed wireless-only area code overlay would be unreasonably discriminatory and anti-competitive in violation of the Commission's guidelines and the Communications Act of 1934. The *NPRM* sought comment on whether the Commission should reassess the jurisdictional balance between the Commission and the states that was crafted in the *Ameritech Order* in light of Congress' grant to the Commission of exclusive jurisdiction over numbering administration, with permission to assign to the states any portion of that authority.[582] The *NPRM* also sought comment on what action the Commission should take when a state appears to be acting inconsistently with the Commission's numbering administration guidelines.[583]

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[582] *See* 47 U.S.C. § 251(e)(1).

[583] *NPRM* at para. 257.

b. Comments

275. Several commenters request that we clarify the *Ameritech Order* to prohibit service-specific overlays.[584] Others request clarification about all area code overlays, not just service-specific overlays. NCTA, for example, argues that all overlays deter the development of local competition. If competitors are relegated to new area codes, it says, potential customers will be forced to change their telephone numbers to obtain service from competitors.[585] NCTA adds that a customer is unlikely to trade a familiar code for a number that may appear to involve a toll charge, or to purchase additional lines from a competitor if those lines receive a different area code than other lines in their home or business.[586] Customers who do change to competing LECs, it claims, will have to dial ten or eleven digits to place local calls to incumbent LEC customers in the same local calling area. By contrast, NCTA maintains that incumbent LEC customers will be able to reach most other local customers through traditional seven-digit dialing.[587] Sprint agrees that all overlays are anticompetitive and argues that the industry should adopt a geographic split approach.[588]

276. MCI urges the Commission to allow an overlay only when it is the only practical alternative, and suggests that such circumstances might include: (a) exhaust in a small metropolitan area; (b) multiple nearly-simultaneous area code exhausts; or (c) when exhaust is so imminent that a split cannot be implemented quickly enough.[589] Numerous commenters suggest that the Commission should clarify the *Ameritech Order* by imposing conditions on the adoption of area code overlays.[590] Suggested conditions include: (a) mandatory ten-digit dialing for all calls within the overlay area;[591] (b) permanent service provider local number

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[584] *See, e.g.*, Cox comments at 6 n.11; PageNet comments at 23; SBC comments at 11; WinStar reply at 16; Vanguard reply at 5.

[585] NCTA comments at 9.

[586] *Id.*

[587] *Id. See also* MFS comments at 8-9.

[588] Sprint reply at 13. *See also* Cox reply at 3-5; MCI comments at 11; WinStar reply at 17.

[589] MCI comments at 12.

[590] *See, e.g.*, Cox comments at 5, 6 n.12; MFS comments at 8-9; California Commission comments at 8; MCI comments at 12-14; NCTA comments at 10; WinStar reply at 17.

[591] *See, e.g.*, MFS comments at 8-9; California Commission comments at 8; MCI comments at 12-13; WinStar reply at 17; PageNet comments at 8.

portability;[592] and (c) the reservation for each competing LEC authorized to operate within a numbering plan area (NPA) of at least one NXX code from the original area code.[593]

277. Cox asserts that area code overlays should be prohibited until the competitive concerns they raise are addressed by the implementation of number portability.[594] Similarly, PageNet asserts that number portability may render the concept of an area code meaningless; once location portability is feasible, numbers will be ported from one area code to another.[595] When this happens, it says, public preference for a particular area code will disappear.[596]

278. In the view of some, the *Ameritech Order* does not prohibit all area code overlays and they request clarification that overlays are an appropriate response to area code exhaust.[597] In Bell Atlantic/NYNEX Mobile's view, for example, the Commission should not prohibit overlays when they may be the best solution to area code exhaust.[598] PacTel agrees that overlays are valuable and, in some metropolitan areas, are preferable to geographic splits because: (1) overlays do not require existing customers to change their numbers; (2) overlays maintain existing communities of interest in their existing geographical area code boundaries; (3) overlays do not change the boundaries of existing area codes; and (4) overlays take less time to implement than a split.[599] These are significant considerations for states facing number exhaust at an accelerated pace, it says.[600]

279. According to some commenters, issues pertaining to area code relief plans should be addressed in the first instance by state commissions, with the understanding that the

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[592] *See, e.g.*, MFS comments at 8-9; Cox comments at 5; California Commission comments at 8; MCI comments at 12 - 14 (overlays should be conditioned upon the substantial mitigation of the cost of interim local number portability to competing LECs pending the implementation of permanent local number portability); NCTA comments at 10; WinStar reply at 17.

[593] *See, e.g.*, MFS comments at 8-9; MCI comments at 12-13 (*all* remaining NXXs in the old NPA should be assigned to competitors).

[594] Cox comments at 3-4.

[595] The term "port" means the transfer of a telephone number from one carrier's switch to another carrier's switch, which enables a customer to retain his or her number when transferring from one carrier to another. *See Number Portability Order* at n.32.

[596] PageNet reply at 4.

[597] *See, e.g.*, Bell Atlantic/NYNEX Mobile reply at 4-6; BellSouth comments at 20.

[598] Bell Atlantic/NYNEX Mobile reply at 4-6.

[599] PacTel reply at 31-32.

[600] *Id.*

Commission can intervene if necessary.[601] Similarly, the Texas Commission argues that the *Ameritech Order* can and should be interpreted to allow for "innovative" means of area code relief crafted to balance the interests, benefits, and burdens for all interested parties. Should the Commission determine that the *Ameritech Order* does not permit such an interpretation, the Texas Commission requests that the *Ameritech Order* be overruled.[602] By contrast, Vanguard warns against allowing states too much latitude in interpreting the *Ameritech Order*. It argues that, if the Commission does not set boundaries for state action, the Commission's procompetitive objectives will remain unrealized as state regulators deprive Commission initiatives of their effect.[603]

280. Bell Atlantic/NYNEX Mobile states that, if states act inconsistently with Commission guidance on numbering policies, the Commission should intervene promptly.[604] The District of Columbia Commission urges that "on a showing that a particular state is acting in violation of FCC guidelines, the FCC may revoke its delegation of jurisdiction to that state."[605] PageNet says the Commission should impose a strict time limit on state commission review of relief plans.[606] Sprint advises that any party "retains the right to appeal any detrimental state commission mandate to the FCC, and . . . the FCC will act promptly on such appeals."[607]

c. Discussion.

281. In this *Order*, we are authorizing the states to continue the task of overseeing the introduction of new area codes subject to the Commission's numbering administration guidelines.[608] We are reiterating the guidelines enumerated in the *Ameritech Order* and clarifying the *Ameritech Order* to prohibit all service-specific or technology-specific overlays, and to impose conditions on the adoption of an all-services overlay. Existing Commission guidelines, which were originally enumerated in the *Ameritech Order*, state that numbering administration should: (1) seek to facilitate entry into the communications marketplace by making numbering resources available on an efficient and timely basis; (2) not unduly favor

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[601] *See, e.g.*, NYNEX reply at 12; GTE reply at 34.

[602] Texas Commission comments at 5. See our discussion below at paras. 294-295 for the Texas Commission's proposed means of area code relief.

[603] Vanguard comments at 3-4.

[604] Bell Atlantic/NYNEX Mobile reply at 2.

[605] District of Columbia Commission comments at 2.

[606] PageNet comments at 7-8.

[607] Sprint comments at 15.

[608] *See* para. 272, *supra*.

or disadvantage any particular industry segment or group of consumers; and (3) not unduly favor one technology over another.[609] The Commission's conclusion in the *Ameritech Order* that Ameritech's proposed wireless-only overlay plan would be unreasonably discriminatory and anticompetitive in violation of Sections 201(b) and 202(a) of the Communications Act of 1934 has also provided guidance to local central office code administrators and state commissions implementing area code relief.[610] We find that the guidelines and the reasoning enumerated in that decision should continue to guide the states and other entities participating in the administration of numbers because these guidelines are consistent with Congress' intent to encourage vigorous competition in the telecommunications marketplace. In addition, we codify in this *Order* the directives of the *NANP Order* that ensure fair and impartial numbering administration.[611]

282. We disagree with the suggestion of some parties that we prohibit or severely restrict the states' right to choose overlay plans. For example, PageNet urges the Commission to impose specific time constraints on states and to require default area code plans if states do not take action within those time constraints. Such restrictions would not be consistent with our dual objectives of encouraging competition through fair numbering administration while at the same time delegating to the states the right to implement area codes.

283. As we note above, states are uniquely situated to determine what type of area code relief is best suited to local circumstances. Certain localities may have circumstances that would support the use of area code overlays. Most significantly, area code overlays do not require any existing customers to change their telephone number, in contrast to geographic splits. Additionally, in some metropolitan areas continuously splitting area codes will result in area codes not covering even single neighborhoods, a situation that can only be avoided by implementing overlays. Finally, area code overlays can be implemented quickly. States may make decisions regarding the relative merits of area code splits and overlays so long as they act consistently with the Commission's guidelines. We emphasize that the burdens created by area code overlays will be greatest during the transition to a competitive marketplace. As competition in telecommunications services takes root, consumers will become more accustomed to ten-digit dialing and to area code overlays and the states will face less resistance in their efforts to implement new area codes than they will in the near term.

284. Nevertheless, we find that it is necessary to clarify the Commission's numbering administration guidelines as they apply to area code relief. Recent action taken by the Texas

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[609] *Ameritech Order*, 10 FCC Rcd at 4604.

[610] *Id.* at 4608, 4610-12.

[611] *See generally NANP Order*. Although we resolve specific issues relating to area code implementation in this *Order*, many other important numbering administration issues will be addressed in other proceedings. For example, the use of N11 codes, (*e.g.*, 211, 311, 411, 511, 611, 711, 811, 911) will be addressed in *The Use of N11 Codes and Other Abbreviated Dialing Arrangements*, CC Docket No. 92-105.

Commission has demonstrated that state commissions might interpret our existing guidelines in a manner that is inconsistent with those guidelines.[612] Thus, while we conclude that geographic area code splits and boundary realignments are presumptively consistent with the Commission's numbering administration guidelines, we clarify our guidelines with respect to how area code overlays can be lawfully implemented.

285. First, we conclude that any overlay that would segregate only particular types of telecommunications services or particular types of telecommunications technologies in discrete area codes would be unreasonably discriminatory and would unduly inhibit competition. We therefore clarify the *Ameritech Order* by explicitly prohibiting all service-specific or technology-specific area code overlays because every service-specific or technology-specific overlay plan would exclude certain carriers or services from the existing area code and segregate them in a new area code. Among other things, the implementation of a service or technology specific overlay requires that only existing customers of, or customers changing to, that service or technology change their numbers. Exclusion and segregation were specific elements of Ameritech's proposed plan, each of which the Commission held violated the Communications Act of 1934.

286. To ensure that competitors, including small entities, do not suffer competitive disadvantages, we also conclude that, if a state commission chooses to implement an all-services area code overlay, it may do so subject to two conditions. Specifically, we will permit all-services overlay plans only when they include: (1) mandatory 10-digit local dialing by all customers between and within area codes in the area covered by the new code; and (2) availability to every existing telecommunications carrier, including CMRS providers, authorized to provide telephone exchange service, exchange access, or paging service in the affected area code 90 days before the introduction of a new overlay area code, of at least one NXX in the existing area code, to be assigned during the 90-day period preceding the introduction of the overlay.[613] Clarifying the conditions that must exist in order to implement an area code overlay will reduce the likelihood that states will act inconsistently with the Commission's guidelines and the consequent need for the Commission to review area code relief plans.

287. We are requiring mandatory 10-digit dialing for all local calls in areas served by overlays to ensure that competition will not be deterred in overlay area codes as a result of dialing disparity. Local dialing disparity would occur absent mandatory 10-digit dialing, because all existing telephone users would remain in the old area code and dial 7-digits to call others with numbers in that area code, while new users with the overlay code would have to

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[612] As discussed at paras. 304-308 *infra*, we find that the Texas Commission's Order addressing area code relief in Dallas and Houston is inconsistent with the *Ameritech Order*.

[613] One NXX will give each carrier the ability to give at least some of its customers numbers in a familiar area code. Guaranteeing more than one NXX in this situation is difficult because by the time the need for the overlay becomes imminent, few NXX codes remain unassigned in the familiar area code.

dial 10-digits to reach any customers in the old code. When a new overlay code is first assigned, there could be nearly 8 million numbers assigned in the old code, with just a few thousand customers using the new overlay code. If most telephone calls would be to customers in the original area code, but only those in the new code must dial ten-digits, there would exist a dialing disparity, which would increase customer confusion. Customers would find it less attractive to switch carriers because competing exchange service providers, most of which will be new entrants to the market, would have to assign their customers numbers in the new overlay area code, which would require those customers to dial 10-digits much more often than the incumbent's customers, and would require people calling the competing exchange service provider's customer to dial 10-digits when they would only have to dial 7-digits for most of their other calls. Requiring 10-digit dialing for all local calls avoids the potentially anti-competitive effect of all-services area code overlays.

288. Allowing every telecommunications carrier authorized to provide telephone exchange service, exchange access, or paging service in an area code to have at least one NXX in the existing NPA will also reduce the potential anti-competitive effect of an area code overlay. This requirement would reduce the problems competitors face in giving their customers numbers drawn from only the new "undesirable" area codes while the incumbent carriers continue to assign numbers in the "desirable" old area code to their own customers.[614]

289. Incumbent LECs have an advantage over new entrants when a new code is about to be introduced, because they can warehouse NXXs in the old NPA.[615] Incumbents also have an advantage when telephone numbers within NXXs in the existing area code are returned to them as their customers move or change carriers. Thus, to advance competition, we require that, when an area code overlay is implemented, each provider of telephone exchange service, exchange access, and paging service must be assigned at least one NXX in the old NPA.

290. A number of commenters suggested that the Commission permit area code overlays only if permanent number portability has been implemented in the applicable NPA.[616]

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[614] The new overlay area code may be considered less desirable by customers during the beginning of its life because it is less recognizable. For example, business users that have a telephone number in the overlay area code because they have switched carriers or obtained new telephone lines might be thought to be in a distant location due to the "unrecognized" area code. Thus, incumbent carriers would have a competitive advantage because most of their customers would remain in the old, more recognizable code. This effect would persist until customers become accustomed to the new overlay code.

[615] *See supra* n.573.

[616] Teleport Communications Group, Inc. (TCG) has raised this issue in a petition for declaratory ruling filed with the Commission on July 12, 1996. TCG's petition for declaratory ruling asks the Commission to: (1) require that overlay area code plans may not be implemented unless permanent number portability and mandatory 10-digit dialing exist, and that geographic area code splits must be used absent these conditions; (2) require the implementation of TCG's "Number Crunch" proposal, which would permit NXX assignments across multiple rate centers in blocks of one thousand numbers; and (3) require as part of a BOC's application to provide in-region interLATA services pursuant to section 271 of the 1996 Act a demonstration that numbering resources are

We decline to do so. We recognize that the implementation of permanent service provider number portability will reduce the anticompetitive impact of overlays by allowing end users to keep their telephone numbers when they change carriers. Requiring the existence of permanent service provider number portability in an area before an overlay area code may be implemented, however, would effectively deny state commissions the option of implementing any all-services overlays while many area codes are facing exhaust. While permanent number portability is being implemented, end users will be allowed to keep their telephone numbers when they change carriers, under the Commission's mandate of interim number portability.[617]

291. If a state acts inconsistently with federal numbering guidelines designed to ensure the fair and timely availability of numbering resources to all telecommunications carriers, parties wishing to dispute a proposed area code plan may file a petition for declaratory ruling, rulemaking, or other appropriate action with the Commission. Pursuant to section 5(c)(1) of the Communications Act of 1934, as amended,[618] authority is delegated to the Common Carrier Bureau to act on such petitions. We expect that with the clarifications we provide in this *Order*, there will be a reduced need for such petitions. Unless it becomes necessary to do so, we decline to follow the recommendations of parties urging that we enumerate more specific procedures to be invoked if states fail to follow our numbering guidelines. We expect that the need for our review of any state commissions' actions with respect to area code relief should diminish as states gain more experience with the area code relief process generally and with area code overlays in particular, particularly as states become more familiar with the Commission's guidelines in this area.

292. Finally, we address petitions for clarification or reconsideration that were filed in the *Ameritech* and *NANP* proceedings. On February 22, 1995, Comcast Corporation filed a Petition for Clarification or Reconsideration of the *Ameritech Order* regarding the Commission's jurisdiction over numbering administration.[619] In its petition, Comcast seeks clarification of the *Ameritech Order* to the extent that it implies the Commission does not have broad statutory authority over the assignment of numbering resources, and seeks reconsideration of any implication in the *Ameritech Order* that the Commission's authority is

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available to competing local carriers. We will address TCG's petition in a separate proceeding. *See Petition for Declaratory Ruling to Impose Competitively Neutral Guidelines for Numbering Plan Administration*, filed by Teleport Communications Group, Inc. (July 12, 1996).

[617] *See Number Portability Order*.

[618] 47 U.S.C. § 155(c)(1).

[619] *See Petition for Clarification or Reconsideration*, filed by Comcast Corporation (February 22, 1995). PageNet and Nextel Communications, Inc. ("Nextel") filed Comments in support of Comcast's petition.

limited by or subordinate to state interests.[620] Because section 251(e)(1) gives the Commission exclusive jurisdiction over numbering matters in the United States, any uncertainty about the Commission's and the states' jurisdiction over numbering administration that may have existed prior to the 1996 Act has now been eliminated. In light of the enactment of section 251(e)(1), Comcast's request that the Commission reconsider its conclusion in the *Ameritech Order* that the Commission does not retain plenary jurisdiction over numbering issues in the United States is moot. Accordingly, we dismiss Comcast's petition.

293. In the *NANP Order* the Commission discussed the states' authority over area code changes and central office code administration. In response the National Association of Regulatory Utility Commissioners filed a Request for Clarification and the Pennsylvania Public Utility Commission filed a Petition for Limited Clarification and/or Reconsideration.[621] NARUC and the Pennsylvania Commission have asked the Commission to clarify that, while the Commission intended in the *NANP Order* to transfer the incumbent LEC functions associated with CO code assignment and area code exhaust to the new NANP Administrator, the Commission did not intend to alter the role of the States in overseeing those functions.[622] Because section 251(e)(1) gives the Commission exclusive jurisdiction over numbering matters in the United States, and because we clarify the role of the states in numbering administration in this *Order*,[623] we dismiss the petitions of NARUC and the Pennsylvania Commission as moot.

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[620] Comcast Petition at 1. According to Comcast, footnote 18 of the *Ameritech Order* explicitly overruled *dicta* in a prior Commission decision that stated that the Commission had plenary jurisdiction over CO code allocation. *Id.* at 3.

[621] *See Request for Clarification*, filed by the National Association of Regulatory Utility Commissioners (NARUC Petition) (August 28,1995); *Petition for Limited Clarification and/or Reconsideration*, filed by the Pennsylvania Commission (Pennsylvania Commission Petition) (August 28, 1995). Nextel filed Comments in response to the petitions.

[622] *See* NARUC Petition at 5; Pennsylvania Commission Petition at 3. The Pennsylvania Commission also seeks clarification or reconsideration of the Commission's *NANP Order* to the extent that it suggests the Commission would interfere with or preempt a state's ability to address local number portability. *Id.* at 3-4. We do not address the states' role with respect to number portability here because this issue has already been addressed by the Commission. *See Number Portability Order* at para. 5.

[623] *See supra* paras. 281-291, and *infra* paras. 309-322.

3. Texas Public Utility Commission's Area Code Relief Order for Dallas and Houston

a. Background

294. On May 9, 1996, the Texas Commission filed two substantively identical pleadings: (1) a petition for expedited declaratory ruling pursuant to 47 CFR § 1.2; and (2) an application for expedited review pursuant to 47 CFR § 1.115.[624] The Texas Commission states that in July 1995, MCI petitioned it for an investigation into numbering practices of Southwestern Bell Telephone Company (SWB)[625] related to exhaustion of telephone numbers in the 214 area code serving the Dallas metropolitan area.[626] SWB proposed to relieve numbering exhaustion by implementing all-services overlays, which would require ten-digit local dialing within Houston and Dallas metropolitan areas.[627] In October 1995, an administrative law judge heard evidence regarding numbering relief plans and issued a written proposal for decision in November 1995. In December 1995, the Texas Commission determined that public comment on the matter was necessary; in January 1996 it conducted public forums in both Dallas and Houston.[628] In March 1996, the Texas Commission issued an Order setting out an area code relief plan.[629] On May 17, 1996, we released a public notice establishing a pleading cycle for comments on the Texas Commission's pleadings.[630]

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[624] The Texas Commission explains that it is filing both pleadings simultaneously, hoping that the Commission will find one or the other an appropriate vehicle by which to determine expeditiously whether a Texas Commission order (*PUCT Order*) pertaining to a proposed area code relief plan is acceptable. For ease of reference, all citations will be to the Texas Commission petition (PUCT petition) unless citations to both pleadings are needed for clarification. In this order, we are ruling on the PUCT petition. Therefore, action on the Texas Commission's application, a procedurally distinct but substantively identical pleading, is unnecessary.

[625] We note that, although SWB was the LEC proposing the originally disputed area code relief plan, SBC filed comments on the Texas Commission's proposed plan. SWB is a subsidiary of SBC.

[626] PUCT petition at 2. The Texas Office of Public Utility Council filed a similar petition in August 1995 regarding SWB's numbering practices related to the exhaustion of telephone numbers in the 713 area code in Houston. The Texas Commission consolidated the petitions into Texas Public Utilities Commission Docket No. 14447 because similar issues were presented.

[627] *Id.*

[628] *Id.*

[629] *Id.*

[630] *See Pleading Cycle Established for Comments on Public Utility Commission of Texas' Petition for Expedited Declaratory Ruling and Application for Expedited Review of Area Code Plan for Dallas and Houston*, Public Notice, DA 96-794 (rel. May 17, 1996). Comments were due June 6, 1996, and reply comments were due June 21, 1996. Nineteen parties filed comments, and twelve parties filed replies, in response to the Texas Commission's petitions.

b. Petition and Comments

295. The Texas Commission ordered a plan that combines an immediate landline geographic split with a prospective wireless overlay in the Dallas and Houston metropolitan areas.[631] In its pleadings to the FCC, the Texas Commission alleges that it specifically considered the *Ameritech Order* in crafting its plan.[632] The Texas Commission's Order required SWB to request new area codes from the NANP administrator (Bellcore) for the prospective wireless overlays. Bellcore refused to supply the new area codes unless ordered to do so by the FCC.[633] According to the Texas Commission, Bellcore incorrectly relied on the *Ameritech Order* to support a position that wireless overlays are, *per se*, invalid and wasteful.[634]

296. On March 21, 1996, Bellcore sent a letter to the Network Services Division of the Common Carrier Bureau, FCC, explaining its view that the Texas Commission plan violated the *Ameritech Order*.[635] In that letter, Bellcore asserts that the *Ameritech Order* is controlling precedent because § 251(e)(1) confers exclusive jurisdiction over numbering administration on the Commission. Bellcore further opposes use of NPAs for service-specific overlays, because such assignments, it says, are inefficient, wasteful, and potentially discriminatory.[636] The Network Services Division responded to the letter on April 11, 1996, agreeing that the *Ameritech Order* forbids service-specific overlays such as those ordered by the Texas Commission and supporting Bellcore's decision, as acting NANP Administrator, not to make the requested NPA assignments for use in Dallas and Houston as a wireless-specific overlay.[637]

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[631] PUCT petition at 2-3.

[632] *Id.* at 3. In the *Ameritech Order*, the Commission held that three elements of a proposed wireless-only overlay each violated the prohibition in section 202(a) of the Communications Act of 1934 against unjust or unreasonable discrimination, and also represented unjust and unreasonable practices under section 201(b). Those objectionable elements were: (1) Ameritech's proposal to continue assigning NPA 708 codes (the old codes) to wireline carriers, while excluding paging and cellular carriers from such assignments (the "exclusion" proposal); (2) Ameritech's proposal to require only paging and cellular carriers to take back from their subscribers and return to Ameritech all 708 telephone numbers previously assigned to them, while wireline carriers would not be required to do so (the "take back" proposal); and (3) Ameritech's proposal to assign all numbers from the new NPA (630) to paging and cellular carriers exclusively (the "segregation" proposal). *See Ameritech Order*, 10 FCC Rcd at 4608, 4611.

[633] PUCT petition at 3.

[634] *Id.*

[635] PUCT petition, Attachment B.

[636] *Id.*

[637] PUCT petition at 3-4.

297. The Texas Commission acknowledges that the FCC has exclusive jurisdiction over numbering pursuant to § 251(e)(1) of the 1996 Act.[638] The Texas Commission states that the *NPRM* might provide additional clarification on these issues, but that, currently, it is uncertain whether the FCC intended to preempt the Texas Order, and asks that the Commission consider the specific facts of this matter.[639] It contends that it carefully deliberated the issues and made a balanced and equitable decision that is consistent with the *Ameritech Order*. Therefore, it insists, any preemption is unwarranted.[640]

298. According to the Texas Commission, the *Ameritech Order* does not, on its face, prohibit all service-specific overlays.[641] Instead, it says, the *Ameritech Order* requires a fact-specific examination of each situation to determine whether the proposed numbering plan violates the statutory prohibition of unreasonable and unjust discrimination.[642] Further, in the Texas Commission's view, its Order "strikes the optimal balance" and is "evenhanded" in its effect on carriers and customers.[643] The Texas Commission alleges that it weighed different proposals offered by several parties, and that, although a geographic split was found superior

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[638] *Id.* at 5.

[639] The Texas Commission argues that the April 11, 1996, letter did not rule directly on the validity of its Order. Moreover, noting that, in the *NPRM*, the Commission references the April 11 Common Carrier Bureau letter, Texas says that the *NPRM* states that the Commission (rather than the Network Services Division) agreed with Bellcore's decision not to make the area code assignments requested by SWB. *NPRM* at para. 257, n.358. Therefore, in Texas' view, the Common Carrier Bureau letter is an action taken pursuant to delegated authority that affirmatively adopts Bellcore's decision and preempts its order. The Texas Commission argues that this action should be reviewed by the Commission. PUCT petition at 4.

[640] PUCT petition at 5. In its petition for declaratory ruling, the Texas Commission requests that we declare: (1) that the refusal of the Chief, Network Services Division, Common Carrier Bureau, to direct the NANP administrator to assign area codes to SWB for use as wireless overlays in Dallas and Houston was erroneous; (2) that the NANP administrator is directed to assign such codes to SWB; and (3) that the Texas Commission's March 13, 1996 Order directing a combination wireline area code split and wireless overlay in Dallas and Houston is lawful. *Id.* at 10. In its application for expedited review, it requests that we: (1) review and reverse the Network Services Division's action in its letter to the NANP administrator; (2) order the NANP administrator to assign the requested area codes for use as wireless overlays in Dallas and Houston; and (3) uphold the Texas Commission's Order pursuant to analysis of Commission precedent. PUCT application at 10.

[641] PUCT petition at 5-6.

[642] *Id.* at 6.

[643] *Id.* at 6-9. In the *Ameritech Order*, we stated that any area code relief plan that becomes effective should strike an optimal balance among three objectives Ameritech had identified: (1) an optimal dialing plan for customers; (2) as minimal a burden as feasible; and (3) an uninterrupted supply of codes and numbers. We further found that the optimal balance must assure that any burden associated with the introduction of the new numbering code falls in as evenhanded a way as possible upon all carriers and customers affected by its introduction. *Ameritech Order*, 10 FCC Rcd at 4611.

'o an all-services overlay, neither plan alone was found to be the best solution.[644] For this 'eason, it chose a two-step, integrated relief plan involving a landline geographic split and a prospective wireless overlay.[645] The Texas Commission argues that its plan permits intra-NPA seven-digit dialing, unlike an all-services overlay, which would have required ten-digit intra-NPA dialing. Also, it says that its plan will reduce customer confusion and provide greater competitive fairness to service providers.[646]

299. Many parties contend that the Texas Commission's plan violates Commission policy as outlined in the *Ameritech Order* and request its clarification.[647] Still others argue that the plan violates § 201(b) or § 202(a),[648] as well as § 251(e)(1), which confers exclusive jurisdiction over numbering administration on the Commission that we have not assigned to any other entity.[649] Still others argue that the plan violates § 253, which provides that no state requirement may prohibit or have the effect of prohibiting the ability of any entity to provide any telecommunications service.[650]

300. In Sprint Spectrum's view, for example, the proposed wireless overlays will undermine the ability of telecommunications carriers to provide service because they allow existing customers of wireless incumbents to retain 7-digit dialing for most calls if they do not switch to a new entrant. Similarly, it says, current customers of wireline incumbents will retain 7-digit dialing to businesses and residences in either the suburban or metropolitan area, unless they switch to a new wireless provider.[651] Sprint Spectrum maintains that, by creating a distinction between services offered by incumbent providers and those seeking entry into the market using wireless technology, the Texas Commission has created a disincentive for new

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[644] PUCT petition at 7.

[645] *Id.*

[646] *Id.*

[647] *See, e.g.*, AT&T comments at 5; Century Cellunet comments at 3-4; Cox comments at 3-4; GTE comments at 8-14; HCTC comments at 3-10; MCI comments at 3-4; Nextel comments at 3-6; PageNet comments at 6-10; PCIA comments at 4-6; ProNet comments at 7-14; Sprint comments at 4-5; Sprint Spectrum comments at 5-11; Teleport comments at 4-12; US West comments at 9-10; Vanguard comments at 2-3; SBC comments at 5-12.

[648] *See, e.g.*, AT&T comments at 5; HCTC comments at 3-10; PageNet comments at 9; ProNet comments at 1; Sprint comments at 4-5; Sprint Spectrum comments at 6-11.

[649] *See, e.g.*, Century Cellunet comments at 4; GTE comments at 7; PCIA comments at 6-7; U S WEST comments at 4-5. *See also* Teleport comments at 13.

[650] Sprint Spectrum comments at 4.

[651] Sprint Spectrum comments at 4-5 and 11-12.

wireless providers to seek entry into these telecommunications markets.[652] Similarly, PageNet argues that this interference with customer choice, and the inhibition of wireline/wireless competition, are contrary to the objectives stated in the *Ameritech Order*, and urges the Commission to expressly declare the Texas Commission's plan prohibited.[653]

301. Twelve reply comments were received. The Texas Commission contends that it had jurisdiction to issue its order containing its proposed area code relief plan, and the 1996 Act does not deprive the Texas Commission of that jurisdiction.[654] The Texas Commission argues that the exclusion, segregation, and take-back facets of the wireless-only overlay proposal should not be considered separate and independent grounds for finding an NPA relief plan unlawful.[655] The Texas Commission maintains that we should not order an alternative form of relief such as an all-services overlay,[656] and that we should not find unlawful the Texas Commission's proposed consideration of take-back of wireless numbers during the geographic split if the wireless overlays are deemed unlawful.[657]

302. The Texas Public Utility Counsel filed reply comments in support of the Texas Commission's proposed area code relief plan. The Texas Public Utility Counsel maintains that the proposed wireless-only overlay is neither discriminatory nor unreasonable under sections 202(a) and 201(b) of the Communications Act of 1934.[658] Further, the Texas Public Utility Counsel claims that the wireless carriers' interpretation of the *Ameritech Order* is unreasonably strict and would preclude all forms of area code relief.[659]

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[652] *Id.* at 12.

[653] PageNet comments at 6-10. *See also* SBC comments at 12-16.

[654] Texas Commission reply at 2-7.

[655] *Id.* at 7-8.

[656] *Id.* at 9-10.

[657] *Id.* at 10-11.

[658] Texas Public Utility Counsel reply at 9-11.

[659] *Id.* at 12-15.

303. In reply, several parties continue to maintain that the Texas Commission's proposed prospective wireless-only overlay is unlawful.[660] Most of these commenters contend that an all-services overlay can be an appropriate method of area code relief.[661]

c. Discussion

304. We conclude that the Texas Commission's wireless-only overlay violates our *Ameritech Order* on its face. It is also inconsistent with our clarification of the *Ameritech Order* contained in this *Order*, wherein we specifically prohibit wireless-only overlays.

305. The Texas Commission itself admits to the presence of exclusion and segregation in its plan.[662] In the *Ameritech Order*, we clearly indicated that the presence of any one of the following elements including: (1) exclusion; (2) segregation; or (3) take-back, renders a service-specific overlay plan unacceptable and violative of the Communications Act.[663] Texas' plan features all these elements. Like the plan proposed in the *Ameritech Order*, the Texas Commission's plan would unreasonably discriminate against wireless carriers. It is thus unreasonably discriminatory under section 202(a) and would constitute an unreasonable practice in violation of section 201(b) of the Communications Act of 1934. Moreover, in this *Order*, we have clarified the *Ameritech Order* by prohibiting all service-specific and technology-specific area code overlays. Service-specific and technology-specific overlays do not further the federal policy objectives of the NANP. They hinder entry into the telecommunications marketplace by failing to make numbering resources available on an efficient, timely basis to telecommunications services providers. As we describe in detail above, service-specific overlays would provide particular industry segments and groups of

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[660] *See, e.g.*, CTIA reply at 2-3; Vanguard reply at 1-4; MCI reply at 3-5; ProNet reply at 1; Sprint reply at 1-2. SBC states that the Texas Commission overlays are unlawful, and argues that we should expressly state that service-specific overlays are *per se* unlawful. SBC reply at 1.

[661] ProNet reply at 2-4; BellSouth reply at 2-6; U S WEST reply at 1-6; SBC reply at 2-4.

[662] The record also indicates that the plan also calls for some take-back of existing wireless numbers. The Texas Commission states that two groups of wireless customers will experience take back due to the geographic split. Those with Type 1 cellular and Type 1-like paging connections will experience take-back for "technical and practical implementation-related reasons. *PUCT Order* at 12 n.9. In addition, the Texas Commission envisions that after the date on which NXX codes are activated for the prospective wireless overlay, wireless carriers holding NXX codes from the prior area codes will not be allowed to assign any additional numbers from those prior area codes, regardless of the fill factor of the NXX codes. Remaining unused numbers in those NXX codes will be returned to the NPA administrator. *PUCT Order* at 6.

[663] *See Ameritech Order*, 10 FCC Rcd at 4608. "[W]e find as a matter of law that *each* of these three Ameritech proposals violates the prohibition in the Act against unjust or unreasonable discrimination." (Emphasis added). *See also id.* at 4611. In discussing whether Ameritech's plan constituted an unjust or unreasonable practice and therefore violated § 201(b) of the Act, we stated that three facets of Ameritech's plan – its exclusion, segregation, and take-back proposals – would *each* impose significant competitive disadvantages on the wireless carriers, while giving certain advantages to wireline carriers.

consumers an unfair advantage. We have also stated that administration of the NANP should be technology neutral; service-specific overlays that deny particular carriers access to numbering resources because of the technology they use to provide their services are not technology neutral.

306. We find the Texas Commission's arguments in support of its proposed wireless-only overlay unpersuasive. It argues, for example, that the wireless overlay will extend the life span for the area code relief plan. What extends the life span of a relief plan, however, is not so much the wireless overlay as the introduction of a new NPA with its 792 additional NXXs. This being the case, the Texas Commission provides no compelling reason for isolating a particular technology in the new NPA. The Texas Commission also states that there will be less confusion regarding NPA assignments, but a plan calling for overlay for one service and a split for another is likely to lead to increased customer confusion regarding NPA assignments, because parties making calls would have to be aware of what type of service the party being called has in order to know whether to dial the ten-digit number or just the last seven digits. The Texas Commission also argues that its plan allows for continued seven-digit dialing for intra-NPA calls, but we note that the same would be true if a geographic split for all services and technologies was imposed. Although an all-services overlay would have required ten-digit intra-NPA dialing, there would not be discrimination based on technology.

307. Several parties raise concerns about dialing disparity resulting from the implementation of the Texas Commission's plan. It is these concerns about dialing disparity in the context of an overlay that have led us to require mandatory ten-digit dialing as part of any all services overlay plan.

308. Some parties also advance concerns about the Texas Commission's statements that, if the proposed wireless-only overlay were found to be unlawful, it would consider a mandatory pro-rata take-back of wireless numbers under the geographic split plan in order to balance the remaining burdens of inconvenience and confusion caused by the number changes necessitated by a split. We do not take action here to prevent the Texas Commission from taking back some wireless numbers in the course of introducing a geographic split plan. In a geographic split, roughly half of the customers in the existing NPA, including wireless customers, will have to change their telephone numbers. We recognize that wireless customers may need to have their equipment reprogrammed to change their telephone number, and that this will inconvenience wireless customers to some extent. This illustrates the fact that geographic splits also have burdensome aspects. Our goal is to have technology-blind area code relief that does not burden or favor a particular technology. Requiring approximately half of the wireless customers and wireline customers to change telephone numbers in a geographic split is an equitable distribution of burdens. This is the kind of implementation detail that is best left to the states.

4. Delegation of Additional Numbering Administration Functions

a. Background

309. In the *NANP Order*, we transferred CO code administration to the new NANP administrator. We stated that a "requirement that CO code administration be centralized in the NANP administrator simply transfers the functions of developing and proposing NPA relief plans from the various LEC administrators to the new NANP Administrator" and that "[s]tate regulators will continue to hold hearings and adopt the final NPA relief plans as they see fit."[664]

310. In the *NPRM*, we tentatively concluded that, pursuant to Section 251(e)(1), the Commission should authorize states to address matters related to implementation of new area codes, and we are doing so in this *Order*. In the *NPRM*, we also sought comment on whether the Commission should authorize states or other entities to address any additional number administration functions. We address this issue here.

b. Comments

311. Some commenters raise issues about the proper role of the states in number administration both before and after transfer of number administration functions to the NANP. BellSouth, for example, argues that we should authorize states to address additional number administration functions until their transfer to the NANP. Specifically, BellSouth recommends that states should take active oversight in CO code implementation activities, including the power to allow for cost recovery.[665]

312. SBC expresses concern regarding the expeditious transfer and centralization of CO code administration into the new NANP. In SBC's view, such transfer is appropriate, but before it can take place, all relevant issues must first be fully addressed and resolved. SBC states that code administrators need local knowledge of authorized carriers, service areas, and toll and local calling areas for the transfer to be effective. SBC asserts that, because CO code administration has significant impacts on local areas in terms of relief plans and dialing plans, state regulatory commissions should be included in any decision.[666] In reply, MFS, stating that the Commission should not "be swayed" by SBC's singular concerns about the complexity of CO code assignments and the need for state involvement, argues against any potential delay in the transfer of numbering responsibilities.[667] Similarly, WinStar, stating that

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[664] *NANP Order*, 11 FCC Rcd at 2622.

[665] BellSouth comments at 20.

[666] SBC comments at 11-13.

[667] MFS reply at 4.

such delay would be contrary to the letter and spirit of the 1996 Act, argues against any delay in transferring numbering administration from the LECs to the NANP administrator.[668]

313. Some parties argue that. when the new NANP administrator is established, the Commission should allow state commissions to handle the current functions of the LEC, including development of area code relief plans and assignment of CO codes.[669] According to the Florida Commission, if the state commissions do not decide to handle these functions, the NANP administrator should be responsible for these processes.[670] Cox, however, does not support delegation of CO code assignment responsibility to the states and contends that if the Commission does authorize the states to perform this function, it should adopt specific policies for CO code assignment requiring that such assignments be made on a non-discriminatory basis.[671] The Pennsylvania Commission states that, after the new NANP administrator assumes LEC administrative responsibilities, the Commission should allow states to continue their regulatory oversight role. Specifically, the Pennsylvania Commission asserts that the Commission should delegate to state commissions regulatory oversight of CO code assignment, including local number portability and local dialing parity measures.[672]

314. In the Indiana Commission Staff's view, we should authorize state commissions to make decisions regarding the implementation or changing of dialing patterns consistent with non-discriminatory and competitive guidelines, and changes in dialing patterns should be incorporated into the area code relief planning process. The Indiana Commission Staff asserts that states are in a better position to determine what impact changes in dialing will have on the local area.[673] Conversely, Vanguard argues the Commission should satisfy its Congressional mandate by establishing national numbering and dialing parity guidelines.[674]

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[668] WinStar reply at 15-16.

[669] See, e.g., Florida Commission comments at 6-7; Indiana Commission Staff comments at 6.

[670] Florida Commission comments at 6-7.

[671] Cox states that the policies should state that carriers and states currently administering CO codes are not permitted to deny codes to new entrants, and are not permitted to levy "code opening" charges to avoid imposing barriers on the entry and expansion of new competitors. Cox comments 8-9. In its reply, Cox notes that incumbent LECs have argued that there is no need for Commission intervention in the assignment of CO codes. Cox argues that, in practice, despite the existence of "neutral" CO code assignment guidelines, significant potential for discriminating against new entrants remains. Until an impartial entity is responsible for assigning CO codes, Cox contends, there is a need for specific Commission rules preventing discrimination. Cox would prefer that CO codes be administered by a neutral administrator, and believes that the possibility that a neutral administrator will lack some local knowledge does not form an insurmountable barrier to a swift transition from the current regime. Cox reply at 10-11.

[672] Pennsylvania Commission comments at 7.

[673] Indiana Commission Staff comments at 7.

[674] Vanguard reply at 2-3.

c. Discussion

315. We conclude that the states may continue to implement or change local dialing patterns subject to any future decision by the Commission regarding whether to require uniform nationwide dialing patterns.[675] The Commission will retain broad policy-making jurisdiction over numbering. We further conclude that states that wish to be responsible for initiating area code relief planning, a function currently performed by the LECs as CO code administrators, may do so now and after transfer of CO code administration from the LECs to the new NANP administrator. Again, because of the need to avoid disruption in numbering administration, we find good cause to make this authorization effective immediately pursuant to 5 U.S.C. § 553(d)(3). We decline, however, to delegate to the states on a permanent basis oversight of CO code administration. Finally, we decline to authorize states to handle CO code assignment functions.

316. Currently, state commissions are responsible for determining the number of digits that must be dialed for intra-NPA toll calls and inter-NPA local calls.[676] For example, while most states require 1 plus 10-digit dialing for all intra-NPA toll calls, California and New Jersey permit such toll calls to be completed with 7-digit dialing. Illinois requires 7-digit dialing for all intra-NPA calls, whether local or toll. Similarly, a number of states, including the District of Columbia, Maryland, and parts of Virginia require 10-digit dialing for all inter-NPA local calls and permit 10-digit or 1 plus 10-digit dialing for all intra-NPA local calls.

317. States are in the best position at this time to determine dialing patterns because of their familiarity with local circumstances and customs regarding telephone usage. For example, one state commission might want to allow its residents to dial 7-digits for all intra-NPA calls, whether toll or local, whereas another state commission might wish to require 10-digit dialing for intra-NPA calls to ensure that its residents recognize that they are making a toll call rather than a local call. Therefore, states may continue to implement appropriate local dialing patterns, subject to the Commission's numbering administration guidelines, including the Commission's requirement in this *Order* of 10-digit dialing for all calls within and between NPAs in any area where an area code overlay has been implemented.

318. Two state commissions specifically ask the Commission to authorize states to perform functions associated with initiating and planning area code relief, as distinct from

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[675] Uniform nationwide dialing, which would require uniform dialing patterns throughout the United States, was raised in the *NANP NPRM*, Docket No. 92-237, 9 FCC Rcd 2068, 2075 (1994), but was not addressed in the *NANP Order* and remains unaddressed by the Commission.

[676] In every state, intra-NPA local calls can be dialed using 7-digits, while all inter-NPA calls require 1 plus 10-digit dialing. For a list of standard and permissible dialing patterns in each state, see *North American Numbering Plan, Numbering Plan Area Codes 1996 Update*, Bellcore (January 1996) at 11-16.

adopting final area code relief plans.[677] We agree that states should be authorized to initiate and plan area code relief. Currently, when an incumbent LEC in its role as CO code administrator predicts that NPA exhaust is imminent, it initiates the NPA relief planning process by holding industry meetings, developing an appropriate area code relief plan or plans, and proposing that plan or several alternative plans for the state commission's consideration and adoption.[678] Thus, state commissions do not initiate and develop area code relief plans,[679] but states adopt, codify or reject the final plan.[680]

319. We conclude that states wishing to become responsible for initiating area code relief planning, a function currently performed by the LECs as CO code administrators, may do so, even after transfer of CO code administration from the LECs to the new NANP administrator. We find that enabling states to initiate and develop area code relief plans is generally consistent with our previous delegation of new area code implementation matters to the state commissions based on their unique familiarity with local circumstances. We make this delegation, however, only to those states wishing to perform area code relief initiation and development. We recognize that many state commissions may not wish to perform these functions because, *inter alia*, the initiation and development of area code relief can require specialized expertise and staff resources that some state commissions may not have. Those states that seek to perform any or all of these functions must notify the new NANP administrator within 120 days of the selection of the NANP administrator. Those states wishing to perform functions relating to initiation and development of area code relief prior to the transfer of such functions to the new NANP administrator must notify promptly the entity

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[677] Indiana Commission Staff comments at 6-7; Florida Commission comments at 5.

[678] *See, e.g., Illinois Bell Telephone Company Petition for Approval of NPA Relief Plan for 708 Area Code by Establishing a 630 Area Code*, Order, No. 94-0315 (Ill. Comm. Comm'n March 20, 1995).

[679] The process of area code relief initiation and development varies by state. In most cases the incumbent LEC (as CO code administrator) declares that the supply of CO codes in a particular area code is about to exhaust, and invites all telecommunications entities with interests in the area code at issue to meet and attempt to reach consensus on a plan for area code relief. Issues before the industry include whether to propose an area code overlay or a geographic split. If the industry can agree on the proposal, it is submitted to the state commission for adoption. If the industry cannot agree, the incumbent LEC may submit a number of alternatives to the state commission from which to choose.

[680] State commissions have, however, recently begun to reject or significantly alter LEC proposals as area code relief has become more controversial. *See, e.g., Illinois Bell Telephone Company Petition for Approval of NPA Relief Plan for 708 Area Code by Establishing a 630 Area Code*, Order, No. 94-0315 (Ill. Comm. Comm'n March 20, 1995); *AirTouch V. Pacific Bell*, Case 94-09-058, *MCI V. Pacific Bell*, Case 95-01-001, Decision No. 95-08-052 (Cal. Pub. Util. Comm'n Aug. 11, 1995); *Petition of MCI Telecommunications Corp. for an Investigation of the Practices of Southwestern Bell Telephone Co. Regarding the Exhaustion of Telephone Numbers in the 214 Numbering Plan Area and Request for a Cease and Desist Order Against Southwestern Bell Telephone Co., Petition of the Office of the Public Utility Counsel for an Investigation of the Practices of Southwestern Bell Telephone Co. Regarding the Exhaustion of Telephone Numbers in the 713 Numbering Plan Area and Request for a Cease and Desist Order Against Southwestern Bell Telephone Co.*, Order on Rehearing, Docket No. 14447 (Tex. Pub. Util. Comm'n. Apr. 29, 1996).

currently performing CO code administration. States should inform the entities of the specific functions upon which the state wishes to take action. Area code relief initiation and development functions will be transferred to and performed by the new NANP administrator for those states that do not seek to perform such functions. We emphasize that, pursuant to our decision to authorize the states to address matters related to the implementation of area code relief, all state commissions will continue to be responsible for making the final decision on how new area codes will be implemented, subject to this Commission's guidelines.

320. While we authorize states to resolve specific matters related to initiation and development of area code relief plans, we do not delegate the task of overall number allocation, whether for NPA codes or CO codes. To do so would vest in fifty-one separate commissions oversight of functions that we have already decided to centralize in the new NANPA. A nationwide, uniform system of numbering, necessarily including allocation of NPA and CO code resources, is essential to efficient delivery of telecommunications services in the United States.[681]

321. With specific regard to CO code allocation, two BOCs and one state commission have asked us to delegate oversight of this function to the states on a permanent basis. We decline. In addition to the problems noted in the preceding paragraph, we are concerned that such an arrangement could complicate and increase the NANP administrator's workload, and could also lead to inconsistent application of CO code assignment guidelines. The oversight and dispute resolution process established in the *NANP Order*, whereby for the U.S. portions of NANP administration the NANC will have initial oversight and dispute resolution duties, with the Commission as the final arbiter, provides an adequate process for overseeing CO code administration.[682] This process also guarantees state participation in the oversight process through their representation on the NANC.

322. Finally, we decline to authorize states to perform CO code assignment functions as suggested by the Florida Commission for two reasons set forth in the *NANP Order*.[683] First, centralizing CO code assignment in one neutral entity will increase the efficiency of CO code assignment because it will preclude varying interpretations of CO code assignment guidelines. Consistent application of assignment guidelines will also diminish the administrative burden, which can be a potential barrier to entry, facing those carriers seeking codes in various states that would otherwise have to associate with a number of separate code assignment bodies rather than one. Second, a centralized CO code administration mechanism would allow the Commission and regulators from other NANP member countries to keep abreast of CO code assignments and predict potential problem areas, such as exhaust, sooner than is possible under the current system.

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[681] *Ameritech Order*, 10 FCC Rcd at 4602.

[682] *See NANP Order*, 11 FCC Rcd at 2605-2610.

[683] *Id.* at 2620-2623.

5. Delegation of Existing Numbering Administration Functions Prior to Transfer

a. Background

323. Prior to the enactment of the 1996 Act, Bellcore, as the NANP Administrator, the incumbent LECs, as central office code administrators, and the states performed the majority of functions related to the administration of numbers.[684] In the *NPRM*, the Commission tentatively concluded that it should authorize Bellcore, the incumbent LECs and the states to continue performing each of their functions related to the administration of numbers as they existed prior to enactment of the 1996 Act until such functions are transferred to the new NANP administrator pursuant to the *NANP Order*.[685] We address this issue here.

b. Comments

324. Several commenters agree with our tentative conclusion to authorize Bellcore, the LECs, and states to continue performing the numbering administration functions they currently perform until such functions are transferred to the new NANP administrator.[686] Generally, these commenters contend that this is the most efficient and least disruptive solution, and that it should be implemented in the interest of numbering administration continuity. Using this approach, NYNEX says, the Commission can intervene and exercise its authority as specific future matters may warrant.[687] AT&T states that current functions should continue until transferred, provided that those functions are not expanded and that the Commission ensures prompt compliance with the *NANP Order*.[688] MFS supports interim delegation of current functions, but asserts that states should have the authority to implement

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[684] For a discussion of NANP administration functions, *see NANP Order*, 11 FCC Rcd at 2595.

[685] *NPRM* at para. 258.

[686] *See, e.g.*, MFS comments at 9; ACSI comments at 13; Ameritech comments at 24; AT&T comments at 12; Bell Atlantic comments at 9; BellSouth comments at 20; District of Columbia Commission comments at 3; Florida Commission comments at 6; GTE comments at 30; NYNEX comments at 18-19; Pennsylvania Commission comments 6-7; PacTel comments at 25; Texas Commission comments at 6; SBC comments at 9.

[687] NYNEX comments at 18-19. NYNEX asserts that we should reject arguments in favor of implementation of an interim arrangement so that incumbent LECs no longer have responsibility for NXX code administration. Incumbent LECs currently assign the NXXs according to industry standards, and under Commission oversight, NYNEX notes. Therefore, there is no need for a short-lived transfer of the responsibilities to another party.

[688] AT&T comments at 12.

interim changes in number administration as long as their actions are consistent with our numbering policy objectives.[689]

325. The California Commission states that it is considering serving as CO code administrator until the NANC has developed its policy on numbering administration. It urges the Commission to allow states with unique number administration problems to resolve these issues in the interim.[690] PacTel states that it has proposed a partial transfer of CO code administration to the California Commission or a third party. In the alternative, it says, the California Commission could serve as an interim CO code administrator until the NANC completes its work, or until the California Commission selects a permanent administrator. In PacTel's view, these options are consistent with our proposal to permit the LECs, Bellcore, and the states to continue performing each of their respective functions related to number administration until those functions are transferred to the new entity.[691] PacTel asserts that California's plan to share code assignment functions between PacTel and the California Commission until the transfer to the new NANP administrator should be identified as a "safe harbor" under the Act.[692]

326. Other commenters oppose the Commission's proposal to authorize Bellcore, the incumbent LECs, and the states to continue performing those numbering administration functions they performed prior to enactment of Section 251(e)(1) on an interim basis until such functions are transferred to the new NANP administrator.[693] They express concern about the appearance of incumbent LEC dominance and discrimination in the assignment and administration of scarce numbering resources. The Indiana Commission Staff recommends that area code planning and implementation be removed from the responsibility of the LECs in favor of state commissions. In its view, delegating the planning and implementation process to state commissions will foster a "more competitive spirit" among the industry. The Indiana Commission Staff envisions that state commissions could obtain periodic reports from the present incumbent LEC administrator as well as Bellcore on projected exhaust dates for area codes.[694] Sprint states that, as long as Bellcore and the LECs serve as NANP and CO code administrators, they should be required to apply identical standards and procedures for

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[689] By way of example, MFS notes that California is considering sharing CO code assignment with LECs until that function is transferred to the NANP administrator. MFS comments at 9.

[690] California Commission comments at 7-8.

[691] PacTel comments at 25.

[692] PacTel reply at 28.

[693] *See, e.g.*, CTIA comments at 5; Indiana Commission Staff comments at 6; NCTA reply at 10; Teleport comments at 4.

[694] Indiana Commission Staff comments at 6.

processing all numbering requests, irrespective of the identity of the party submitting the request.[695]

327. Cox recommends that, in the event the Commission authorizes the state commissions to handle CO assignment, such assignment must be made on a nondiscriminatory basis, and states or the carriers currently administering the CO codes should not be permitted to deny codes to new entrants or to levy "code opening" charges. In Cox's view, the Commission should adopt specific CO code guidelines because: (a) there is evidence of continued discrimination in CO code assignment; and (b) without Commission guidance, states will develop inconsistent regimes. Cox notes that Commission action is especially important here because CO code assignments have not been transferred to a neutral party.[696] Similarly, several commenters argue in CC Docket No. 95-185 that many incumbent LECs are charging paging carriers and other CMRS providers discriminatory fees for activating CO codes, as well as unreasonable and discriminatory recurring monthly charges for blocks of numbers.[697]

c. Discussion

328. Until such functions are transferred to the new NANP administrator, we authorize Bellcore and the incumbent LECs to continue performing the number administration functions they performed prior to the enactment of the 1996 Act. Again, because of the need to avoid disruption in numbering administration, we find that there is good cause to make these authorizations effective immediately pursuant to 5 U.S.C. § 553(d)(3). We also conclude that any incumbent LEC charging competing carriers fees for assignment of CO codes may do so only if it charges the same fee to all carriers, including itself and its affiliates.

329. Numbering administration is a complex task that Bellcore, the incumbent LECs, and, to some extent, the states have been performing for over a decade. It is crucial that efficient and effective administration of numbers continues as the local market opens to competition. This delegation is the most practicable way that numbering administration can continue without disruption. During the transition period, those parties with experience should continue to perform the administrative functions that they have become uniquely equipped to handle. Thus, we authorize Bellcore to continue to perform its functions as the North American Numbering Plan Administrator in the same manner it did at the time of

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[695] Sprint comments at 14.

[696] Cox comments at 7-9.

[697] With regard to the specific issue of paging carriers being charged recurring monthly fees for blocks of numbers, it is necessary to incorporate the record from CC Docket No. 95-185, *In the Matter of Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*. *See, e.g.*, AirTouch Communications comments, CC Docket No. 95-185, at 22 n.22; Arch Communications Group comments, CC Docket No. 95-185, at 7-8, 15, 23-24; PageNet comments, CC Docket No. 95-185, at 22 and App. C.

enactment of the 1996 Act. We also allow the incumbent LECs to continue to perform the CO code administration functions that they performed at the time of enactment of the 1996 Act. Finally, we allow the states, if they performed any number administration functions prior to enactment of the 1996 Act, to continue to do so until such functions are transferred to the new NANP administrator.

330. Some commenters argue that we should not authorize Bellcore and the incumbent LECs to perform numbering administration functions on a transitional basis because continued administration of numbers by these entities, which are not neutral administrators, will permit discriminatory treatment of the incumbents' competitors with respect to access to number resources. While we recognize these concerns, we see no alternative to the action we take here. Transfer of numbering administration functions will be a complex task, one that cannot be accomplished immediately even on transitional basis. The Commission, for example, does not have the resources to administer numbers on a day-to-day basis.

331. In this regard, we note that a proposal has been made to the California Commission to transfer CO code administration to the California Commission or a third party or, in the alternative, to have the California Commission serve as the interim CO code administrator until the NANC completes its work or until the California Commission selects a permanent administrator.[698] We conclude that the record does not support allowing states to change the way CO code administration is performed during the transition to the new NANP administrator. Uniform CO code administration is critical to efficient operation of the public switched network for proper delivery of telecommunications services. The transfer of CO code administration to the states pending the transition to the new NANP administrator would not foster that consistency because states wishing to assume such responsibilities would lack the necessary experience to perform them with speed and accuracy. The California Commission does not refute this persuasively. We therefore urge parties wishing to alter the administration of certain numbers or to change the assignment of responsibilities for administering numbers pending transfer of these functions to the new NANP administrator to raise these issues with the Commission on a case-by-case basis in separate proceedings. In their filings, these parties should state who would bear the cost of a temporary delegation and how such a delegation could be implemented without confusion to carriers and customers.

332. Some commenters have expressed concern that numbering administration will be performed in a discriminatory and anticompetitive manner as long as interested parties exercise these functions. For this reason, some commenters urge the Commission to adopt guidelines for CO code administration with which the incumbent LECs must comply prior to transfer of CO code administration to a new NANP administrator. Specifically, they ask the Commission to prohibit incumbent LECs from levying disparate "code opening" fees on different carriers. We conclude that charging different "code opening" fees for different providers or categories of providers of telephone exchange service constitutes discriminatory

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[698] California Commission comments at 7-8.

access to telephone numbers and therefore violates section 251(b)(3)'s requirement of nondiscrimination. Charging different "code opening" fees for different providers or categories of providers of any telecommunications service (not just telephone exchange service) also violates section 202(a)'s prohibition of unreasonable discrimination and also constitutes an "unjust practice" and "unjust charge" under section 201(b).[699] Further. it is inconsistent with the principle stated in section 251(e)(1), which states that numbers are to be available on an equitable basis. Incumbent LECs have control over CO codes, a crucial resource for any competitor attempting to enter the telecommunications market; incumbent LECs must therefore treat other carriers as the incumbent LECs would treat themselves. To ensure that numbering administration does not become a barrier to competition in the telecommunications marketplace prior to the transfer of NANP administration functions to a neutral number administrator, we conclude that any incumbent LEC charging competing carriers fees for assignment of CO codes may only do so if the incumbent LEC charges one uniform fee for all carriers, including itself or its affiliates.

333. We are explicitly extending this protection, pursuant to section 202, from discriminatory "code opening" fees to telecommunications carriers, such as paging carriers, that are not providers of telephone exchange service or telephone toll service, and therefore are not covered by Section 251(b)(3).[700] Paging carriers are increasingly competing with other CMRS providers, and they would be at an unfair competitive disadvantage if they alone could be charged discriminatory code activation fees. For the reasons stated above, we explicitly forbid incumbent LECs from assessing unjust, discriminatory, or unreasonable charges for activating CO codes on any carrier or group of carriers. To the extent that recurring per-number charges represent charges for interconnection, they are governed by the principles set out in the *First Report and Order* in this proceeding. Moreover, the Commission has already stated that telephone companies may not impose recurring charges solely for the use of numbers.[701]

334. We emphasize that incumbent LEC attempts to delay or deny CO code assignments for competing providers of telephone exchange service would violate section 251(b)(3), where applicable, section 202(a), and the Commission's numbering administration guidelines found, *inter alia*, in the *Ameritech Order*, the *NANP Order*, and this *Order*. The Commission expects the incumbent LECs to comply strictly with those guidelines and act in an evenhanded manner as long as they retain their number administration functions. Specifically, incumbent LECs should apply identical standards and procedures for processing all numbering requests, regardless of the identity of the party making the request.

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[699] 47 U.S.C. § 251(b)(3); 47 U.S.C. § 202(a).

[700] Paging is not "telephone exchange service" within the meaning of the Act because it is neither "intercommunicating service of the character ordinarily furnished by a single exchange" nor "comparable" to such service. See 47 U.S.C. § 153(47).

[701] *See The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services*, Memorandum Opinion and Order, 59 R.R.2d 1275, 1284 (1986).

335. Indeed, our delegation of matters related to numbering administration during the transition to a new NANP administrator is generally governed by the Commission's existing objectives and guidelines related to number administration as well as those enumerated in this proceeding. We will monitor closely the actions of Bellcore and the LECs with respect to numbering administration to ensure that they perform their tasks impartially and expeditiously until such tasks are transferred.

C. Cost Recovery for Numbering Administration

1. Background

336. In section 251(e)(2), Congress mandates that "[t]he cost of establishing telecommunications numbering administration arrangements and number portability shall be borne by all telecommunications carriers on a competitively neutral basis as determined by the Commission."[702] In the *NANP Order*, the Commission: (1) directed that the costs of the new impartial numbering administrator be recovered through contributions by all communications providers; (2) concluded that the gross revenues of each communications provider will be used to compute each provider's contribution to the new numbering administrator; and (3) concluded that the NANC will address the details concerning recovery of the NANP administration costs.[703] In the *NPRM*, we found that we did not need to take further action because the Commission had already determined that cost recovery for numbering administration arrangements must be borne by all telecommunications carriers on a competitively neutral basis.[704]

2. Comments

337. Several parties believe that the Commission should take further action with regard to cost recovery for numbering administration.[705] BellSouth states that, states should have the power to authorize cost recovery in conjunction with oversight of central office code implementation activities, until transfer of numbering administration to the NANP.[706]

338. Telecommunications Resellers Association urges us to reconsider the assessment that the costs associated with the administration of telecommunications numbering should be borne by telecommunications carriers on a competitively neutral basis. It asserts that reliance

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[702] 47 U.S.C. § 251(e)(2).

[703] *NANP Order*, 11 FCC Rcd at 2627-2629.

[704] *NPRM* at para. 259.

[705] *See, e.g.*, BellSouth comments 20; Telecommunications Resellers Association comments at 10; NCTA comments at 11.

[706] BellSouth comments at 20.

upon gross revenues would result in a double or greater recovery from resale carriers and their customers.[707]

339. Similarly, NCTA urges us to require that companies providing telecommunications services in addition to other services fund NANP administration based on a percentage of their gross telecommunications revenues, and not their revenues from other services. Otherwise, NCTA argues, diversified companies that have relatively little need for NXXs but large gross revenues from other sources may have to fund a disproportionately large share of NANP administration expenses. Also, NCTA notes that the 1996 Act requires "telecommunications carriers" to contribute to cost recovery for number administration, but that the *NANP Order* requires recovery from all "communications providers." NCTA requests clarification that only "telecommunications carriers" as defined by the 1996 Act must contribute to cost recovery for number administration.[708]

340. Other commenters do not believe that it is necessary for the Commission to take additional action with regard to cost recovery for numbering administration.[709] These parties generally agree that the cost recovery approach taken in the *NANP Order* satisfies the 1996 Act's requirements with respect to ensuring nondiscriminatory access to telephone numbers. Several reiterate that the costs of number administration must be borne by all carriers on a competitively neutral basis. GTE states that the *NANP Order* conclusions satisfy the cost recovery requirement of the 1996 Act, if we ensure that those conclusions are implemented in a manner that does not unduly favor or disadvantage any particular industry segment or technology.[710]

341. In its reply comments, PacTel rejects MCI's suggestion that costs of implementing number portability should be reduced or eliminated. In PacTel's view, interim number portability is an essential element of achieving equitable number administration and all parties that benefit from this process should contribute to full cost recovery.[711]

3. Discussion

342. Because of ambiguity between the language of the 1996 Act and language in the *NANP Order*, we are persuaded that further action is necessary to meet the 1996 Act's

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[707] Telecommunications Resellers Association comments at 10.

[708] NCTA comments at 11.

[709] *See, e.g.*, ACSI comments at 13; ALTS comments at 8; CTIA comments at 8; Frontier comments at 5 n.14; GCI comments at 6; GTE comments at 31; Ohio Consumers' Council comments at 5; PacTel comments at 26.

[710] GTE comments at 31. *See also* PacTel comments at 26.

[711] PacTel reply at 33.

requirement that cost recovery for number administration be borne by all telecommunications carriers on a competitively neutral basis, and to conform the cost recovery requirements specified in the *NANP Order* to the 1996 Act. First, we require that: (1) only "telecommunications carriers," as defined in Section 3(44), be ordered to contribute to the costs of establishing numbering administration; and (2) such contributions shall be based only on each contributor's gross revenues from its provision of telecommunications services.[712] We note that we have considered the economic impact of our rules in this section on small incumbent LECs and other small entities. We conclude that by basing contributions only on each contributor's gross revenues from its provision of telecommunications services (instead of, for example, imposing a flat fee contribution on all telecommunications carriers), we more equitably apportion the burden of cost recovery for numbering administration.

343. Section 251(e)(2) requires that the costs of telecommunications numbering administration be borne by all telecommunications carriers on a competitively neutral basis. Contributions based on gross revenues would not be competitively neutral for those carriers that purchase telecommunications facilities and services from other telecommunications carriers because the carriers from whom they purchase services or facilities will have included in their gross revenues, and thus in their contributions to number administration, those revenues earned from services and facilities sold to other carriers. Therefore, to avoid such an outcome, we require all telecommunications carriers to subtract from their gross telecommunications services revenues expenditures for all telecommunications services and facilities that have been paid to other telecommunications carriers.[713] It should be noted that this requirement is solely for the purpose of determining a carrier's contribution to numbering administration costs and not for any other purpose, interpretation, or meaning of any other Commission rule such as those contained in Parts 32, 36, 51, 64, 65, or 69 of the Commission's rules.

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[712] 47 U.S.C. § 251(e)(2) also requires that the cost of establishing telecommunications number portability shall be borne by all telecommunications carriers on a competitively neutral basis. We note that cost recovery for number portability was addressed in the *Number Portability Order*.

[713] See *Assessment and Collection of Regulatory Fees for Fiscal Year 1995*, Report and Order, 10 FCC Rcd 13512, at 13558-59 (1995) (*Regulatory Fees Order*) In the *Regulatory Fees Order*, we stated that, in order to avoid imposing a double payment burden on resellers, we would permit interexchange carriers to subtract from their reported gross interstate revenues any payments made to underlying carriers for telecommunications facilities or services. *Id.* Our action here is consistent with that taken in the *Regulatory Fees Order*. We note that the gross telecommunications services revenues referenced in this discussion are not limited to gross interstate revenues.

D. Section 271 Competitive Checklist Requirement that the BOCs Provide Non-Discriminatory Access to Numbers for Entry into In-region InterLATA Services

1. Background and Comments

344. Section 271(c)(2)(B) contains a competitive checklist of requirements governing the access to functions, facilities and services or interconnection that BOCs must provide or generally offer to other competing telecommunications carriers if the BOC wants authority to provide in-region interLATA service. Pursuant to the competitive checklist, BOCs desiring to provide in-region interLATA telecommunications services must afford, "[u]ntil the date by which telecommunications numbering administration guidelines, plans or rules are established, non-discriminatory access to telephone numbers for assignment to the other carrier's telephone exchange service customers . . . [and] [a]fter that date, [must] compl[y] with such guidelines, plan or rules."[714] In the *NPRM*, we stated that these measures foster competition by ensuring telecommunications numbering resources are administered in a fair, efficient, and orderly manner.[715] Ameritech asks us to clarify that, by complying with the *NANP Order*, a BOC satisfies the competitive checklist requirement of nondiscriminatory access to numbers.[716] MCI argues that we must ensure that the BOCs comply with section 271(c)(2)(B) and assign NXX codes in a competitively neutral manner.[717]

2. Discussion

345. We decline to address section 271(c)(2)(B) issues in this *Order*. We will consider each BOC's application to enter in-region interLATA services pursuant to section 271(c)(2)(B) on a case by case basis, and will look specifically at the circumstances and business practices governing CO code administration in each applicant's state to determine whether the BOC has complied with section 271(c)(2)(B)(ix).

VI. FINAL REGULATORY FLEXIBILITY ANALYSIS

346. As required by Section 603 of the Regulatory Flexibility Act (RFA), 5 U.S.C. § 603, an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the Notice of Proposed Rulemaking (*NPRM*) in this proceeding. The Commission sought written public

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[714] 47 U.S.C. § 271(c)(2)(B)(ix).

[715] *NPRM* at para. 251.

[716] Ameritech comments at 23. *See also* NYNEX comments at 18.

[717] MCI comments at 10. We also note that in its petition for declaratory ruling filed July 12, 1996, TCG has asked the Commission to require, as part of a BOC's application to provide in-region interLATA services pursuant to section 271, a demonstration that numbering resources are available to competing local carriers. *See supra* n.616.

comments on the proposals in the *NPRM*, including the IRFA. The Commission's Final Regulatory Flexibility Analysis (FRFA) in this *Order* conforms to the RFA, as amended by the Contract With America Advancement Act of 1996, (CWAAA), Pub. L. No. 104-121, 110 Stat. 847 (1996).[718]

A. Need for and Purpose of this Action

347. The Commission, in compliance with section 251(d)(1), promulgates the rules in this *Order* to ensure the prompt implementation of section 251, which is the local competition provision. Congress sought to establish through the 1996 Act "a pro-competitive, de-regulatory national policy framework" for the United States telecommunications industry.[719] Three principal goals of the telecommunications provisions of the 1996 Act are: (1) opening the local exchange and exchange access markets to competition; (2) promoting increased competition in telecommunications markets that already are open to competition, including, particularly, the long distance services market; and (3) reforming our system of universal service so that universal service is preserved and advanced as the local exchange and exchange access markets move from monopoly to competition.

348. The rules adopted in this *Order* implement the first of these goals -- opening the local exchange and exchange access markets to competition by eliminating certain operational barriers to competition. The objective of the rules adopted in this *Order* is to implement as quickly and effectively as possible the national telecommunications policies embodied in the 1996 Act and to promote the pro-competitive, deregulatory markets envisioned by Congress.[720] We are mindful of the balance that Congress struck between this goal and its concern for the impact of the 1996 Act on small local exchange carriers, particularly rural carriers. This balance is evidenced in section 251(f).

B. Summary of Issues Raised by Public Comments Made in Response to the IRFA

349. Summary of Initial Regulatory Flexibility Analysis (IRFA). In the *NPRM*, the Commission performed an IRFA.[721] In the IRFA, the Commission found that the rules it proposed to adopt in this proceeding may have a significant impact on a substantial number of small businesses as defined by section 601(3) of the RFA. The Commission stated that its regulatory flexibility analysis was inapplicable to incumbent LECs because such entities are

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[718] Subtitle II of the CWAAA is "The Small Business Regulatory Enforcement Fairness Act of 1996" (SBREFA), codified at 5 U.S.C. § 601 *et. seq.*

[719] S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 1 (1996).

[720] *Id.*

[721] *NPRM* at paras. 274-287.

dominant in their field of operation. The Commission noted, however, that it would take appropriate steps to ensure that special circumstances of smaller incumbent LECs are carefully considered in our rulemaking. Finally, the IRFA solicited comment on alternatives to our proposed rules that would minimize the impact on small entities consistent with the objectives of this proceeding.

1. Treatment of Small LECs

350. Comments. The Small Business Administration (SBA), Rural Tel. Coalition, and CompTel maintain that the Commission violated the RFA when it sought to exclude incumbent LECs from regulatory flexibility consideration without first consulting the SBA to establish a definition of "small business."[722] Rural Tel. Coalition and CompTel also argue that the Commission failed to explain its statement that "incumbent LECs are dominant in their field" or how that finding was reached.[723] Rural Tel. Coalition states that the lack of such analysis is inappropriate because incumbent LECs are now facing competition from a variety of sources, including wireline and wireless carriers. Rural Tel. Coalition recommends that the Commission abandon its determination that incumbent LECs are dominant, and perform the regulatory flexibility analysis for incumbent LECs having fewer than 1500 employees.[724]

351. Discussion. In essence, the SBA and the Rural Tel. Coalition argue that we exceeded our authority under the RFA by certifying all incumbent LECs as dominant in their field of operations, and therefore concluding on that basis that they are not small businesses under the RFA. They contend that the authority to make a size determination rests solely with the SBA, and that by excluding a group from the scope of regulatory flexibility analysis the Commission makes an unauthorized size determination.[725] Neither the SBA nor the Rural Tel. Coalition cite any specific authority for this latter proposition.

2. Other Issues

352. We have found incumbent LECs to be "dominant in their field of operations" since the early 1980's and consequently have consistently since that time certified under the RFA[726] that incumbent LECs are not subject to regulatory flexibility analyses because they are

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[722] SBA RFA comments at 3-5; Rural Tel. Coalition reply at 38-39; CompTel reply at 46.

[723] Rural Tel. Coalition reply at 39.

[724] Rural Tel. Coalition reply at 40.

[725] SBA RFA comments at 4-5 (citing 15 U.S.C. § 632(a)(2)); Rural Tel. Coalition reply at 38.

[726] *See* 5 U.S.C. § 605(b).

not small businesses.[727] We have made similar determinations in other areas.[728] We recognize the SBA's special role and expertise with regard to the RFA, and intend to continue to consult with the SBA to ensure that the Commission is fully implementing the RFA. Although we are not fully persuaded on the basis of this record that our prior practice has been incorrect, in light of the special concerns raised by the SBA, the Rural Tel. Coalition, and CompTel in this proceeding, we will, nevertheless, include small incumbent LECs in this FRFA to remove any possible issue of RFA compliance. We, therefore, need not address directly the Rural Tel. Coalition's arguments that incumbent LECs are not dominant.[729]

353. Comments. Parties raised several other issues in response to the Commission's IRFA in the *NPRM*. The SBA and CompTel contend that commenters should not be required to separate their comments on the IRFA from their comments on the other issues raised in the *NPRM*.[730] SBA maintains that separating RFA comments and discussion from the rest of the comments "isolates" the regulatory flexibility analysis from the remainder of the discussion, thereby handicapping the Commission's analysis of the impact of the proposed rules on small businesses.[731] The SBA further suggests that our IRFA failed to: (1) give an adequate description of the projected reporting, recordkeeping, and other compliance requirements of the proposed rules, including an estimate of the classes of small entities which will be subject to the requirement and the professional skills necessary to prepare such reports or records;[732] and (2) describe significant alternatives that minimize the significant economic impact of the proposal on small entities, including exemption from coverage of the rule.[733] SBA also asserts that none of the alternatives in the *NPRM* are designed to minimize the impact of the proposed rules on small businesses.

354. The Idaho Public Utilities Commission argues that the Commission's rules will be devised for large carriers and therefore will be "*de facto*" burdensome to Idaho's incumbent LECs and probably to potential new entrants, which may be small companies.[734]

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[727] *See, e.g., Expanded Interconnection with Local Telephone Company Facilities*, 6 FCC Rcd 5809 (1991); *MTS and WATS Market Structure*, 2 FCC Rcd 2953, 2959 (1987) (citing *MTS and WATS Market Structure*, 98 F.C.C.2d 241, 338-39 (1983)).

[728] *See, e.g., Implementation of Sections of the Cable Television Consumer Protection Act of 1992: Rate Regulation*, 10 FCC Rcd 7393, 7418 (1995).

[729] Rural Tel. Coalition reply at 39-40.

[730] SBA RFA comments at 2-3; CompTel reply at 46.

[731] *Id.*

[732] SBA RFA comments at 5-6, *citing* 5 U.S.C. § 603(b)(4).

[733] SBA RFA comments at 7-8, *citing* 5 U.S.C. § 603(c).

[734] Idaho Commission comments at 15.

Therefore, Idaho requests that state commissions retain flexibility to address the impact of our rules on smaller incumbent LECs.

355. The Small Cable Business Association (SCBA) contends that the Commission's IRFA is inadequate because it does not state that small cable companies are among the small entities affected by the proposed rules.[735] In its comments on the IRFA, SCBA refers to its proposal that the Commission establish the following national standards for small cable companies: (1) the definition of "good faith" negotiation; (2) the development of less burdensome arbitration procedures for interconnection and resale; and (3) the designation of a small company contact person at incumbent LECs and state commissions. The SCBA also asserts that the Commission must adopt national standards to guide state commissions in their implementation of section 251(f),[736] the rural telephone company exemption. The *First Report and Order* and its FRFA discusses issues raised by the SCBA regarding its proposal that the Commission establish national standards for certain provisions of the rules that affect small cable companies. Accordingly, we do not repeat those analyses in this FRFA.

356. Discussion. We disagree with the SBA's assessment of our IRFA. Although the IRFA referred only generally to the reporting and recordkeeping requirements imposed on incumbent LECs, our *Federal Register* notice set forth in detail the general reporting and recordkeeping requirements as part of our Paperwork Reduction Act statement.[737] The IRFA also sought comments on the many alternatives discussed in the body of the *NPRM*, including the statutory exemption for certain rural telephone companies.[738] The numerous general public comments concerning the impact of our proposal on small entities in response to our notice, including comments filed directly in response to the IRFA,[739] have enabled us to prepare this FRFA. Thus, we conclude that the IRFA was sufficiently detailed to enable parties to comment meaningfully on the proposed rules and, thus, for us to prepare this FRFA. We have been working with, and will continue to work with the SBA, to ensure that both our IRFAs and FRFAs fully meet the requirements of the RFA.

357. The SBA also objects to the *NPRM's* requirement that responses to the IRFA be filed under a separate and distinct heading, and proposes that we integrate RFA comments into the body of general comments on a rule.[740] Almost since the adoption of the RFA, we

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[735] SCBA RFA comments at 1.

[736] *Id.* at 1-2.

[737] *NPRM, summarized at* 61 Fed. Reg. 18311, 18312 (Apr. 25, 1996).

[738] 47 U.S.C. § 251(f).

[739] *See* SBA RFA comments; Rural Tel. Coalition reply at 38-41; Idaho Public Utilities Commission comments at 15; SCBA RFA comments; CompTel reply at 45-46.

[740] SBA RFA comments at 2.

have requested that IRFA comments be submitted under a separate and distinct heading.[741] Neither the RFA nor the SBA's rules prescribe the manner in which comments may be submitted in response to an IRFA[742] and, in such circumstances, it is well established that an administrative agency can structure its proceedings in any manner that it concludes will enable it to fulfill its statutory duties.[743] Based on our past practice, we find that separation of comments responsive to the IRFA facilitates our preparation of a compulsory summary of such comments and our responses to them, as required by the RFA. Comments on the impact of our proposed rules on small entities have been integrated into our analysis and consideration of the final rules. We therefore reject SBA's argument that we improperly required commenters to include their comments on the IRFA in a separate section.

358. We also reject SBA's assertion that none of the alternatives in the *NPRM* were designed to minimize the impact of the proposed rules on small businesses and the Idaho Public Utilities Commission's assertion that our rules will be burdensome on new entrants. For example, we proposed that incumbent LECs be required to disclose all information relating to network design and technical standards and information concerning changes to the network that affect interconnection facilities.[744] This proposal allows a potential competitor, that may be a small entity, to collect the information necessary to achieve and maintain efficient interconnection. Thus, the competitor can enter the market by relying, in part or entirely, on the incumbent LEC's facilities. Reduced operational entry barriers are designed to provide reasonable opportunities for new entrants, particularly small entities, to enter the market by minimizing the initial investment needed to begin providing service.

359. In addition, we disagree with the Idaho Public Utilities Commission's contention that the rules devised by the Commission will be burdensome to the majority of Idaho's incumbent LECs. We believe section 251(f) and the rules we have crafted provide states with significant flexibility to "deal with the needs of individual companies in light of public interest concerns," as requested by the Idaho Commission. We note that, pursuant to section 251(f), smaller LECs may petition their state commissioners for suspension or modification of the implementation schedule for toll dialing parity established under section 251(b)(3). Although we have required incumbent LECs to continue performing their current functions related to the administration of numbers, this requirement will expire when numbering administration is transferred to the new North American Number Plan (NANP) Administrator, pursuant to Section 251(e). As incumbent LECs are currently performing these functions and

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[741] *See, e.g., Inquiry into the Development of Regulatory Policy in Regard to Direct Broadcast Satellites*, 86 F.C.C.2d 719, 755 (1981).

[742] *See* 5 U.S.C. § 603 (IRFA requirements).

[743] *See Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 524-25 (1978) (*citing FCC v. Schreiber*, 381 U.S. 279, 290 (1965) and *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940)).

[744] *NPRM* paras. 189-190.

we have received no comments from incumbent LECs objecting to this requirement, we do not consider it burdensome for them to continue to perform these tasks during the transition period.

360. In addition, we disagree with SCBA's assertion that the IRFA was deficient because it did not identify small cable operators as entities that would be affected by the proposed rules. The IRFA in the *NPRM* states: "Insofar as the proposals in this Notice apply to telecommunications carriers other than incumbent LECs (generally interexchange carriers and new LEC entrants), they may have a significant impact on a substantial number of small entities."[745] The phrase "new LEC entrants" clearly encompasses small cable operators that become providers of local exchange service. The *NPRM* even identifies cable operators as potential new entrants.[746] Thus, the record shows that we have identified small cable operators as entities that would be affected by the proposed rules.

C. Description and Estimate of the Small Entities Affected by the Rules

361. The RFA defines "small entity" to include the definition of "small business concern" under the Small Business Act, 15 U.S.C. § 632.[747] Under the Small Business Act, a "small business concern" is one that: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) meets any additional criteria established by the Small Business Administration.[748] The SBA has defined companies listed under Standard Industrial Classification (SIC) categories 4812 (Radiotelephone Communications)[749] and 4813 (Telephone Communications, Except Radiotelephone) to be small entities when they have fewer than 1,500 employees.[750] The SBA has defined companies listed under the SIC category 7379 (Business Services, not otherwise classified) to be small entities when they have annual receipts of less than five million dollars.[751] These standards also apply in determining whether an entity is a small business for purposes of the RFA.

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[745] *NPRM* para. 277.

[746] *NPRM* para. 6.

[747] *See* 5 U.S.C. § 601(6) (incorporating by reference the definition of "small business concern" in 5 U.S.C. § 632).

[748] *See* 15 U.S.C. § 632(1)(a).

[749] 13 C.F.R. § 121.201, Standard Industrial Classification (SIC) Code 4812.

[750] 13 C.F.R. § 121.201, Standard Industrial Classification (SIC) Code 4813.

[751] 13 C.F.R. § 121.201, Standard Industrial Classification (SIC) Code 7379.

362. The rules we adopt today regarding dialing parity and nondiscriminatory access apply to all LECs. The rules regarding public disclosure of changes to local networks apply to all incumbent LECs. Finally, the rules regarding numbering administration impose financial obligations on all telecommunications carriers. These rules also affect IXCs, providers of cellular, broadband PCS, and geographic area 800 MHz and 900 MHz specialized mobile radio services, including licensees who have obtained extended implementation authorizations in the 800 MHz or 900 MHz SMR services, either by waiver or under section 90.629 of the Commission's rules,[752] which may be small business concerns. However, these rules will apply to SMR licensees only if they offer real-time, two-way voice service that is interconnected with the public switched network. Additional business entities affected by this rulemaking include providers of telephone toll service, providers of telephone exchange service, independent operator service providers, independent directory assistance providers, independent directory listing providers, independent directory database managers, and resellers of these services. These entities could be small business concerns.

363. Consistent with our prior practice, we shall continue to exclude small incumbent LECs from the definition of a small entity for the purpose of this FRFA. Nevertheless, as mentioned above, we include small incumbent LECs in our FRFA. Accordingly, our use of the terms "small entities" and "small businesses" does not encompass "small incumbent LECs." We use the term "small incumbent LECs" to refer to any incumbent LECs that arguably might be defined by SBA as "small business concerns."[753]

364. Local Exchange Carriers. Neither the Commission nor SBA has developed a definition of small providers of local exchange services. The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies, SIC category 4813. For the purposes of revenue reporting, 1,347 companies reported doing business as LECs at the end of 1994.[754] Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with any more particularity the number of LECs that would qualify as small business concerns. Consequently, we estimate that there are fewer than 1,347 small incumbent LECs that may be affected by the decisions and rules adopted in this *Order*.

365. Interexchange Carriers. Neither the Commission nor SBA has developed a definition of small entities that would apply specifically to providers of interexchange services (IXCs). The closest applicable definition under SBA rules is for telephone communications

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[752] 47 C.F.R. § 90.629.

[753] *See* 13 C.F.R. § 121.210 (SIC 4813).

[754] Federal Communications Commission, CCB, Industry Analysis Division, *Telecommunications Industry Revenue: TRS Fund Worksheet Data*, Tbl. 21 (Average Total Telecommunications Revenue Reported by Class of Carrier) (Feb. 1996).

companies other than radiotelephone (wireless) companies, SIC category 4813. The most reliable source of information regarding the number of IXCs nationwide of which we are aware appears to be the data that we collect annually in connection with Telecommunications Relay Service (TRS). According to our most recent data, 97 companies reported that they were engaged in the provision of interexchange services.[755] Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of IXCs that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 97 small entity IXCs that may be affected by the decisions and rules adopted in this *Order*.

366. Cellular Service Providers. Neither the Commission nor SBA has developed a definition of small entities specifically applicable to providers of cellular services. The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of cellular service carriers nationwide of which we are aware appears to be the data that we collect annually in connection with TRS. According to our most recent data 789 companies reported that they were engaged in the provision of cellular services.[756] Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of cellular service carriers that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 789 small entity cellular service carriers that may be affected by the decision and rules adopted in this *Order*.

367. Broadband PCS Licensees. The broadband PCS spectrum is divided into six frequency blocks designated A through F. Pursuant to 47 C.F.R. § 24.720(b), the Commission has defined "small entity" in the auctions for Blocks C and F as a firm that had average gross revenues of less than $40 million in the three previous calendar years. This regulation defining "small entity" in the context of broadband PCS auctions has been approved by the SBA.[757] The Commission has auctioned broadband PCS licenses in Blocks A, B, and C. We do not have sufficient data to determine how many small businesses bid successfully for licenses in Blocks A and B. There were 90 winning bidders that qualified as small entities in the Block C auction. Based on this information, we conclude that the number of broadband PCS licensees affected by the decisions in this *Order* includes, at a minimum, the 90 winning bidders that qualified as small entities in the Block C broadband PCS auction.

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[755] *Id.*

[756] 13 C.F.R. § 121.201, Standard Industrial Classification (SIC) Code 4812.

[757] *See Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, PP Docket No. 93-253, Fifth Report and Order, 9 FCC Rcd 5532, 5581-84 (1994).

368. At present, no licenses have been awarded for Blocks D, E, and F of broadband PCS spectrum. Therefore, there are no small businesses currently providing these services. A total of 1,479 licenses will be awarded, however, in the D, E, and F Block broadband PCS auctions, which are scheduled to begin on August 26, 1996. Eligibility for the 493 F Block licenses is limited to entrepreneurs with average gross revenues of less than $125 million. We cannot estimate the number of these licenses that will be won by small entities, nor how many small entities will win D or E Block licenses. Given the facts that nearly all radiotelephone companies have fewer than 1,000 employees[758] and that no reliable estimate of the number of prospective D, E, and F Block licensees can be made, we assume, for purposes of our evaluations and conclusions in this FRFA, that all of the licenses will be awarded to small entities, as that term is defined by the SBA. Broadband PCS licensees are affected by the decisions and rules adopted in this *Order* to the extent that they provide telephone exchange service.

369. SMR Licensees. Pursuant to 47 C.F.R. § 90.814(b)(1), the Commission has defined "small entity" in auctions for geographic area 800 MHz and 900 MHz SMR licenses as a firm that had average gross revenues of less than $15 million in the three previous calendar years. This definition of a "small entity" in the context of 800 MHz and 900 MHz SMR has been approved by the SBA.[759]

370. The rule adopted in this *Order* applies to SMR providers in the 800 MHz and 900 MHz bands that either hold geographic area licenses or have obtained extended implementation authorizations. We do not know how many firms provide 800 MHz or 900 MHz geographic area SMR service pursuant to extended implementation authorizations, nor how many of these providers have annual revenues of less than $15 million. Since the RFA amendments were not in effect until the record in this proceeding was closed, the Commission was unable to request information regarding the number of small businesses in this category. We do know that one of these firms has over $15 million in revenues. We assume, for purposes of our evaluations and conclusions in this FRFA, that all of the remaining extended implementation authorizations may be held by small entities, which may be affected by the decisions and rules adopted in this *Order*.

371. The Commission recently held auctions for geographic area licenses in the 900 MHz SMR band. There were 60 winning bidders who qualified as small entities in the 900 MHz auction. Based on this information, we conclude that the number of geographic area

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[758] *See* United States Department of Commerce, Bureau of the Census, *Standard Industrial Classification Manual* (1992) (*1992 Census*) SIC Code 4812.

[759] *See Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and the 935-940 MHz Bands Allotted to the Specialized Mobile Radio Pool*, PR Docket No. 89-583, Second Order on Reconsideration and Seventh Report and Order, 11 FCC Rcd 2639, 2693-702 (1995); *Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band*, PR Docket No. 93-144, First Report and Order, Eighth Report and Order, and Second Further Notice of Proposed Rulemaking, 11 FCC Rcd 1463 (1995).

SMR licensees affected by the rule adopted in this *Order* includes these 60 small entities. No auctions have been held for 800 MHz geographic area SMR licenses. Therefore, no small entities currently hold these licenses. A total of 525 licenses will be awarded for the upper 200 channels in the 800 MHz geographic area SMR auction. The Commission, however, has not yet determined how many licenses will be awarded for the lower 230 channels in the 800 MHz geographic area SMR auction. There is no basis to estimate, moreover, how many small entities within the SBA definition will win these licenses. Because nearly all radiotelephone companies have fewer than 1,000 employees and no reliable estimate of the number of prospective 800 MHz licensees can be made, we assume, for purposes of our evaluations and conclusions in this FRFA, that all of the licenses will be awarded to small entities, as defined by the SBA. Those SMR licensees that provide telephone exchange service will be affected by the decisions in this *Order*.

372. Providers of Telephone Toll Service, Providers of Telephone Exchange Service. Neither the Commission nor the SBA has developed a definition of small entities applicable to providers of telephone toll service and telephone exchange service. According to the 1992 Census, there were approximately 3,497 firms engaged in providing telephone services, as defined therein, for at least a year.[760] This number contains a variety of different categories of carriers, including local exchange carriers, interexchange carriers, competitive access providers, cellular carriers, mobile service carriers, operator service providers, pay telephone operators, PCS providers, covered SMR providers, providers of telephone toll service, providers of telephone exchange service, and resellers. It seems certain that some of those 3,497 telephone service firms may not qualify as small businesses because they are not "independently owned and operated."[761] It seems reasonable to conclude, therefore, that fewer than 3,497 telephone service firms are providers of telephone toll service or providers of telephone exchange service and are small entities that may be affected by this *Order*.

373. Independent Operator Service Providers, Independent Directory Assistance Providers, Independent Directory Listing Providers, and Independent Directory Database Managers. We were unable to obtain reliable data regarding the number of entities that provide these telecommunications services or how many of these are small entities. The Commission has not developed a definition of small entities applicable to telecommunications service providers. Therefore, the closest applicable definition of a small entity providing telecommunications services is the definition under SBA rules applicable to business services companies, SIC 7389, which defines a small entity to be a business services company with annual receipts of less than five million dollars. U.S. Census data provides that 46,289 firms providing business services had annual receipts of 5 million dollars or less.[762] Because it

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[760] *See* United States Department of Commerce, Bureau of the Census, *1992 Census of Transportation, Communications, and Utilities; Establishment and Firm Size*, at Firm Size 1-123 (1995) *(1992 Census)*.

[761] 15 U.S.C. § 632(a)(1).

[762] *1992 Census*, Table 2D, SIC Code 7389.

seems unlikely that all of the business services firms would meet the other criteria, it seems reasonable to conclude that fewer than 46,289 firms may be small entities that might be affected by our *Order*.

374. Resellers. Neither the Commission nor SBA has developed a definition of small entities specifically applicable to resellers. The closest applicable SBA definition for a reseller is a telephone communications company, SIC category 4813. However, the most reliable source of information regarding the number of resellers nationwide of which we are aware appears to be the data that the Commission collects annually in connection with TRS. For the purposes of revenue reporting, 206 companies reported doing business as resellers at the end of 1994.[763] Although it seems certain that some of these companies are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of resellers that would qualify as small entities or small incumbent LEC concerns under SBA's definition. Consequently, we estimate that there are fewer than 206 small entity resellers that may be affected by the decisions and rules adopted in this *Order*.

375. Telephone Companies. U.S. Census data provides that, at the end of 1992, there were 3,497 firms engaged in providing telephone services, as defined therein, for at least a year.[764] This number contains a variety of different categories of carriers, including local exchange carriers, interexchange carriers, competitive access providers, cellular carriers, mobile service, carriers, operator service providers, pay telephone operators, PCS providers, covered SMR providers, providers of telephone toll service, providers of telephone exchange service, and resellers. It seems certain that some of those 3,497 telephone service firms may not qualify as small businesses because they are not "independently owned and operated."[765] It seems reasonable to conclude, therefore, that fewer than 3,497 telephone service firms are telephone companies and small entities that may be affected by this *Order*.

376. Cable System Operators. SBA has developed a definition of small entities for cable and other pay television services, which includes all such companies generating less than $11 million in revenues annually. This definition includes cable systems operators, closed circuit television services, direct broadcast satellite services, multipoint distribution systems, satellite master antenna systems, and subscription television services. According to the Census Bureau, there were 1,323 such cable and other pay television services generating less

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[763] Federal Communications Commission, CCB, Industry Analysis Division, *Telecommunications Industry Revenue: TRS Fund Worksheet Data*, Tbl. 21 (Average Total Telecommunications Revenue Reported by Class of Carrier) (Feb. 1996).

[764] *See* United States Department of Commerce, Bureau of the Census, *1992 Census of Transportation, Communications, and Utilities; Establishment and Firm Size*, at Firm Size 1-123 (1995) *(1992 Census)*.

[765] 15 U.S.C. § 632(a)(1).

than $11 million in revenue that were in operation for at least one year at the end of 1992.[766] The Commission has developed its own definition of a small cable system operator for the purposes of rate regulation, which has been approved by SBA.[767] Under the Commission's rules, a "small cable company is one serving fewer than 400,000 subscribers nationwide." Based on our most recent information, we estimate that there were 1,439 cable operators that qualified as small cable system operators at the end of 1995. Since then, some of those companies may have grown to serve over 400,000 subscribers, and others may have been involved in transactions that caused them to be combined with the other cable operators. Consequently, we estimate that there are fewer than 1,439 small entity cable companies that may be affected by the decisions and rules adopted in this *Order*.

377. The Communications Act of 1934 also contains a definition of a small cable system operator, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000."[768] There were 63,196,310 basic cable subscribers at the end of 1995, and 1,450 cable system operators serving fewer than 1 percent (631,960) of subscribers.[769] Although it seems certain that some of these cable system operators are affiliated with entities whose gross annual revenues exceed $250,000,000, we are unable at this time to estimate with greater precision the number of cable systems operators that would qualify as small cable operators under the definition in the Communications Act of 1934.

D. Summary of Projected Reporting, Recordkeeping and Other Compliance Requirements and their Effect on Small Businesses And Steps Taken to Minimize the Significant Economic Impact on Small Entities and Alternatives Considered

378. Structure of the Analysis. In this section of the FRFA, we analyze the projected reporting, recordkeeping, and other compliance requirements that may apply to small entities as a result of this *Order*.[770] As a part of this discussion, we mention some of the types of skills that will be needed to meet the new requirements. We also describe the steps taken to minimize the economic impact of our decisions on small entities, including the significant

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[766] *1992 Census, supra*, at Firm Size 1-123.

[767] Small Bus. Admin., *13 C.F.R. Part 121 - Small Business Size Regulations*, Proposed Rules, 60 Fed. Reg. 57982, 57988 (Nov. 24, 1995).

[768] 47 U.S.C. § 543(m)(2).

[769] Paul Kagan Associates, Inc., *Cable TV Investor*, Feb. 29, 1996 (based on figures for Dec. 30, 1995).

[770] *See* 5 U.S.C. § 604(a)(4).

alternatives considered and rejected.[771] Due to the size of this *Order*, we set forth our analysis separately for individual sections of the *Order*, using the same headings as were used above in the corresponding sections of the *Order*.

379. To the extent that any statement contained in this FRFA is perceived as creating ambiguity with respect to our rules or statements made in preceding sections of this *Order*, the rules and statements set forth in those preceding sections shall be controlling.

380. Dialing Parity Requirements. The dialing parity provisions of section 251(b)(3) entitle customers to choose different carriers for their local exchange, intraLATA toll, and interLATA toll services without the burden of dialing access codes. Each LEC is required to provide dialing parity to providers of telephone exchange and telephone toll service with respect to all telecommunications services that require dialing to route a call. This obligation encompasses international, interstate, intrastate, local and toll services.

381. Summary of Projected Reporting, Recordkeeping and Other Compliance Requirements. In order to comply with the guidelines and minimum federal standards established in this *Order*, each LEC must implement toll dialing parity utilizing the "full 2-PIC" presubscription method and following the mandated timetable for implementation of toll dialing parity. Although no timetable was adopted for implementing local dialing parity it is expected that it will be achieved through LECs' compliance with other section 251 requirements. LECs may recover the incremental costs of implementing local and toll dialing parity such as the costs of dialing parity-specific switch software, hardware, signalling system upgrades and necessary consumer education. These costs will be recovered from all providers of telephone exchange service and telephone toll service in the area served by the LEC, including the LEC, through the use of a competitively-neutral allocator established by each state. Compliance with these requirements may entail the use of engineering, technical, operational, and accounting skills.

382. Steps Taken to Minimize the Significant Economic Impact on Small Entities and Small Incumbent LECs, and Alternatives Considered. This *Order* adopts broad guidelines and minimum federal standards for toll dialing parity so that LECs and competing providers of telephone toll service, many of whom will be small business entities, will not be subject to an array of differing state standards and timetables requiring them to research and tailor their operations to the unique requirements of each state.

383. First, we required all LECs to implement toll dialing parity based on LATA boundaries.[772] Non-BOC LECs, including many smaller LECs, that implement intraLATA and interLATA toll dialing parity may choose whichever LATA within their state that they deem to be most appropriate to define the area within which they will offer intraLATA toll

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[771] *See* 5 U.S.C. § 604(a)(5).

[772] *See supra* para. 37.

dialing parity. State commissions, in ruling upon such a choice of LATA association, shall determine whether the proposed LATA association is in the public interest. Because many smaller LECs have not been subject to LATA boundary distinctions, we also gave states the flexibility to take such factors into account and to require that toll dialing parity be based on state rather than LATA boundaries in their jurisdictions. Insofar as a state determines that presubscription should occur along state, rather than LATA, boundaries, we anticipate that such a determination will assist smaller LECs, in particular, by permitting those LECs to define their service markets based on a geographic distinction that is familiar to consumers.

384. In addition, we adopted the "full 2-PIC" nationwide presubscription method for implementing the toll dialing parity requirements.[773] In making this decision we considered a number of methodologies, including the "modified 2-PIC," "the multi-PIC" and the "smart-PIC" methods. We concluded that the "modified 2-PIC" would limit the number of competitive service providers that could participate in the market and that the "multi-PIC" method had not yet proven to be technically and economically feasible. As the "full 2-PIC" method is widely available and well defined, we noted that LECs, many of which are small entities, would not be forced to purchase and maintain an expensive, untested, and new technology. The *Order* provides that, until the Commission considers the use of the "multi-PIC" or "smart-PIC methods," states may impose such additional requirements only after evaluating the technical feasibility and economic impact of those requirements on smaller LECs in their jurisdictions.

385. We instituted a federal toll dialing parity implementation schedule rather than allowing states to implement their own schedules.[774] This federally-mandated plan will provide certainty for competitors, some of which may be small business entities, seeking to become telephone toll service providers. Both LECs and competing providers of telephone toll service will be able to develop business plans and advertising strategies based upon specific timelines. This ability to plan ahead is cost-efficient and levels the playing field for all seeking to participate in the marketplace.

386. We also concluded that a LEC may not accomplish toll dialing parity by automatically assigning toll customers to itself, to a customer's currently presubscribed interLATA or interstate toll carrier, or to any other carrier except when, in a state that already has implemented intrastate, intraLATA toll dialing parity, the subscriber has selected the same interLATA and intraLATA, or interstate and intrastate, presubscribed carrier.[775] This requirement prevents a carrier from automatically designating itself as a toll carrier without notifying the customer of the opportunity to choose an alternative carrier, one or more of which may be a small business.

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[773] *See supra* paras. 49-50.

[774] *See supra* para. 62.

[775] *See supra* para. 81.

387. Lastly, we implemented national rules for the recovery of dialing parity costs.[776] Although it was suggested that these costs be borne only by new entrants, and not incumbent LECs, we determined that the network upgrades necessary to achieve dialing parity should be recovered on a competitively-neutral basis. A competitively neutral cost recovery mechanism prevents incumbent LECs from imposing excessive fees upon competing entrants, some of which may be small businesses. The imposition of excessive fees could constitute an impediment to entry into the intraLATA toll market by small entities that lack extensive financial resources and could reinforce the marketplace dominance of established LECs. A competitively-neutral cost recovery mechanism also benefits small LECs that might otherwise have been unduly burdened by a cost allocation plan requiring an equal payment from each entity.

388. Nondiscriminatory Access Provisions. Under section 251(b)(3), all LECs are required to allow competing providers of telephone exchange service and telephone toll service access to telephone numbers, operator services, directory assistance, and directory listings that is at least equal in quality to the access the LEC itself receives, without unreasonable dialing delays. LECs are required to make available to competing providers operator services and directory assistance and all adjunct features necessary for the use of these services.

389. Summary of Projected Reporting, Recordkeeping, and Other Compliance Requirements. In order to comply with the nondiscriminatory access provisions all LECs must share subscriber listing information with their competitors in "readily accessible" tape or electronic formats. This information must be provided upon request and in a timely manner.[777] In addition, each LEC must process all calls from competing providers, including calls to the LEC's operator services and directory assistance, on an equal basis as calls originating from the providing LEC.[778] LECs that refuse to comply with reasonable, technically feasible requests from competing providers for "rebranding" of resold operator services or directory assistance are presumed to be unlawfully restricting access to these services.[779] Compliance with these requests may require the use of engineering, computer, accounting, and legal skills.

390. Steps Taken to Minimize Significant Economic Impact on Small Entities and Small Incumbent LECs, and Alternatives Considered. The entitlement to access, on a nondiscriminatory basis, to telephone numbers, operator services, directory assistance and directory listings will benefit providers competing with incumbent LECs. Many of these

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[776] *See supra* para. 92.

[777] *See supra* para. 141.

[778] *See supra* para. 159.

[779] *See supra* paras. 128, 148.

competitors will be small business entities. The requirement that LECs make their operator assistance and directory listing services available to competitors may allow those competitors to save the time and money it would take to build similar information resources. Additionally, these competing providers will benefit because they will be able to offer consumers at least the same quality of operator service and directory assistance that is provided by the established LEC. Small entities will be able to compete with established LECs more quickly and with less initial investment. Their services will have an opportunity to become equally valuable and equally marketable to consumers. We have declined to support alternatives that would have allowed LECs to degrade or limit access to these services, because such behavior would bar competitive entry into the telecommunications services market.

391. Network Disclosure. Pursuant to section 251(c)(5) incumbent LECs are required to provide "reasonable public notice" of changes in their network which would affect a competing service provider's performance or ability to provide service or otherwise affect carriers' interoperability. The types of changes that incumbent LECs must disclose include, but are not limited to, changes that affect transmission, signalling standards, call routing, network configuration, electronic interfaces or data elements.

392. Summary of Projected Reporting, Recordkeeping, and Other Compliance Requirements. To implement this disclosure requirement, this *Order* imposes a new filing requirement on incumbent LECs that plan to make changes to their networks. An incumbent LEC has a choice of filing certain information with the Commission or of filing a short certification with the Commission that the equivalent information has been disclosed elsewhere. In either case, the incumbent LEC is also responsible for maintaining the accuracy of the information. Compliance with this requirement may require the use of engineering, technical, computer, and legal skills.

393. Steps Taken to Minimize Significant Economic Impact on Small Entities and Small Incumbent LECs, and Alternatives Considered. This recordkeeping submission requirement should, in fact, ease the burden on smaller entities in their endeavor to remain abreast of changes to the incumbent LEC network with which they interconnect. In our *Order*, we authorize the use of industry forums, industry publications, and the Internet, to make public disclosure of network changes and required technical information by incumbent LECs. We believe that "this approach would build on a voluntary practice that now exists in the industry and would result in broad availability of the information."[780] By making information broadly available, we hope to facilitate the participation of entities, such as small businesses, that lack the resources to participate in industry forums. We originally postulated that public notice should be provided exclusively through industry fora or industry publications.[781] Upon further consideration, however, we broadened the means by which an

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[780] *NPRM* at para. 191.

[781] *See supra* para. 192.

incumbent LEC could satisfy our public notice requirement to include two alternative low-cost mechanisms -- use of the Internet or filing with the Commission.[782] These additional options will be beneficial to small incumbent LECs because they will allow those small LECs to meet their network disclosure obligations without incurring the costs associated with attending industry conferences or publishing the information in an industry magazine or journal.

394. Numbering Administration. Section 251(e) confers upon the Commission exclusive authority over all matters relating to the administration of numbering resources that pertain to the United States. To implement section 251(e)(1) the Commission plans to designate a North American Numbering Plan (NANP) Administrator that will administer telecommunications numbering in the United States equitably and impartially. Pursuant to 251(e)(2) the cost of establishing and maintaining the NANP Administrator will be borne by all telecommunications carriers on a competitively neutral basis.

395. Summary of Projected Reporting, Recordkeeping, and Other Compliance Requirements. The Commission has authorized state public utility commissions to perform the task of implementing new area codes subject to Commission guidelines. If a state commission chooses to initiate and plan area code relief, it must inform the NANP Administrator of the functions the commission will perform. All telecommunications carriers will be required to contribute to the costs of establishing numbering administration. Compliance with this requirement will require engineering, technical, operational, and accounting skills.

396. Steps Taken to Minimize Significant Economic Impact on Small Entities and Small Incumbent LECs, and Alternatives Considered. Although the Commission has authorized states to implement new area codes, it has stipulated that states may not implement them in a manner that will unduly favor or disadvantage any particular industry segment or group of consumers.[783] Accordingly, the Commission has prohibited service-specific or technology specific area code overlays, because they would exclude certain services or carriers, that may be small business entities, from the existing area code and would segregate their operations in a new area code.[784] If states choose to implement all-service overlays, the Commission has required that there be 10-digit dialing for all local calls in areas served by such overlays to ensure that competition will not be deterred as a result of dialing disparity.[785] Without mandatory 10-digit dialing, customers might find it less attractive to switch carriers because competing LECs, many of which may be new entrants to the market and may include small businesses, would have to assign their customers numbers in the new overlay area code.

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[782] *See supra* para. 198.

[783] *See supra* para. 281.

[784] *See supra* para. 285.

[785] *See supra* para. 286.

This would require those customers to dial 10 digits much more often than the incumbents' customers. Requiring 10-digit dialing for all local calls avoids the potentially anti-competitive effect of all-service area code overlays. In addition, to advance competition, the Commission has required that where an area code overlay is implemented, every entity authorized to provide local exchange service in the old area code, which may include small businesses, must be assigned at least one NXX in that area code.

397. Under the 1996 Act each telecommunications carrier must contribute to cover the cost of numbering administration. Many alternatives for allocating these costs were considered to ensure that each carrier would contribute to a fund to cover the cost of numbering administration on a competitively neutral basis. The contributions will be based on the carrier's gross revenues from its provision of telecommunications services reduced by all payments for telecommunications services or facilities that are paid to other telecommunications carriers. Such a competitively neutral cost allocation plan benefits small incumbent LECs that might have been unduly burdened by a cost apportionment plan requiring an equal payment from each entity.[786]

E. Report to Congress

398. The Commission shall send a copy of this Final Regulatory Flexibility Analysis, along with this *Order*, in a report to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. § 801(a)(1)(A). A copy of this FRFA will also be published in the *Federal Register*.

VII. ORDERING CLAUSES

399. Accordingly, IT IS ORDERED that, pursuant to the authority contained in sections 1, 2, 4(i), 4(j), 201-209, 218, 251, and 332 of the Communications Act, as amended, 47 U.S.C. §§ 151, 152, 154(i), 154(j), 201-209, 218, 251 and 332, Parts 51 and 52 of the Commission's rules, 47 C.F.R. Parts 51, 52 are **AMENDED** as set forth in Appendix B hereto.

400. IT IS FURTHER ORDERED that the policies, rules, and requirements set forth herein ARE ADOPTED.

401. IT IS FURTHER ORDERED, pursuant to Sections 416(a) and 413 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 416(a) and 413, that the Secretary shall serve this *Second Report and Order and Memorandum Opinion and Order* on all local exchange carriers, as defined in Section 3(26) of the Communications Act of 1934, as amended, 47 U.S.C. § 153(26), that have designated in writing an agent in the District of Columbia, upon whom service of all notices and process and all orders, decisions, and

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[786] *See supra* para. 343.

requirements of the Commission may be made for and on behalf of the local exchange carrier, as required by Section 413 of the Communications Act of 1934, as amended, 47 U.S.C. § 413.

402. IT IS FURTHER ORDERED that, pursuant to the authority contained in section 408 of the Communications Act, as amended, 47 U.S.C. § 408, all authorizations for state commissions, Bellcore, and local administrators, including LECs, to perform certain numbering administration functions, consistent with the terms as defined in this *Order*, are effective immediately. Because of the need to avoid disruption in numbering administration, we find that there is good cause for this action pursuant to 5 U.S.C. § 553(d)(3). All other policies, rules, and requirements set forth herein are effective 30 days after publication of this order in the *Federal Register*, except for collections of information subject to approval by the Office of Management and Budget ("OMB"), which are effective 70 days following publication in the *Federal Register*.

403. IT IS FURTHER ORDERED that, pursuant to Sections 4, 5, and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154, 155, and 405, *In the Matter of Proposed 708 Relief Plan and 630 Numbering Plan Area Code by Ameritech - Illinois*, IAD File no. 94-102, Declaratory Ruling and Order, 10 FCC Rcd. 4596 (1995) IS CLARIFIED to the extent indicated herein at paragraph numbers 281-293.

404. IT IS FURTHER ORDERED that, pursuant to the authority contained in Sections 4(i), 251(e)(1), and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 251(e)(1) and 405, Comcast Corporation's Petition for Clarification or Reconsideration of *In the Matter of Proposed 708 Relief Plan and 630 Numbering Plan Area Code by Ameritech - Illinois*, IAD File no. 94-102, Declaratory Ruling and Order, 10 FCC Rcd. 4596 (1995), IS DISMISSED as moot.

405. IT IS FURTHER ORDERED that, pursuant to the authority contained in Sections 4(i), 251(e)(1), and 405 of the Communications Act, as amended, 47 U.S.C. §§154(i), 251(e)(1), and 405, the Petition for Limited Clarification and/or Reconsideration filed by the Pennsylvania Public Utilities Commission and the Request for Clarification filed by the National Association of Regulatory Utility Commissioners of *In the Matter of Administration of the North American Numbering Plan*, CC Docket No. 92-237, Report and Order, 11 FCC Rcd 2588 (1995) ARE hereby DISMISSED.

406. IT IS FURTHER ORDERED that the relief requested in the petition for declaratory ruling filed by the Texas Public Utilities Commission is DENIED.

407. IT IS FURTHER ORDERED that, pursuant to section 5(c)(1) of the Communications Act of 1934, as amended, 47 U.S.C. § 155(c)(1), authority is delegated to the Chief, Common Carrier Bureau, to act on petitions filed by parties wishing to dispute proposed area code plans, to act on toll dialing parity implementation plans filed by LECs seeking to implement toll dialing parity, and to issue orders fixing reasonable public notice

periods in the case of contested short term disclosure by incumbent local exchange carriers of network changes under 251(c)(5).

408. IT IS FURTHER ORDERED that, to the extent that issues from CC Docket No. 95-185, *In the Matter of Interconnection Between Local Exchange Carriers and Commercial Mobile Service Providers*, are resolved here, we incorporate the relevant portions of the record in that docket pertaining to paging carriers being charged fees for the opening of central office codes and for blocks of numbers.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX A - LIST OF PARTIES

Comments: (filed on or before May 20, 1996)

American Communications Services, Inc. (ACSI)
Ameritech
Association for Local Telecommunications Services (ALTS)
AT&T Corporation (AT&T)
Beehive Telephone Company, Inc. (Beehive)
Bell Atlantic Telephone Companies (Bell Atlantic)
BellSouth Corporation (BellSouth)
Cellular Telecommunications Industry Association (CTIA)
Cincinnati Bell Telephone Company (CBT)
Citizens Utilities Company (Citizens Utilities)
Cox Communications, Inc. (Cox)
District of Columbia Public Service Commission (District of Columbia Commission)
Excel Telecommunications (Excel)
Florida Public Service Commission (Florida Commission)
Frontier Corporation (Frontier)
General Communication, Inc. (GCI)
General Services Administration/Department of Defense (GSA/DOD)
GTE Service Corporation (GTE)
GVNW Inc./Management (GVNW)
Illinois Commerce Commission (Illinois Commission)
Indiana Utility Regulatory Commission (Indiana Commission Staff)
Lincoln Telephone and Telegraph Company (Lincoln Telephone)
Louisiana Public Service Commission (LPSC)
MCI Telecommunications Corporation (MCI)
MFS Communications Company, Inc. (MFS)
Michigan Public Service Commission (Michigan Commission Staff)
National Cable Television Association, Inc. (NCTA)
New Jersey, Staff of Board of Public Utilities (New Jersey Commission)
NEXTLINK Communications, L.L.C. (NEXTLINK)
Northern Telecom inc. (Nortel)
NYNEX Telephone Companies (NYNEX)
Office of the Ohio Consumers' Counsel (Ohio Consumers' Counsel)
Omnipoint Communications, Inc. (Omnipoint)
Pacific Telesis Group (PacTel)
Paging Network, Inc. (PageNet)
Pennsylvania Public Utility Commission (Pennsylvania Commission)
People of the State of California and the Public Utility Commission of the State of California (California Commission)
Public Utilities Commission of Ohio (Ohio Commission)
Rural Telephone Coalition (Rural Tel. Coalition)

SBC Communications Inc. (SBC)
Small Cable Business Association (SCBA)
Sprint Corporation (Sprint)
Telecommunications Resellers Association
Telecommunications Carriers for Competition (TCC)
Teleport Communications Group Inc. (Teleport)
Texas Public Utilities Commission (Texas Commission)
The Western Alliance (Western Alliance)
Time Warner Communications Holdings, Inc. (Time Warner)
U S WEST, Inc. (U S WEST)
United States Telephone Association (USTA)
Vanguard Cellular Systems, Inc. (Vanguard)
WinStar Communications, Inc. (WinStar)

Replies: (filed on or before June 3, 1996)

A-Plus Network, Inc. (A-Plus)
ACSI
American Electric Power Service Corp.
Ameritech
AT&T
Bell Atlantic
Bell Atlantic/NYNEX Mobile
BellSouth
California Commission
Carolina Power and Light Co.
CBT
Citizens Utilities
Consolidated Edison Company of New York (Con Ed)
Cox
Delmarva Power and Light (Delmarva)
District of Columbia Commission
General Communication, Inc. (GCI)
GSA/DOD
GTE Service Corporation (GTE)
Iowa Network Services, Inc., SDN Inc., and KIN Network, Inc. (Iowa Network Services)
Joint Cable Companies
Koch
MCI
MFS
Minnesota Independant Equal Access Corporation (MIEAC)
Motorola, Inc.
Municipal Utilities

BEST AVAILABLE COPY

National Exchange Carriers Association (NECA)
NCTA
New England Electric Companies
New Mexico Public Service Corporation
NEXTLINK
NYNEX
Ohio Consumers' Counsel
Ohio Edison Company
PacTel
PageNet
Puerto Rico Telephone Company
Rural Tel. Coalition
SBC
Sprint
TCC
Telecommunications Resellers Association
Teleport
U S WEST
USTA
Vanguard
Western Alliance
WinStar

Parties filing comments in the Texas PUC matter

Comments

AT&T
BellSouth
Century Cellunet, Inc. (Century Cellunet)
Competitive Telecommunications Association (CompTel)
Cox
GTE
Houston Cellular Telephone Company (HCTC)
Intelcom Group (U.S.A.), Inc. (Intelcom)
MCI
MFS
Nextel Communications, Inc. (Nextel)
PageNet
Personal Communications Industry Association (PCIA)
ProNet, Inc. (ProNet)
SBC
Sprint Spectrum
Sprint

Teleport
US West
Vanguard

Reply Comments

BellSouth
CTIA
MCI
Omnipoint Communications, Inc. (Omnipoint)
ProNet
SBC
Sprint
Teleport
Texas Commission
Texas Office of Public Utility Counsel (Texas Public Utility Counsel)
U S WEST
Vanguard

Parties Filing Comments in CC Docket No. 95-185

Arch Communications Group, Inc.
AirTouch Communications
PageNet

APPENDIX B - FINAL RULES

Parts 51 and 52 of Title 47 of the Code of Federal Regulations are amended as follows:

PART 51 - INTERCONNECTION

1. The authority citation for Part 51 is:

AUTHORITY: Sections 1, 2, 4, 5, 48 Stat. 1066, as amended; 47 U.S.C. §§ 151, 152, 154, 155 unless otherwise noted. Interpret or apply secs. 3, 4, 201-05, 207-09, 218, 225-7, 251-2, 271 and 332, 48 Stat. 1070, as amended, 1077; 47 U.S.C. §§ 153, 154, 201-05, 207-09, 218, 225-7, 251-2, 271 and 332 unless otherwise noted.

2. Section 51.5 is amended by adding the following definitions in alphabetical order to read as follows:

§ 51.5 Terms and definitions.

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Dialing Parity. The term "dialing parity" means that a person that is not an affiliate of a local exchange carrier is able to provide telecommunications services in such a manner that customers have the ability to route automatically, without the use of any access code, their telecommunications to the telecommunications service provider of the customer's designation from among 2 or more telecommunications service providers (including such local exchange carrier).

Information services. The term "information services" means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.

Local Access and Transport Area (LATA). A "Local Access and Transport Area" is a contiguous geographic area -- (A) established before February 8, 1996 by a Bell operating company such that no exchange area includes points within more than 1 metropolitan statistical area, consolidated metropolitan statistical area, or State, except as expressly permitted under the AT&T Consent Decree; or (B) established or modified by a Bell operating company after February 8, 1996 and approved by the Commission.

Service provider. A "service provider" is a provider of telecommunications services or a provider of information services.

State. The term "state" includes the District of Columbia and the Territories and possessions.

Telecommunications service. The term "telecommunications service" refers to the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.

Telephone exchange service. A "telephone exchange service" is: (1) a service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge, or (2) a comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service.

Telephone toll service. The term "telephone toll service" refers to telephone service between stations in different exchange areas for which there is made a separate charge not included in contracts with subscribers for exchange service.

Unreasonable dialing delay. For the same type of calls, dialing delay is "unreasonable" when the dialing delay experienced by the customer of a competing provider is greater than that experienced by a customer of the LEC providing dialing parity, or nondiscriminatory access to operator services or directory assistance.

3. A new section 51.205 is added to read as follows:

§ 51.205 Dialing parity: general.

A local exchange carrier (LEC) shall provide local and toll dialing parity to competing providers of telephone exchange service or telephone toll service, with no unreasonable dialing delays. Dialing parity shall be provided for all originating telecommunications services that require dialing to route a call.

4. A new section 51.207 is added to read as follows:

§ 51.207 Local dialing parity.

A LEC shall permit telephone exchange service customers within a local calling area to dial the same number of digits to make a local telephone call notwithstanding the identity of the customer's or the called party's telecommunications service provider.

5. A new section 51.209 is added to read as follows:

§ 51.209 Toll dialing parity.

(a) A LEC shall implement throughout each state in which it offers telephone exchange service intraLATA and interLATA toll dialing parity based on LATA boundaries. When a single LATA covers more than one state, the LEC shall use the implementation procedures that each state has approved for the LEC within that state's borders.

(b) A LEC shall implement toll dialing parity through a presubscription process that permits a customer to select a carrier to which all designated calls on a customer's line will be routed automatically. LECs shall allow a customer to presubscribe, at a minimum, to one telecommunications carrier for all interLATA toll calls and to presubscribe to the same or to another telecommunications carrier for all intraLATA toll calls.

(c) A LEC may not assign automatically a customer's intraLATA toll traffic to itself, to its subsidiaries or affiliates, to the customer's presubscribed interLATA or interstate toll carrier, or to any other carrier, except when, in a state that already has implemented intrastate, intraLATA toll dialing parity, the subscriber has selected the same presubscribed carrier for both intraLATA and interLATA toll calls.

(d) Notwithstanding the requirements of subsections (a) and (b), states may require that toll dialing parity be based on state boundaries if it deems that the provision of intrastate and interstate toll dialing parity is procompetitive and otherwise in the public interest.

6. A new section 51.211 is added to read as follows:

§ 51.211 Toll dialing parity implementation schedule.

(a) A LEC that does not begin providing in-region, interLATA or in-region, interstate toll services in a state before February 8, 1999, must implement intraLATA and interLATA toll dialing parity throughout that state on February 8, 1999 or an earlier date as the state may determine, consistent with section 271(e)(2)(b) of the Communications Act of 1934, as amended, to be in the public interest.

(b) A Bell Operating Company (BOC) that provides in-region, interLATA toll services in a state before February 8, 1999 shall provide intraLATA toll dialing parity throughout that state coincident with its provision of in-region, interLATA toll services.

(c) A LEC that is not a BOC that begins providing in-region, interLATA or in-region, interstate toll services in a state before August 8, 1997, shall implement intraLATA and interLATA toll dialing parity throughout that state by August 8, 1997. If the LEC is unable to comply with the August 8, 1997 implementation deadline, the LEC must notify the

Commission's Common Carrier Bureau by May 8, 1997. In the notification, the LEC must state its justification for noncompliance and must set forth the date by which it proposes to implement intraLATA and interLATA toll dialing parity.

(d) A LEC that is not a BOC that begins providing in-region, interLATA or in-region, interstate toll services in a state on or after August 8, 1997, but before February 8, 1999 shall implement intraLATA and interLATA toll dialing parity throughout that state no later than the date on which it begins providing in-region, interLATA or in-region, interstate toll services.

(e) Notwithstanding the requirements of paragraphs (a) - (d) of this section, a LEC shall implement toll dialing parity under a state order as described below:

(i) If the state issued a dialing parity order by December 19, 1995 requiring a BOC to implement toll dialing parity in advance of the dates established by these rules, the BOC must implement toll dialing parity in accordance with the implementation dates established by the state order.

(ii) If the state issued a dialing parity order by August 8, 1996 requiring a LEC that is not a BOC to implement toll dialing parity in advance of the dates established by these rules, the LEC must implement toll dialing parity in accordance with the implementation dates established by the state order.

(f) For LECs that are not Bell Operating Companies, the term *in-region, interLATA toll service,* as used in this section and § 51.213, includes the provision of toll services outside of the LEC's study area.

7. A new section 51.213 is added to read as follows:

§ 51.213 Toll dialing parity implementation plans.

(a) A LEC must file a plan for providing intraLATA toll dialing parity throughout each state in which it offers telephone exchange service. A LEC cannot offer intraLATA toll dialing parity within a state until the implementation plan has been approved by the appropriate state commission or the Commission.

(b) A LEC's implementation plan must include:

(1) a proposal that explains how the LEC will offer intraLATA toll dialing parity for each exchange that the LEC operates in the state, in accordance with the provisions of this section, and a proposed time schedule for implementation; and

(2) a proposal for timely notification of its subscribers and the methods it proposes to use to enable subscribers to affirmatively select an intraLATA toll service provider.

A LEC that is not a BOC also shall identify the LATA with which it will associate for the purposes of providing intraLATA and interLATA toll dialing parity under this subpart.

(c) A LEC must file its implementation plan with the state commission for each state in which the LEC provides telephone exchange service, except that if a LEC determines that a state commission has elected not to review the plan or will not complete its review in sufficient time for the LEC to meet the toll dialing parity implementation deadlines in § 51.211, the LEC must file its plan with the Commission:

(1) no later than 180 days before the date on which the LEC will begin providing toll dialing parity in the state, or no later than 180 days before February 8, 1999, whichever occurs first; or

(2) for LECs that begin providing in-region, interLATA or in-region, interstate toll service (*see* § 51.211(f)) before August 8, 1997, no later than 90 days after these rules are published in the Federal Register.

(d) The Commission will release a public notice of any LEC implementation plan that is filed with the Commission under paragraph (c) of this section.

(1) The LEC's plan will be deemed approved on the fifteenth day following release of the Commission's public notice unless, no later than the fourteenth day following the release of the Commission's public notice, either

(i) the Common Carrier Bureau notifies the LEC that its plan will not be deemed approved on the fifteenth day; or

(ii) an opposition to the plan is filed with the Commission and served on the LEC that filed the plan. Such an opposition must state specific reasons why the LEC's plan does not serve the public interest.

(2) If one or more oppositions are filed, the LEC that filed the plan will have seven additional days (*i.e.*, until no later than the twenty-first day following the release of the Commission's public notice) within which to file a reply to the opposition(s) and serve it on all parties that filed an opposition. The response shall:

(i) include information responsive to the allegations and concerns identified by the opposing party; and

(ii) identify possible revisions to the plan that will address the opposing party's concerns.

(3) If a LEC's plan is opposed under paragraph (d)(1)(ii) of this section, the Common Carrier Bureau will act on the plan within ninety days of the date on which the Commission released its public notice. In the event the Bureau fails to act within ninety days, the plan will not go into effect pending Bureau action. If the plan is not opposed, but it did not go into effect on the fifteenth day following the release of the Commission's public notice (*see* paragraph (d)(1)(i) of this section), and the Common Carrier Bureau fails to act on the plan within ninety days of the date on which the Commission released its public notice, the plan will be deemed approved without further Commission action on the ninety-first day after the date on which the Commission released its public notice of the plan's filing.

8. A new section 51.215 is added to read as follows:

§ 51.215 Dialing parity: cost recovery.

(a) A LEC may recover the incremental costs necessary for the implementation of toll dialing parity. The LEC must recover such costs from all providers of telephone exchange service and telephone toll service in the area served by the LEC, including that LEC. The LEC shall use a cost recovery mechanism established by the state.

(b) Any cost recovery mechanism for the provision of toll dialing parity pursuant to this section that a state adopts must not:

(1) give one service provider an appreciable cost advantage over another service provider, when competing for a specific subscriber (*i.e.*, the recovery mechanism may not have a disparate effect on the incremental costs of competing service providers seeking to serve the same customer); or

(2) have a disparate effect on the ability of competing service providers to earn a normal return on their investment.

9. A new section 51.217 is added to read as follows:

§ 51.217 Nondiscriminatory access: telephone numbers, operator services, directory assistance services, and directory listings.

(a) Definitions. As used in this section, the following definitions apply:

(1) *Competing provider*. A "competing provider" is a provider of telephone exchange or telephone toll services that seeks nondiscriminatory access from a local exchange carrier (LEC) in that LEC's service area.

(2) *Nondiscriminatory access*. "Nondiscriminatory access" refers to access to telephone numbers, operator services, directory assistance and directory listings that is at least equal to the access that the providing local exchange carrier (LEC) itself receives. Nondiscriminatory access includes, but is not limited to: (i) nondiscrimination between and among carriers in the rates, terms, and conditions of the access provided; and (ii) the ability of the competing provider to obtain access that is at least equal in quality to that of the providing LEC.

(3) *Providing local exchange carrier* (LEC). A "providing local exchange carrier" is a local exchange carrier (LEC) that is required to permit nondiscriminatory access to a competing provider.

(b) *General rule*. A local exchange carrier (LEC) that provides operator services, directory assistance services or directory listings to its customers, or provides telephone numbers, shall permit competing providers of telephone exchange service or telephone toll service to have nondiscriminatory access to that service or feature, with no unreasonable dialing delays.

(c) *Specific requirements*. A LEC subject to paragraph (b) of this section must also comply with the following requirements:

(1) *Telephone numbers*. A LEC shall permit competing providers to have access to telephone numbers that is identical to the access that the LEC provides to itself.

(2) *Operator services*. A LEC must permit telephone service customers to connect to the operator services offered by that customer's chosen local service provider by dialing "0," or "0" plus the desired telephone number, regardless of the identity of the customer's local telephone service provider.

(3) *Directory assistance services and directory listings.*

(i) *Access to directory assistance*. A LEC shall permit competing providers to have access to its directory assistance services so that any customer of a competing provider can obtain directory listings, except as provided in paragraph (c)(3)(iii) of

this section, on a nondiscriminatory basis, notwithstanding the identity of the customer's local service provider, or the identity of the provider for the customer whose listing is requested.

(ii) *Access to directory listings.* A LEC shall provide directory listings to competing providers in readily accessible magnetic tape or electronic formats in a timely fashion upon request. A LEC also must permit competing providers to have access to and read the information in the LEC's directory assistance databases.

(iii) *Unlisted numbers.* A LEC shall not provide access to unlisted telephone numbers, or other information that its customer has asked the LEC not to make available. The LEC shall ensure that access is permitted only to the same directory information that is available to its own directory assistance customers.

(iv) *Adjuncts to services.* Operator services and directory assistance services must be made available to competing providers in their entirety, including access to any adjunct features (*e.g.*, rating tables or customer information databases) necessary to allow competing providers full use of these services.

(d) *Branding of operator services and directory assistance services.* The refusal of a providing local exchange carrier (LEC) to comply with the reasonable request of a competing provider that the providing LEC rebrand its operator services and directory assistance, or remove its brand from such services, creates a presumption that the providing LEC is unlawfully restricting access to its operator services and directory assistance. The providing LEC can rebut this presumption by demonstrating that it lacks the capability to comply with the competing provider's request.

(e) *Disputes.*

(1) *Disputes involving nondiscriminatory access.* In disputes involving nondiscriminatory access to operator services, directory assistance services, or directory listings, a providing LEC shall bear the burden of demonstrating with specificity: (i) that it is permitting nondiscriminatory access, and (ii) that any disparity in access is not caused by factors within its control. "Factors within its control" include, but are not limited to, physical facilities, staffing, the ordering of supplies or equipment, and maintenance.

(2) *Disputes involving unreasonable dialing delay.* In disputes between providing local exchange carriers (LECs) and competing providers involving unreasonable dialing delay in the provision of access to operator services and directory assistance, the burden of proof is on the providing LEC to demonstrate with specificity that it is processing the calls of the competing provider's customers on terms equal to that of similar calls from the providing LEC's own customers.

10. Section 51.305 is revised by adding a new subsection (f) as follows:

§ 51.305 Interconnection.

* * * * *

(f) An incumbent LEC shall provide to a requesting telecommunications carrier technical information about the incumbent LEC's network facilities sufficient to allow the requesting carrier to achieve interconnection consistent with the requirements of this section.

11. Section 51.307 is revised by adding a new subsection (e) as follows:

§ 51.307 Duty to provide access on an unbundled basis to network elements.

* * * * *

(e) An incumbent LEC shall provide to a requesting telecommunications carrier technical information about the incumbent LEC's network facilities sufficient to allow the requesting carrier to achieve access to unbundled network elements consistent with the requirements of this section.

12. A new section 51.325 is added to read as follows:

§ 51.325 Notice of network changes: public notice requirement.

(a) An incumbent local exchange carrier ("LEC") must provide public notice regarding any network change that:

(1) will affect a competing service provider's performance or ability to provide service; or

(2) will affect the incumbent LEC's interoperability with other service providers.

(b) For purposes of this section, *interoperability* means the ability of two or more facilities, or networks, to be connected, to exchange information, and to use the information that has been exchanged.

(c) Until public notice has been given in accordance with §§ 51.325 - 51.335, an incumbent LEC may not disclose to separate affiliates, separated affiliates, or unaffiliated entities (including actual or potential competing service providers or competitors), information about planned network changes that are subject to this section.

(d) For the purposes of §§ 51.325 - 51.335, the term *services* means telecommunications services or information services.

13. A new section 51.327 is added to read as follows:

§ 51.327 Notice of network changes: content of notice.

(a) Public notice of planned network changes must, at a minimum, include:

(1) the carrier's name and address;

(2) the name and telephone number of a contact person who can supply additional information regarding the planned changes;

(3) the implementation date of the planned changes;

(4) the location(s) at which the changes will occur;

(5) a description of the type of changes planned (Information provided to satisfy this requirement must include, as applicable, but is not limited to, references to technical specifications, protocols, and standards regarding transmission, signaling, routing, and facility assignment as well as references to technical standards that would be applicable to any new technologies or equipment, or that may otherwise affect interconnection); and

(6) a description of the reasonably foreseeable impact of the planned changes.

(b) The incumbent LEC also shall follow, as necessary, procedures relating to confidential or proprietary information contained in § 51.335.

14. A new section 51.329 is added to read as follows:

§ 51.329 Notice of network changes: methods for providing notice.

(a) In providing the required notice to the public of network changes, an incumbent LEC may use one of the following methods:

(1) filing a public notice with the Commission; or

(2) providing public notice through industry fora, industry publications, or the carrier's publicly accessible Internet site. If an incumbent LEC uses any of the methods specified in paragraph (a)(2) of this section, it also must file a certification with the Commission that includes:

(i) a statement that identifies the proposed changes;

(ii) a statement that public notice has been given in compliance with §§ 51.325 - 51.335; and

(iii) a statement identifying the location of the change information and describing how this information can be obtained.

(b) Until the planned change is implemented, an incumbent LEC must keep the notice available for public inspection, and amend the notice to keep the information complete, accurate and up-to-date.

(c) *Specific filing requirements.* Commission filings under this section must be made as follows:

(1) The public notice or certification must be labeled with one of the following titles, as appropriate: "Public Notice of Network Change Under Rule 51.329(a)," "Certification of Public Notice of Network Change Under Rule 51.329(a)," "Short Term Public Notice Under Rule 51.333(a)," or "Certification of Short Term Public Notice Under Rule 51.333(a)."

(2) Two paper copies of the incumbent LEC's public notice or certification, required under paragraph (a) of this section, must be sent to "Secretary, Federal Communications Commission, Washington, D.C. 20554." The date on which this filing is received by the Secretary is considered the official filing date.

(3) In addition, one paper copy and one diskette copy must be sent to the "Chief, Network Services Division, Common Carrier Bureau, Federal Communications Commission, Washington, D.C. 20554." The diskette copy must be on a standard 3½ inch diskette, formatted in IBM-compatible format to be readable by high-density floppy drives operating under MS DOS 5.X or later compatible versions, and shall be in a word-processing format designated, from time-to-time, in public notices released by the Network Services Division. The diskette must be submitted in "read only" mode, and must be clearly labeled with the carrier's name, the filing date, and an identification of the diskette's contents.

15. A new section 51.331 is added to read as follows:

§ 51.331 Notice of network changes: timing of notice.

(a) An incumbent LEC shall give public notice of planned changes at the make/buy point, as defined in paragraph (b) of this section, but at least 12 months before implementation, except as provided below.

(1) If the changes can be implemented within twelve months of the make/buy point, public notice must be given at the make/buy point, but at least six months before implementation.

(2) If the changes can be implemented within six months of the make/buy point, public notice may be given pursuant to the short term notice procedures provided in § 51.333.

(b) For purposes of this section, the *make/buy point* is the time at which an incumbent LEC decides to make for itself, or to procure from another entity, any product the design of which affects or relies on a new or changed network interface. If an incumbent LEC's planned changes do not require it to make or to procure a product, then the make/buy point is the point at which the incumbent LEC makes a definite decision to implement a network change.

(1) For purposes of this section, a *product* is any hardware or software for use in an incumbent LEC's network or in conjunction with its facilities that, when installed, could affect the compatibility of an interconnected service provider's network, facilities or services with an incumbent LEC's existing telephone network, facilities or services, or with any of an incumbent carrier's services or capabilities.

(2) For purposes of this section a *definite decision* is reached when an incumbent LEC determines that the change is warranted, establishes a timetable for anticipated implementation, and takes any action toward implementation of the change within its network.

16. A new section 51.333 is added to read as follows:

§ 51.333 Notice of network changes: short term notice.

(a) *Certificate of service.* If an incumbent LEC wishes to provide less than six months notice of planned network changes, the public notice or certification that it files with the Commission must include a certificate of service in addition to the information required by § 51.327(a) or § 51.329(a)(2), as applicable. The certificate of service shall include:

(1) a statement that, at least five business days in advance of its filing with the Commission, the incumbent LEC served a copy of its public notice upon each telephone exchange service provider that directly interconnects with the incumbent LEC's network; and

(2) the name and address of each such telephone exchange service provider upon which the notice was served.

(b) *Implementation date.* The Commission will release a public notice of such short term notice filings. Short term notices shall be deemed final on the tenth business day after

the release of the Commission's public notice, unless an objection is filed, pursuant to paragraph (c) of this section.

(c) *Objection procedures.* An objection to an incumbent LEC's short term notice may be filed by an information service provider or telecommunication service provider that directly interconnects with the incumbent LEC's network. Such objections must be filed with the Commission, and served on the incumbent LEC, no later than the ninth business day following the release of the Commission's public notice. All objections to an incumbent LEC's short term notice must:

(1) state specific reasons why the objector cannot accommodate the incumbent LEC's changes by the date stated in the incumbent LEC's public notice and must indicate any specific technical information or other assistance required that would enable the objector to accommodate those changes;

(2) list steps the objector is taking to accommodate the incumbent LEC's changes on an expedited basis;

(3) state the earliest possible date (not to exceed six months from the date the incumbent LEC gave its original public notice under this section) by which the objector anticipates that it can accommodate the incumbent LEC's changes, assuming it receives the technical information or other assistance requested under paragraph (c)(1) of this section;

(4) provide any other information relevant to the objection; and

(5) provide the following affidavit, executed by the objector's president, chief executive officer, or other corporate officer or official, who has appropriate authority to bind the corporation, and knowledge of the details of the objector's inability to adjust its network on a timely basis:

> "I, *(name and title)*, under oath and subject to penalty for perjury, certify that I have read this objection, that the statements contained in it are true, that there is good ground to support the objection, and that it is not interposed for purposes of delay. I have appropriate authority to make this certification on behalf of *(objector)* and I agree to provide any information the Commission may request to allow the Commission to evaluate the truthfulness and validity of the statements contained in this objection."

(d) *Response to objections.* If an objection is filed, an incumbent LEC shall have until no later than the fourteenth business day following the release of the Commission's public notice to file with the Commission a response to the objection and to serve the response on all parties that filed objections. An incumbent LEC's response must:

(1) provide information responsive to the allegations and concerns identified by the objectors;

(2) state whether the implementation date(s) proposed by the objector(s) are acceptable;

(3) indicate any specific technical assistance that the incumbent LEC is willing to give to the objectors; and

(4) provide any other relevant information.

(e) *Resolution.* If an objection is filed pursuant to paragraph (c) of this section, then the Chief, Network Services Division, Common Carrier Bureau, will issue an order determining a reasonable public notice period, *provided however*, that if an incumbent LEC does not file a response within the time period allotted, or if the incumbent LEC's response accepts the latest implementation date stated by an objector, then the incumbent LEC's public notice shall be deemed amended to specify the implementation date requested by the objector, without further Commission action. An incumbent LEC must amend its public notice to reflect any change in the applicable implementation date pursuant to § 51.329(b).

17. A new section 51.335 is added to read as follows:

§ 51.335 Notice of network changes: confidential or proprietary information.

(a) If an incumbent LEC claims that information otherwise required to be disclosed is confidential or proprietary, the incumbent LEC's public notice must include, in addition to the information identified in § 51.327(a), a statement that the incumbent LEC will make further information available to those signing a nondisclosure agreement.

(b) *Tolling the public notice period.* Upon receipt by an incumbent LEC of a competing service provider's request for disclosure of confidential or proprietary information, the applicable public notice period will be tolled until the parties agree on the terms of a nondisclosure agreement. An incumbent LEC receiving such a request must amend its public notice as follows:

(1) on the date it receives a request from a competing service provider for disclosure of confidential or proprietary information, to state that the notice period is tolled; and

(2) on the date the nondisclosure agreement is finalized, to specify a new implementation date.

PART 52 - NUMBERING

18. The authority citation for Part 52 is amended to read as follows:

AUTHORITY: Sections 1, 2, 4, 5, 48 Stat. 1066, as amended; 47 U.S.C. §§ 151, 152, 154, 155 unless otherwise noted. Interpret or apply secs. 3, 4, 201-05, 207-09, 218, 225-7, 251-2, 271 and 332, 48 Stat. 1070, as amended, 1077; 47 U.S.C. §§ 153, 154, 201-05, 207-09, 218, 225-7, 251-2, 271 and 332 unless otherwise noted.

19. The table of contents for Part 52 is amended to read as follows:

Subpart A - Scope and Authority

§ 52.1 Basis and purpose.
§ 52.3 General.
§ 52.5 Definitions.

Subpart B - Administration

§ 52.7 Definitions.
§ 52.9 General requirements.
§ 52.11 North American Numbering Council.
§ 52.13 North American Numbering Plan Administrator.
§ 52.15 Central office code administration.
§ 52.17 Costs of number administration.
§ 52.19 Area code relief.

Subpart C - Number Portability

§ 52.21 Definitions.
§ 52.23 Deployment of long-term database methods for number portability by LECs.
§ 52.25 Database architecture and administration.
§ 52.27 Deployment of transitional measures for number portability.
§ 52.29 Cost recovery for transitional measures for number portability.
§ 52.31 Deployment of long-term database methods for number portability by CMRS providers.
§§ 52.32 - 52.99 [Reserved]

20. Subpart A is added to Part 52 to read as follows:

Subpart A - Scope and Authority.

§ 52.1 Basis and purpose.

(a) *Basis.* These rules are issued pursuant to the Communications Act of 1934, as amended, 47 U.S.C. 151 *et. seq.*

(b) *Purpose.* The purpose of these rules is to establish, for the United States, requirements and conditions for the administration and use of telecommunications numbers for provision of telecommunications services.

§ 52.3 General.

The Commission shall have exclusive authority over those portions of the North American Numbering Plan (NANP) that pertain to the United States. The Commission may delegate to the States or other entities any portion of such jurisdiction.

§ 52.5 Definitions.

As used in this Part:

(a) *Incumbent local exchange carrier.* With respect to an area, an "incumbent local exchange carrier" is a local exchange carrier that -- (1) on February 8, 1996, provided telephone exchange service in such area; and (2) (i) on February 8, 1996, was deemed to be a member of the exchange carrier association pursuant to § 69.601(b) of this chapter (47 CFR 69.601(b)); or (ii) is a person or entity that, on or after February 8, 1996, became a successor or assign of a member described in clause (i).

(b) *North American Numbering Council* (NANC). The "North American Numbering Council" is an advisory committee created under the Federal Advisory Committee Act, 5 U.S.C., App (1988), to advise the Commission and to make recommendations, reached through consensus, that foster efficient and impartial number administration.

(c) *North American Numbering Plan* (NANP). The "North American Numbering Plan" is the basic numbering scheme for the telecommunications networks located in Anguilla, Antigua, Bahamas, Barbados, Bermuda, British Virgin Islands, Canada, Cayman Islands, Dominica, Dominican Republic, Grenada, Jamaica, Montserrat, St. Kitts & Nevis, St. Lucia, St. Vincent, Turks & Caicos Islands, Trinidad & Tobago, and the United States (including Puerto Rico, the U.S. Virgin Islands, Guam and the Commonwealth of the Northern Mariana Islands).

(d) *State.* The term "state" includes the District of Columbia and the Territories and possessions.

(e) *State commission*. The term "state commission" means the commission, board, or official (by whatever name designated) which under the laws of any state has regulatory jurisdiction with respect to intrastate operations of carriers.

(f) *Telecommunications*. "Telecommunications" means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.

(g) *Telecommunications carrier*. A "telecommunications carrier" is any provider of telecommunications services, except that such term does not include aggregators of telecommunications services (as defined in 47 U.S.C. § 226(a)(2)).

(h) *Telecommunications service*. The term "telecommunications service" refers to the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.

21. In part 52, subpart B is redesignated as subpart C, and §§ 52.1 through 52.12 are redesignated as §§ 52.21 through 52.31; a new subpart B is added as follows:

Subpart B - Administration

§ 52.7 Definitions.

As used in this subpart:

(a) *Area code or numbering plan area* (NPA). The term "area code or numbering plan area" refers to the first three digits (NXX) of a ten-digit telephone number in the form NXX-NXX-XXXX, where N represents any one of the numbers 2 through 9 and X represents any one of the numbers 0 through 9.

(b) *Area code relief*. The term "area code relief" refers to the process by which central office codes are made available when there are few or no unassigned central office codes remaining in an existing area code and a new area code is introduced.

(c) *Central office (CO) code*. The term "central office code" refers to the second three digits (NXX) of a ten-digit telephone number in the form NXX-NXX-XXXX, where N represents any one of the numbers 2 through 9 and X represents any one of the numbers 0 through 9.

(d) *Central office (CO) code administrator*. The term "central office code administrator" refers to the entity or entities responsible for managing central office codes in each area code.

(e) *North American Numbering Plan Administrator* (NANPA). The term "North American Numbering Plan Administrator" refers to the entity or entities responsible for managing the NANP.

§ 52.9 General requirements.

(a) To ensure that telecommunications numbers are made available on an equitable basis, the administration of telecommunications numbers shall, in addition to the specific requirements set forth in this subpart:

(1) facilitate entry into the telecommunications marketplace by making telecommunications numbering resources available on an efficient, timely basis to telecommunications carriers;

(2) not unduly favor or disfavor any particular telecommunications industry segment or group of telecommunications consumers; and

(3) not unduly favor one telecommunications technology over another.

(b) If the Commission delegates any telecommunications numbering administration functions to any State or other entity pursuant to 47 U.S.C. § 251(e)(1), such State or entity shall perform these functions in a manner consistent with this part.

§ 52.11 North American Numbering Council.

The duties of the North American Numbering Council (NANC), may include, but are not limited to:

(a) advising the Commission on policy matters relating to the administration of the NANP in the United States;

(b) making recommendations, reached through consensus, that foster efficient and impartial number administration;

(c) initially resolving disputes, through consensus, pertaining to number administration in the United States;

(d) recommending to the Commission an appropriate entity to serve as the NANPA;

(e) recommending to the Commission an appropriate mechanism for recovering the costs of NANP administration in the United States, consistent with § 52.17;

(f) carrying out the duties described in § 52.25; and

(g) carrying out this part as directed by the Commission.

§ 52.13 North American Numbering Plan Administrator.

(a) The North American Numbering Plan Administrator (NANPA) shall be an independent and impartial non-government entity.

(b) The duties of the NANPA shall include, but are not limited to:

(1) ensuring that the interests of all NANP member countries are considered;

(2) processing number assignment applications associated with, but not limited to: area codes, N11 codes, carrier identification codes (CICs), "500" central office codes, "900"central office codes, "456" central office codes, Signalling System 7 network codes, and Automatic Number Identification Integration Integers (ANI II);

(3) assigning the numbers and codes described in paragraph (b)(2) of this section;

(4) maintaining and monitoring administrative number databases;

(5) assuming additional telecommunications number administration activities, as assigned; and

(6) ensuring that any action taken with respect to number administration is consistent with this Part.

§ 52.15 Central office code administration.

(a) Central Office Code Administration shall be performed by the NANPA, or another entity or entities, as designated by the Commission.

(b) Duties of the entity or entities performing central office code administration may include, but are not limited to:

(1) processing central office code assignment applications and assigning such codes in a manner that is consistent with this Part;

(2) accessing and maintaining central office code assignment databases;

(3) contributing to the CO Code Use Survey (COCUS), an annual survey that describes the present and projected use of CO codes for each NPA in the NANP;

(4) monitoring the use of central office codes within each area code and forecasting the date by which all central office codes within that area code will be assigned; and

(5) planning for and initiating area code relief, consistent with § 52.19.

(c) Any telecommunications carrier performing central office code administration:

(1) shall not charge fees for the assignment or use of central office codes to other telecommunications carriers, including paging and CMRS providers, unless the telecommunications carrier assigning the central office code charges one uniform fee for all carriers, including itself and its affiliates; and

(2) shall, consistent with this subpart, apply identical standards and procedures for processing all central office code assignment requests, and for assigning such codes, regardless of the identity of the telecommunications carrier making the request.

§ 52.17 Costs of number administration.

All telecommunications carriers in the United States shall contribute on a competitively neutral basis to meet the costs of establishing numbering administration.

(a) For each telecommunications carrier, such contributions shall be based on the gross revenues from the provision of its telecommunications services.

(b) The contributions in paragraph (a) of this section shall be based on each contributor's gross revenues from its provision of telecommunications services reduced by all payments for telecommunications services and facilities that have been paid to other telecommunications carriers.

§ 52.19 Area code relief.

(a) State commissions may resolve matters involving the introduction of new area codes within their states. Such matters may include, but are not limited to: directing whether area code relief will take the form of a geographic split, an overlay area code, or a boundary realignment; establishing new area code boundaries; establishing necessary dates for the implementation of area code relief plans; and directing public education and notification efforts regarding area code changes.

(b) State commissions may perform any or all functions related to initiation and development of area code relief plans, so long as they act consistently with the guidelines enumerated in this part, and subject to paragraph (b)(2) of this section. For the purposes of this paragraph, initiation and development of area code relief planning encompasses all functions related to the implementation of new area codes that were performed by central

office code administrators prior to February 8, 1996. Such functions may include: declaring that the area code relief planning process should begin; convening and conducting meetings to which the telecommunications industry and the public are invited on area code relief for a particular area code; and developing the details of a proposed area code relief plan or plans.

(1) The entity or entities designated by the Commission to serve as central office code administrator(s) shall initiate and develop area code relief plans for each area code in each state that has not notified such entity or entities, pursuant to paragraph (b)(2) of this section, that the state will handle such functions.

(2) Pursuant to paragraph (b)(1) of this section, a state commission must notify the entity or entities designated by the Commission to serve as central office code administrator(s) for its state that such state commission intends to perform matters related to initiation and development of area code relief planning efforts in its state. Notification shall be written and shall include a description of the specific functions the state commission intends to perform. Where the NANP Administrator serves as the central office code administrator, such notification must be made within 120 days of the selection of the NANP Administrator.

(c) New area codes may be introduced through the use of:

(1) a geographic area code split, which occurs when the geographic area served by an area code in which there are few or no central office codes left for assignment is split into two or more geographic parts;

(2) an area code boundary realignment, which occurs when the boundary lines between two adjacent area codes are shifted to allow the transfer of some central office codes from an area code for which central office codes remain unassigned to an area code for which few or no central office codes are left for assignment; or

(3) an area code overlay, which occurs when a new area code is introduced to serve the same geographic area as an existing area code, subject to the following conditions:

(i) No area code overlay may be implemented unless all central office codes in the new overlay area code are assigned to those entities requesting assignment on a first-come, first-serve basis, regardless of the identity of, technology used by, or type of service provided by that entity. No group of telecommunications carriers shall be excluded from assignment of central office codes in the existing area code, or be assigned such codes only from the overlay area code, based solely on that group's provision of a specific type of telecommunications service or use of a particular technology;

(ii) No area code overlay may be implemented unless there exists, at the time of implementation, mandatory ten-digit dialing for every telephone call within and between all area codes in the geographic area covered by the overlay area code; and

(iii) No area code overlay may be implemented unless every telecommunications carrier, including CMRS providers, authorized to provide telephone exchange service, exchange access, or paging service in that NPA 90 days before introduction of the new overlay area code, is assigned during that 90 day period at least one central office code in the existing area code.

22. Subpart C is added to read as follows:

Subpart C - Number Portability

• • • • •

§§ 52.1 through 52.12 [Redesignated]

23. Sections 52.1 through 52.12 are redesignated as follows:

Old section	New section
52.1	52.21
52.3	52.23
52.5	52.25
52.7	52.27
52.9	52.29
52.11	52.31
52.12 - 52.99 [Reserved]	52.32 - 52.99 [Reserved]

24. Paragraphs (f), (l), (s), (t) and (u) of section 52.21 are removed and redesignated respectively as paragraphs (a), (b), (f), (g) and (h) of section 52.5. The remaining paragraphs of section 52.21 are redesignated in alphabetical order to read (a) - (q).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers	)	CC Docket No. 95-185

Third Order on Reconsideration
and
Further Notice of Proposed Rulemaking

Adopted: August 18, 1997 Released: August 18, 1997

FNPRM Comment Date: October 2, 1997
FNPRM Reply Date: October 17, 1997

By the Commission: Chairman Hundt issuing a separate statement.

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I. INTRODUCTION

1. In this Order, we address two petitions for reconsideration or clarification of the *Local Competition and Order*[1] regarding the obligation of incumbent local exchange carriers (LECs) to provide unbundled access to interoffice transport facilities on a shared basis.[2] We intend to address petitions for reconsideration of other aspects of the *Local Competition Order* in the future.

2. In the *Local Competition Order*, which established rules to implement sections 251 and 252 of the Communications Act of 1934 (the Act),[3] as amended by the Telecommunications Act of 1996,[4] the Commission required incumbent LECs "to provide unbundled access to shared transmission facilities between end offices and the tandem switch."[5] In this reconsideration order, we first explain that the *Local Competition Order* required incumbent LECs to provide requesting carriers with access to the same transport facilities, between the end office switch and the tandem switch, that incumbent LECs use to carry their own traffic. We further explain that, when a requesting carrier takes unbundled local switching, it gains access to the incumbent LEC's routing table, resident in the switch. Second, we reconsider the requirement that incumbent LECs only provide "shared transport"[6]

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[1] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Report and Order, CC Docket No. 96-98, 11 FCC Rcd 15499 (1996) (*Local Competition Order*), *Order on Reconsideration*, 11 FCC Rcd 13042 (1996), *Second Order on Reconsideration*, 11 FCC Rcd 19738 (1996), *further recon. pending, aff'd in part and vacated in part sub. nom. CompTel. v. FCC*, 11 F.3d 1068 (8th Cir. 1997) (*CompTel*), *aff'd in part and vacated in part sub nom. Iowa Utilities Bd. v. FCC and consolidated cases*, No. 96-3321 *et al.*, 1997 WL 403401 (8th. Cir., Jul. 18, 1997) (*Iowa Utilities Bd.*).

[2] 47 C.F.R. § 51.319(d).

[3] 47 U.S.C. § 251.

[4] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996 Act), *codified at* 47 U.S.C. §§ 151 *et seq.*

[5] *Local Competition Order*, 11 FCC Rcd at 15718, para. 440.

[6] Section 51.319(d) of the Commission's rules requires that incumbent LECs provide access on an unbundled basis to interoffice transmission facilities shared by more than one customer or carrier. 47 C.F.R. § 51.319(d). In this reconsideration order, we refer to such shared interoffice transmission facilities as "shared

between the end office and tandem. For the reasons discussed below, we conclude that incumbent LECs should be required to provide requesting carriers with access to shared transport for all transmission facilities connecting incumbent LECs' switches -- that is, between end office switches, between an end office switch and a tandem switch, and between tandem switches. Third, we conclude that incumbent LECs must permit requesting carriers that purchase unbundled shared transport and unbundled switching to use the same routing table and transport links that the incumbent LEC uses to route and carry its own traffic. By requiring incumbent LECs to provide requesting carriers with access to the incumbent LEC's rounting table and to all its interoffice transmission facilities on an unbundled basis, requesting carriers can route calls in the same manner that an incumbent routes its own calls and thus take advantage of the incumbent LEC's economies of scale, scope, and density. Finally, incumbent LECs must permit requesting carriers to use shared transport as an unbundled element to carry originating access traffic from, and terminating access traffic to, customers to whom the requesting carrier is also providing local exchange service.

3. We also issue a further notice of proposed rulemaking seeking comment on whether requesting carriers may use shared transport facilities in conjunction with unbundled switching, to originate or terminate interexchange traffic to customers to whom the requesting carrier does not provide local exchange service. Moreover, we seek comment on whether requesting carriers may use dedicated transport facilities to originate or terminate interexchange traffic to customers to whom the requesting carrier does not provide local exchange service.

II. BACKGROUND

A. Local Competition Order

4. Sections 251(c)(3) and 251(d)(2) of the Act set forth standards for identifying unbundled network elements that incumbent LECs must make available to requesting telecommunications carriers.[7] Section 251(c)(3) requires incumbent LECs to provide requesting carriers with "nondiscriminatory access to network elements on an unbundled basis at any technically feasible point."[8] Section 251(d)(2) provides that, in identifying unbundled elements, the "Commission shall consider, at a minimum, whether--

> (A) access to such network elements as are proprietary in nature is necessary; and

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transport."

[7] 47 U.S.C. §§ 251(c)(3) and (d)(2).

[8] 47 U.S.C. § 251(c)(3).

> (B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer."[9]

5. In the *Local Competition Order*, the Commission, pursuant to sections 251(c)(3) and 251(d)(2), identified a minimum list of seven network elements to which incumbent LECs must provide access on an unbundled basis. These network elements included local switches, tandem switches, and interoffice transmission facilities. With respect to interoffice transmission facilities, the Commission required incumbent LECs to provide requesting telecommunications carriers access to both dedicated and "shared" interoffice transmission facilities.[10] The Commission defined "interoffice transmission facilities" as:

> incumbent LEC transmission facilities dedicated to a particular customer or carrier, or shared by more than one customer or carrier, that provide telecommunications between wire centers owned by incumbent LECs or requesting telecommunications carriers, or between switches owned by incumbent LECs or requesting telecommunications carriers.[11]

The Commission stated that "[f]or some elements, especially the loop, the requesting carrier will purchase exclusive access to the element for a specific period, [and for] other elements, especially shared facilities such as common transport, [carriers] are essentially purchasing access to a functionality of the incumbent's facilities on a minute-by-minute basis."[12] In

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[9] 47 U.S.C. § 251(d)(2).

[10] *Local Competition Order*, 11 FCC Rcd at 15718, para. 440. 47 C.F.R. § 51.319(d)(2) states: The incumbent LEC shall:

> (i) provide a requesting telecommunications carrier exclusive use of interoffice transmission facilities dedicated to a particular customer or carrier, or use of the features, functions, and capabilities of interoffice transmission facilities shared by more than one customer or carrier;
>
> (ii) provide all technically feasible transmission facilities, features, functions, and capabilities that the requesting telecommunications carrier could use to provide telecommunications services;
>
> (iii) permit, to the extent technically feasible, a requesting telecommunications carrier to connect such interoffice facilities to equipment designated by the requesting telecommunications carrier, including, but not limited to, the requesting telecommunications carrier's collocated facilities . . . .

47 C.F.R. § 51.319(d)(2).

[11] 47 C.F.R. § 51.319(d)(1).

[12] *Local Competition Order*, 11 FCC Rcd at 15631, para. 258.

defining the network elements to which incumbent LECs must provide access on an unbundled basis, the Commission adopted the statutory definition of unbundled elements as physical facilities of the network, together with the features, functions, and capabilities associated with those facilities.[13] The Commission concluded that "the definition of the term network element includes physical facilities, such as a loop, switch, or other node, as well as logical features, functions, and capabilities that are provided by, for example, software located in a physical facility such as a switch."[14] The Commission found that:

> the embedded features and functions within a network element are part of the characteristics of that element and may not be removed from it. Accordingly, incumbent LECs must provide network elements along with all of their features and functions, so that new entrants may offer services that compete with those offered by incumbents as well as new services.[15]

The Commission also determined that "we should not identify elements in rigid terms, but rather by function."[16]

6. On July 18, 1997, the United States Court of Appeals for the Eighth Circuit issued a decision affirming certain of the Commission's rules adopted in the *Local Competition Order*, and vacating other rules.[17] With respect to issues relevant to this reconsideration decision, the court affirmed the Commission's authority to identify unbundled network elements pursuant to section 251(d)(2), and generally upheld the Commission's decision regarding incumbent LECs' obligations to provide access to network elements on an unbundled basis.[18] The order we issue today is consistent with the court's decision.

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[13] The Act defines the term "network element" as:

> a facility or equipment used in the provision of a telecommunications service. Such term also includes features, functions, and capabilities that are provided by means of such facility or equipment, including subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service.

47 U.S.C. § 3 (29).

[14] *Local Competition Order*, 11 FCC Rcd at 15632, para. 260.

[15] *Local Competition Order*, 11 FCC Rcd at 15632, para. 260.

[16] *Local Competition Order*, 11 FCC Rcd at 15631-32, para. 259.

[17] *Iowa Utilities Bd. v. FCC*, 1997 WL 403401 (8th Cir. July 18, 1997). *See* n.1 *supra*.

[18] *Iowa Utilities Bd.* at *22-24.

B. Petitions

7. Parties contend that the *Local Competition Order* is not clear with respect to incumbent LECs' obligation to provide access to shared transport as a network element. Although only two petitions for reconsideration, filed by WorldCom, Inc. (WorldCom) and the Local Exchange Carriers Coalition (LECC), seek clarification or reconsideration of what incumbent LECs must provide pursuant to section 251(c)(3) with regard to "shared transport," several parties addressed that issue in oppositions to petitions for reconsideration and replies. Moreover, since the record closed in the reconsideration proceeding, some parties have made numerous *ex parte* presentations in this docket regarding their views on the proper definition of shared transport as a network element.

8. The record indicates that one basis for confusion is the discrepancy between our rule defining interoffice transmission facilities under section 251(c)(3), 47 C.F.R. § 51.319(d), and the rule that establishes the rate structure standard for shared transport, 47 C.F.R. § 51.509(d). The Eighth Circuit vacated the Commission's rule, 47 C.F.R. § 51.509(d), which established the rate structure standard for shared transport.[19] Although the discrepancy between our rule defining interoffice transmission facilities and the rate structure rule no longer exists, we nevertheless believe that it is useful to clarify the Commission's rules regarding shared transport. The definition of interoffice transmission facilities includes transmission facilities "dedicated to a particular customer or carrier, or shared by more than one customer or carrier, that provide telecommunications between wire centers[20] owned by incumbent LECs or requesting telecommunications carriers, or *between switches* owned by incumbent LECs or requesting telecommunications carriers."[21] The rule setting forth the rate structure for shared transport, which has been vacated by the Eighth Circuit, addressed only "[s]hared transmission facilities *between tandem switches and end offices*."[22] In the *Local*

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[19] *Iowa Utilities Bd.* at *9, n.20.

[20] A wire center, or serving wire center, is defined as a telephone company central office designated by the telephone company to serve the geographic area in which the interexchange carrier or other person's point of demarcation is located. 47 C.F.R. § 69.2(rr).

[21] *See* 47 C.F.R. §51.319(d) (emphasis added). Switches include both end office and tandem switches.

[22] 47 C.F.R. § 51.509(d) (emphasis added). That rule (now vacated) stated:

> (d) Shared transmission facilities between tandem switches and end offices. The costs of shared transmission facilities between tandem switches and end offices may be recovered through usage-sensitive charges, or in another manner consistent with the manner that the incumbent LEC incurs those costs.

47 C.F.R. § 51.509(d).

Competition Order, we promulgated no rules mandating the rate structure for shared transport *between end offices*. WorldCom requests that the Commission clarify that incumbent LECs must offer a usage option for shared transport regardless of whether the traffic is routed through the tandem.[23] LECC requests that the Commission clarify that shared transmission facilities must be provided to a requesting carrier only "in conjunction with" both a local switching and tandem switching capability.[24]

9. More fundamentally, parties ask the Commission to clarify, or reconsider, the definition of shared transport. WorldCom asks the Commission to clarify that section 251(c)(3) requires incumbent LECs to provide shared transport as a network element pursuant to a usage option whereby the requesting carrier pays a single, usage based rate for the routing functionality between the end office and the serving wire center (SWC).[25] LECC, on the other hand, asserts that "transmission facilities are 'shared' only if they are associated with switching capability. If they are not so associated, such facilities presumably must be considered dedicated facilities."[26]

10. In support of WorldCom's petition, various competitive carriers argue that the Commission was clear in the *Local Competition Order* that "shared transport," as defined by the Commission, requires incumbent LECs to make available to requesting carriers access to all transport links between any two incumbent LEC switches (*i.e.*, between two end office switches, between an end office switch and a tandem switch, or between two tandem switches) on a per minute of use basis.[27] AT&T notes that, in defining unbundled network elements, the Commission stated that the definition includes "all the features, functions, and capabilities that are provided by means of such facility or equipment" and that "carriers seeking . . . shared facilities, such as common transport, are essentially purchasing access to a

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[23] WorldCom Petition at 2, 6-7. *Accord* CompTel Opposition at 3-4 (FCC should establish a usage option for all transport over shared facilities between two incumbent LEC end offices); Sprint Opposition at 6-7 (shared transport to take traffic directly from one end-office switch to another is the most economical means of handling the traffic).

[24] LECC Petition at 33. *Cf.* NYNEX Opposition at 10 (traditionally, shared facilities are only provided by an incumbent LEC between its central offices and its tandems, and not between its central offices and the switching facilities of another carrier).

[25] Worldcom Petition at 2-5. *See also* MCI Opposition at 18; Sprint Opposition at 6.

[26] LECC Petition at 33.

[27] Letter from Bruce K. Cox, Government Affairs Director, AT&T, to William F. Caton, Acting Secretary, FCC, Jan. 28, 1997 (AT&T Jan. 28 *Ex Parte*), *citing Local Competition Order*, 11 FCC Rcd at 15633, 15631, paras. 262, 258; Letter from Leonard S. Sawicki, Director FCC Affairs, MCI, to William F. Caton, Acting Secretary, FCC, June 17, 1997 (MCI June 17 *Ex Parte*).

functionality of the incumbent's facilities on a minute-by-minute basis."[28] WorldCom claims that the 1996 Act and the Commission's rules make clear that carriers taking unbundled local switching have the right to use the incumbent LEC's entire interoffice network on a cost based, nondiscriminatory basis to complete local calls. WorldCom asserts that several incumbent LECs, such as NYNEX and Bell Atlantic, have made this form of transport available.[29]

11. Ameritech argues that the network element "interoffice transport" must be unbundled from switching and must be a discrete facility or piece of equipment used in the provision of telecommunications services.[30] Ameritech contends that the Commission's requirement to provide unbundled shared interoffice facilities means that requesting carriers have the option of sharing dedicated interoffice facilities by subdividing those facilities among themselves, but that requesting carriers do not have the right to share the links used to transport Ameritech's own traffic.[31] Ameritech claims that unbundled transport can be provided in two ways: (1) dedicated transport, which is a discrete network element used exclusively by a single carrier and billed to that carrier; and (2) shared transport, which is a discrete network element jointly used by two or more requesting carriers, with the bill being pro-rated as directed by sharers.[32] Ameritech contends that, although requesting carriers may have the option of combining unbundled network elements, the definition of the term "network element" requires that the element must be able to be used separate from the rest of the incumbent LEC's network or facilities.[33]

12. Several incumbent LECs argue that the competitive carriers' definition of shared transport is inconsistent with the definition of an unbundled network element. Ameritech and BellSouth argue that shared transport, as proposed by competitive carriers, constitutes a

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[28] AT&T Jan. 28 *Ex Parte*.

[29] Letter from Linda L. Oliver, Counsel for WorldCom, Inc., to William F. Caton, Acting Secretary, FCC, Apr. 16, 1997 (WorldCom Apr. 16 *Ex Parte*).

[30] Letter from James K. Smith, Director Federal Relations, Ameritech, to William F. Caton, Acting Secretary, FCC, May 23, 1997 (Ameritech May 23 *Ex Parte*). *See also* Letter from Cyndie Eby, Executive Director - Federal Regulatory, US West, Inc., to William F. Caton, Acting Secretary, FCC, Feb. 27, 1997 (US West Feb. 27 *Ex Parte*) (a network element is a facility that is dedicated to the exclusive use of a lawful interconnector).

[31] Ameritech Opposition at 8-9.

[32] Ameritech Jan. 28 *Ex Parte*.

[33] Ameritech Opposition at 7-8.

service rather than an unbundled element.[34] According to Ameritech, such a definition bundles two elements -- transport and switching.[35] Ameritech also argues that the competitive carriers' position is contrary to the basic concept of unbundled network elements because unbundled elements are billed on a per facility/per month basis, which is consistent with the purchase of facilities as opposed to services.[36] Ameritech contends that competitive LECs are requesting "common transport" service rather than the network element "shared transport." Ameritech claims that the term "common transport" is used to describe basic network connectivity, where incumbent LECs are responsible for transporting the call to the destination. Ameritech contends that it is currently offering "common transport" service as switched access service and wholesale usage service. Ameritech argues that these services are not network elements; rather, the switched access and wholesale usage services use many separate components of the existing public switched network in combination. Ameritech claims that "common transport" is thus inextricably intertwined with switching, and is not "transport unbundled from switching."[37] Ameritech also argues that the Commission's rules applicable to the provision of unbundled switching only require that incumbent LECs offer the features "the switch is capable of providing."[38] Ameritech claims that the switch does not include the routing instructions, which are a proprietary product of Ameritech, and are not a feature of the switch.[39]

13. Ameritech contends that competitive LECs are trying to "game" the statutory pricing scheme by attempting to purchase minutes of use of Ameritech's entire network, as opposed to a specific transport facility within the network. According to Ameritech, competitive carriers would thus be able to purchase unbundled elements while avoiding the concomitant risk that the leased facility will be underutilized. This, according to Ameritech,

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[34] Ameritech Opposition at 7; BellSouth Opposition at 5. *See also* Bell Atlantic Opposition at 20 (the Commission's unbundled rules require services to be unbundled into separate network elements).

[35] Ameritech Opposition at 7.

[36] Letter from James K. Smith, Director Federal Relations, Ameritech, to William F. Caton, Acting Secretary, FCC, Feb. 3, 1997 (Ameritech Feb. 3 *Ex Parte*).

[37] Ameritech Jan. 28 *Ex Parte*.

[38] Letter From James K. Smith, Director Federal Relations, Ameritech, to William F. Caton, Acting Secretary, FCC, May 9, 1997 (Ameritech May 9 *Ex Parte*) attaching Supplemental Rebuttal Testimony of David H. Gebhardt at 6-7 (Gebhardt Supplemental Rebuttal Testimony).

[39] Gebhardt Supplemental Rebuttal Testimony at 6.

is contrary to the FCC's intent.[40] Bell Atlantic contends that WorldCom is requesting a single usage-sensitive rate for both dedicated and tandem switched transport. Bell Atlantic opposes this request on the ground that it seeks reinstatement of the "equal charge per unit of traffic" rule[41] that the Commission abandoned years ago.[42] BellSouth claims that per minute-of-use pricing for shared transport would be inconsistent with the 1996 Act because, pursuant to Section 252(d)(1), pricing for an unbundled element shall be "based on the cost . . . of providing" the element.[43] BellSouth contends that the "common" transport option that WorldCom requests would consist of "common" transport between an incumbent LEC's local end office and tandem plus dedicated transport between the incumbent LEC's tandems and the serving wire center. BellSouth argues that the costs of the dedicated transport are not usage-sensitive.[44] In addition, several incumbent LECs object to WorldCom's petition on the ground that it would enable requesting carriers, in effect, to obtain access service without having to pay access charges.[45]

14. AT&T contends that Ameritech's proposal for "shared transport" is merely dedicated transport with a billing option that would enable carriers to resell portions of the

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[40] Ameritech Feb. 3 *Ex Parte*, *citing Local Competition Order*, FCC Rcd at 15668-69, para. 334. *See also* Ameritech Opposition at 7-8 (citing the Commission's statement that carriers purchasing network elements by definition face a greater risk than a reseller but under WorldCom's proposal, requesting carriers assume no additional risk).

[41] The "equal charge per unit of traffic rule" was established in the Modification of Final Judgment (MFJ) in *United States v. AT&T*, 552 F. Supp. 131 (D.D.C. 1982), *affirmed sub. nom., Maryland v. United States*, 103 S. Ct. 1240 (1983). The rule required that until Sept. 1, 1991:

> Charges for delivery or receipt of traffic of the same type between end offices and facilities of interexchange carriers within an exchange area, shall be equal, per unit of traffic delivered or received, for all interexchange carriers.

MFJ, Appendix B, Section B.

[42] Bell Atlantic Opposition at 20; Bell Atlantic Reply at 10. Bell Atlantic claims, however, that, if WorldCom seeks merely to route *local calls* made by customers of competitive carriers that purchase unbundled switching over the incumbent's network in common with local calls made by customers of the incumbent, then Bell Atlantic is willing to provide such transport and will route competitive carrier's local calls between offices exactly the way Bell Atlantic routes its own local calls. Bell Atlantic Reply at 10.

[43] BellSouth Reply at 6, *citing* 47 U.S.C. § 252(d)(1).

[44] BellSouth Reply at 6.

[45] Ameritech Opposition at 7; USTA Opposition at 16-17; LECC Reply at 9.

dedicated transport and have Ameritech act as the billing agent.[46] AT&T argues that shared transport, as defined by Ameritech, would not provide a viable transport option for competitive carriers. AT&T claims that competitive carriers cannot properly engineer a transport network because they do not have access to data about existing traffic patterns and levels. Consequently, AT&T alleges that, under Ameritech's shared transport proposal, competitive carriers will be forced to route their traffic to tandems even when it would be more efficient to route such traffic directly to end offices. AT&T claims that this will lead to poor utilization of incumbent LEC interoffice transport facilities and will require the inefficient deployment of additional transport facilities between incumbent LEC end offices and the tandems.[47] AT&T also argues that usage sensitive pricing for shared use of interoffice transport facilities is consistent with other network elements such as unbundled switching, tandem switching, signalling, and call related databases, which are either partly or entirely priced on a per minute-of-use or per query basis.[48] In contrast to Ameritech's position regarding the routing table, NYNEX claims that the shared transport unbundled element being offered by NYNEX allows competing carriers to use the same end office routing tables and functions that are used by NYNEX to route its own traffic.[49] Also, WorldCom claims that, when a carrier purchases unbundled local switching, it purchases all "features and functions, including functions integral to call routing" including the routing table.[50]

15. MCI and AT&T assert that the per minute-of-use option for shared transport is critical when providing local exchange service via unbundled local switching.[51] AT&T states that the Commission, in the *Local Competition Order*, recognized that the unbundling requirements of the 1996 Act provided competitive carriers with the opportunity to share the economies of scale and scope of the incumbent LEC. AT&T contends that access to shared

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[46] AT&T Jan. 28 *Ex Parte*.

[47] Letter from Bruce K. Cox, Government Affairs Director, AT&T, to William F. Caton, Acting Secretary, FCC, Dec. 12, 1996 (AT&T Dec. 12 *Ex Parte*).

[48] AT&T Jan. 28 *Ex Parte*. *See also* WorldCom May 21 *Ex Parte*.

[49] Letter from G. R. Evans, Vice President Federal Regulatory Affairs, NYNEX, to William F. Caton, Acting Secretary, FCC, July 18, 1997 (NYNEX July 18 *Ex parte*).

[50] Letter from Linda L. Oliver, Counsel for WorldCom, Inc., to William F. Caton, Acting Secretary, FCC, May 21, 1997 (WorldCom May 21 *Ex parte*) attaching Surrebuttal Testimony of Joseph Gillan at 16. (Gillan Surrebuttal Testimony). *See also* WorldCom Opposition at 3 (shared transport is necessary to permit a requesting carrier using the local switching element to use the same routing options for its local traffic that the incumbent LEC uses for its own traffic).

[51] MCI June 17 *Ex Parte*; AT&T Jan. 25 *Ex Parte*.

transport on a cost-based, per minute-of-use basis is critical to preserving such scale and scope economies for competitive carriers.[52] MCI claims that competing carriers will need access to unbundled local switching and shared transport in less densely populated areas, because they are likely to build their own facilities early on only in urban centers. MCI contends that transport thus needs to be priced on a per minute-of-use basis because, in less densely populated areas, new entrants may have insufficient customer volume to justify flat-rated, dedicated transport.[53] MCI notes that other incumbent LECs, including NYNEX and BellSouth, are offering shared transport on a per minute-of-use basis.[54] MCI further notes that Ameritech's proposed non-recurring charges associated with Ameritech's shared and dedicated transport make the use of flat-rated shared and dedicated facilities even more uneconomic.[55] MCI contends that in Illinois Ameritech, in connection with its unbundled local switching proposal, is attempting to impose monthly trunk port charges of $147.56 for each digital trunk port and a nonrecurring charge of $729.39 for each trunk port. MCI claims that, if Ameritech is successful in forcing new entrants to use dedicated trunking in connection with unbundled local switching at these rates, there is little likelihood that use of unbundled local switching will be a viable entry strategy where traffic volumes do not justify flat-rated transport.[56]

16. AT&T and WorldCom also argue that, contrary to Ameritech's contention, defining shared transport consistent with the competitive carriers' interpretation would not eliminate the difference between resale and unbundled elements.[57] AT&T claims that the

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[52] AT&T Jan. 28 *Ex Parte*, *citing Local Competition Order*, 11 FCC Rcd at 15508-09, para. 11 ("incumbent LECs have economies of density, connectivity, and scale; traditionally, these have been viewed as creating a natural monopoly . . . [t]he local competition provisions of the [1996] Act require that these economies be shared with entrants"); *Id.* at 15624, para. 242 ("National requirements for unbundled elements will allow new entrants . . . seeking to enter local markets on a national or regional scale to take advantage of economies of scale in the network design").

[53] MCI June 17 *Ex Parte*. AT&T claims that competitive carriers will not have the volume of traffic to justify purchasing dedicated transport. Letter from Judy Argentieri, Government Affairs Director, AT&T, to William F. Caton, Acting Secretary, FCC, Jan. 6, 1997 (AT&T Jan. 6 *Ex Parte*). *Accord* WorldCom Apr. 16 *Ex Parte*; CompTel Opposition at 2-3 (a usage option for tandem-switched transport is necessary to prevent harmful discrimination against new entrants who must rely upon tandem-switched transport compared with larger carriers whose traffic volumes justify purchasing dedicated transport).

[54] MCI June 17 *Ex Parte*.

[55] MCI June 17 *Ex Parte*.

[56] MCI June 17 *Ex Parte*.

[57] Letter from Bruce K. Cox, Government Affairs Director, AT&T, to William F. Caton, Acting Secretary, FCC, May 14, 1996 (AT&T May 14 *Ex Parte*); Letter from Linda L. Oliver, Counsel for WorldCom, Inc., to William F. Caton, Acting Secretary, FCC, May 23, 1997 (WorldCom May 23 *Ex parte*).

Commission. in the *Local Competition Order*, identified three differences between the purchase of unbundled elements and resale, and all three differences continue to be valid.[58]

17. WorldCom contends that the Act and the Commission's rules make clear that the requesting carrier, purchasing unbundled local switching, is the sole provider of the local switching portion of interexchange access, regardless of the method of transport chosen by the interexchange carrier (IXC) to reach the unbundled local switch.[59] WorldCom suggests that NYNEX and Bell Atlantic do not contest this.[60] AT&T contends that, when a requesting carrier purchases the unbundled local switch and the unbundled loop, that requesting carrier is entitled to bill an IXC for the access services associated with those unbundled network elements when the competitive carrier's local customer initiates or receives an interexchange call carried by that IXC. AT&T also claims that the requesting carrier has the right to offer transport services to the IXC; it is, however, the IXC's decision as to which carrier it uses to provide access transport services.[61]

18. Responding to LECC's petition, WorldCom argues that, by tying the provision of shared transmission facilities to both local switching and tandem capabilities, the clarification sought by LECC is overbroad and would unnecessarily constrain the ability of requesting carriers to purchase access to shared transmission facilities between two end offices as a

[58] AT&T May 14 *Ex Parte*. First, according to AT&T, network element purchasers bear the risk if elements, such as the loop and the switch, are not profitably utilized by customers. Carriers purchasing end-to-end rebundled unbundled elements face the risk that their users will generate substantial switch usage costs on local calls (free usage), without generating significant interLATA traffic and associated revenue. Second, competitive carriers buying the end-to-end unbundled elements can use their elements to create services the incumbent does not offer, and thus increase competitive options to consumers. Finally, use of rebundled unbundled network elements fosters the growth of facilities-based competition because competitors can gradually introduce their own facilities in place of elements purchased from incumbents. AT&T contends that most large competitive carriers would prefer to own their own networks because it reduces their vulnerability to discrimination by the incumbent, and gives them greater control over their costs, network quality, and ability to provide new services in response to consumer demand. *Id. See also* WorldCom May 23 *Ex Parte* (combinations of network elements provide new entrants an entirely different competitive entry strategy than resale. Such combinations of network elements permit new entrants the opportunity to provide new service and price pressures on incumbent LECs).

[59] WorldCom Apr. 16 *Ex Parte*.

[60] WorldCom Apr. 16 *Ex Parte*.

[61] Letter from Bruce K. Cox, Government Affairs Director, AT&T, to William F. Caton, Acting Secretary, FCC, filed July 11, 1997.

network element.[62] WorldCom further contends that such a transport regime would require that each requesting carrier that purchases dedicated trunks between end offices establish customized routing using new line class codes. According to WorldCom, this would lead to rapid line class code exhaustion.[63]

III. DISCUSSION

19. On July 18, 1997, the United States Court of Appeals for the Eighth Circuit affirmed in part and vacated in part the Commission's *Local Competition Order*. We note, as a predicate to our discussion below, that the court affirmed the Commission's rulemaking authority to identify unbundled network elements. The court held that section 251(d)(2) of the Act expressly gave the Commission jurisdiction in this area.[64] We thus conclude that the Commission has authority to address, in this reconsideration order, the issues raised by petitioners concerning the extent to which "shared transport" should be provided as an unbundled element.

20. WorldCom filed a petition for clarification, and LECC filed a petition for reconsideration of the *Local Competition Order*; both petitions concerned the definition of shared transport as an unbundled network element. WorldCom filed a petition for clarification pursuant to 47 U.S.C. § 405 and 47 C.F.R. § 1.429, which set forth rules regarding petitions for reconsideration. In its petition WorldCom also stated that, "[s]hould the Commission not regard this petition as a request for clarification of the *Local Competition Order*, WorldCom requests that it be regarded as a petition for reconsideration."[65] We believe WorldCom's filing is more properly addressed as a petition for reconsideration, and treat it as such in this decision.

21. Parties disagree about what we required in the *Local Competition Order* with respect to shared transport. In addition, parties ask us to clarify or reconsider our decision regarding the provision of shared transport under section 251(c)(3). We first restate what we required in the *Local Competition Order*, and then reconsider certain aspects that may have been unclear or that were not addressed in the *Local Competition Order*. We then respond to

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[62] WorldCom Opposition at 3-5 (network cost and efficiency of both the incumbent and the requesting carrier would suffer because additional and unnecessary dedicated trunk groups would have to be created, raising the costs for competitors, and the incumbent's own trunk groups would operate less efficiently as new entrant's traffic is removed from trunk groups already sized to handle this traffic load).

[63] WorldCom Opposition at 5.

[64] *Iowa Utilities Bd.* at *32, n.10.

[65] WorldCom Petition at 1, fn 1.

arguments raised by parties that advocate a different approach to the provision of shared transport than our rules require.

22. We believe that the petitions for reconsideration have raised reasonable questions about the scope and nature of an incumbent LEC's obligation to offer shared transport as an unbundled network element, pursuant to section 251(c)(3) and our implementing regulations. We address these issues below. We also believe, however, some parties have argued that certain aspects of the rules adopted last August were ambiguous which, in our view, were clear. Specifically, in the *Local Competition Order*, we expressly required incumbent LECs to provide access to transport facilities "shared by more than one customer or carrier."[66] The term "carrier" includes both an incumbent LEC as well as a requesting telecommunications carrier. We, therefore, conclude that "shared transport," as required by the *Local Competition Order* encompasses a facility that is shared by multiple carriers, including the incumbent LEC. We recognize that the *Local Competition Order* did not explicitly state that an incumbent LEC must provide shared transport in a way that enables the traffic of requesting carriers to be carried on the same facilities that an incumbent LEC uses for its traffic. We find, however, that a fair reading of our order and rules does not support the claim advanced by Ameritech that a shared network element necessarily is shared only among competitive carriers and is separate from the facility used by the incumbent LEC for its own traffic. Indeed, only Ameritech and US West suggest that the *Local Competition Order* could be interpreted to require sharing only between multiple competitive carriers.[67] Moreover, the fact that we required incumbent LECs to provide access to other network elements, such as signalling, databases, and the local switch, which are shared among requesting carriers and incumbent LECs is consistent with our view that transport facilities "shared by more than one customer or carrier" must be shared between the incumbent LECs and requesting carriers. Furthermore, with respect to local switching, we expressly rejected, in the *Local Competition Order*, a proposal that incumbent LECs could, or were required to, partition local switches before providing requesting carriers access to incumbent LEC switches under section 251(c)(3). We stated that "[t]he requirements we establish for local switch unbundling do not entail physical division of the switch, and consequently do not impose the inefficiency or technical difficulties identified by some commentators."[68] We thus required that shared portions of incumbent LEC switches would be shared by all carriers, including the incumbent LEC. Although we do not believe that the *Local Competition Order* was unclear as to this aspect of an incumbent LEC's obligation to provide shared transport, we take this opportunity to state explicitly that the *Local Competition Order* requires incumbent LECs to offer

[66] 47 C.F.R. § 51.319(d)(2)(i).

[67] *See* Ameritech Jan. 28. *Ex Parte*; US West Feb. 27 *Ex Parte*.

[68] *Local Competition Order*, 11 FCC Rcd at 15708, para. 416.

requesting carriers access, on a shared basis, to the same interoffice transport facilities that the incumbent uses for its own traffic.

23. We also conclude that the *Local Competition Order* was not ambiguous as to an incumbent LEC's obligation to offer access to the routing table resident in the local switch to requesting carriers that purchase access to the unbundled local switch.[69] The *Local Competition Order* made clear that requesting carriers that purchase access to the unbundled local switch may obtain customized routing, unless it is not technically feasible to provide customized routing from that switch. In those instances, a requesting carrier is limited to using the routing instructions in the incumbent LEC's routing table.[70] In so holding, we necessarily accepted the view that requesting carriers that take unbundled local switching have access to the incumbent LEC's routing table, resident in the switch. We find nothing in the *Local Competition Order* that supports the contention that requesting carriers that obtain access to unbundled local switching, pursuant to section 251(c)(3), do not obtain access to the routing table in the unbundled local switch.

24. The *Local Competition Order* did not clearly define certain aspects of incumbent LECs' obligation to provide access to shared transport under section 251(c)(3). In particular, we did not clearly and unambiguously (1) identify all portions of the network to which incumbent LEC must provide interoffice transport facilities on a shared basis; and (2) address whether requesting carriers may use shared transport facilities to provide exchange access service to IXCs for access to customers to whom they also provide local exchange service. We do so here on reconsideration.

A. Incumbent LECs' obligation regarding shared transport

25. We conclude that the obligation of incumbent LECs to provide requesting carriers with access to shared transport extends to all incumbent LEC interoffice transport facilities, and not just to interoffice facilities between an end office and tandem. Thus, incumbent LECs are required to provide shared transport between end offices, between tandems, and between tandems and end offices).[71]

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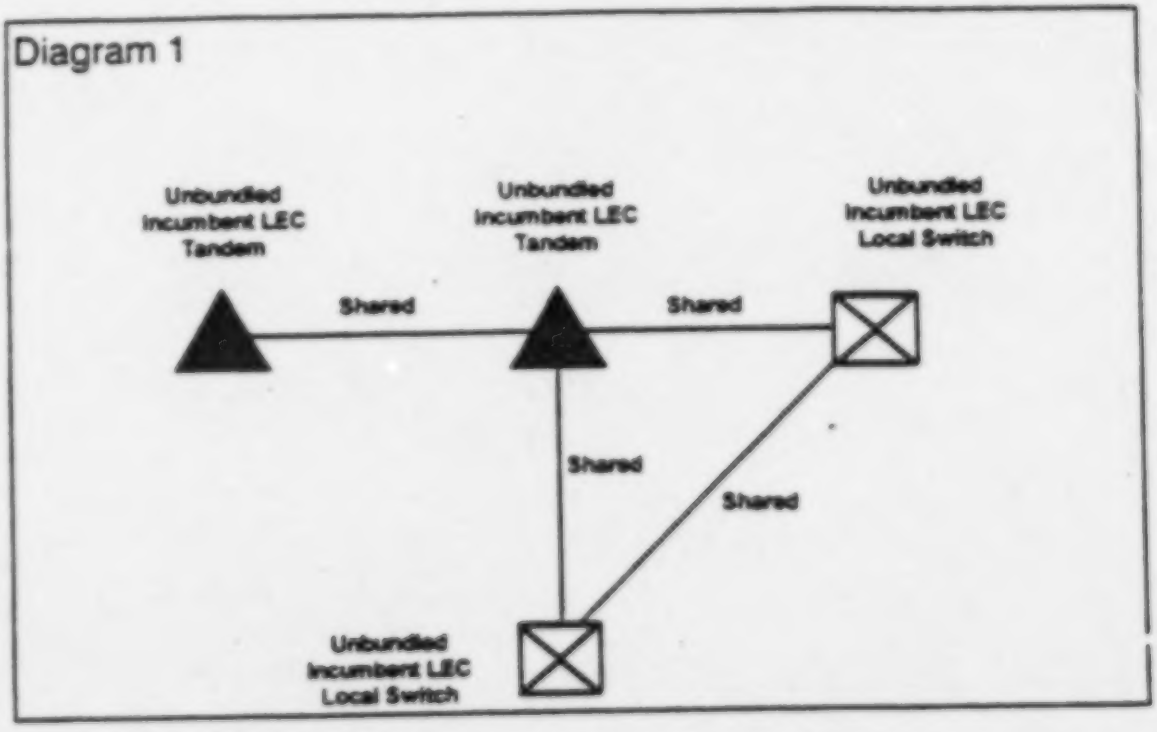
[69] Both end office and tandem switches contain routing tables, which provide information about how to route each call. The routing instructions notify the switch as to which trunks are to be used in transporting a call. Depending upon the availability of circuits, a call may be routed directly from the end office of the calling party to the called party's end office, or routed through a tandem switch.

[70] *Local Competition Order*, 11 FCC Rcd at 15706, para. 412.

[71] *See* Diagram 1.



26. The *Local Competition Order* expressly required "incumbent LECs to provide unbundled access to shared transmission facilities between end offices and the tandem switch."[72] Parties disagree, however, about whether incumbent LECs are required to provide shared transport between end offices. As noted above,[73] there is a discrepancy between the rule that establishes the general obligation to provide shared transport as a network element, and the rule vacated by the court that purports to establish the pricing standard for shared transport.[74] To the extent that incumbent LECs already have transport facilities between end offices, and between tandems, the routing table contained in the switch most likely would

[72] *Local Competition Order*, 11 FCC Rcd at 15718, para. 440. The Commission also stated in its rules that shared transmission facilities must be made available between "tandem switches and end offices." 47 C.F.R. § 51.509(d).

[73] *See supra* para. 9.

[74] 47 C.F.R. §§ 51.319(d) and 51.509(d). We note that the Eighth Circuit has held that the Commission lacked jurisdiction to adopt the pricing standard set forth in section 51.509(d), and accordingly vacated that section of the Commission's rules.

route calls between such switches.[75] We therefore conclude that there is no basis for limiting the use of shared transport facilities to links between end office switches and tandem switches. Limiting the definition of shared transport in this manner would not permit requesting carriers to utilize the routing tables in the incumbent LECs' switches. To the contrary, such a limitation effectively would require a requesting carrier to design its own customized routing table, in order to avoid having its traffic transported over the same interoffice facilities, connecting end offices, that the incumbent LEC use to transport its own interoffice traffic. Moreover, in the *Local Competition Order*, we held that it is technically feasible to provide access to interoffice transport facilities between end offices and between end offices and tandem switches.[76] No new evidence has been presented in this proceeding to convince us that our earlier conclusion regarding technical feasibility was incorrect.[77]

27. We further clarify in this order that incumbent LECs are only required to offer *dedicated* transport between their switches, or serving wire centers, and requesting carriers' switches. Our *Local Competition Order* was not absolutely clear as to whether incumbent LECs must provide dedicated or shared interoffice transport between incumbent LEC switches, or serving wire centers, and switches owned by requesting carriers. In the *Local Competition Order*, we required incumbent LECs to "provide access to *dedicated transmission*

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[75] In fact, incumbent LECs would have to *modify* their routing tables in order to prevent calls from being routed between end offices or between tandems.

[76] *Local Competition Order*, 11 FCC Rcd at 15719, paras. 442 and 443.

[77] Among incumbent LECs, only Ameritech, in various *ex parte* submissions, asserts that its switches are unable to "provide precise usage data or originating carrier identity for terminating local usage, or to identify terminating access usage with the called number." In essence, Ameritech contends that it is unable to accurately bill for the use of shared transport, including exchange access. Letter from James K. Smith, Director Federal Relations, Ameritech, to William F. Caton, Acting Secretary, FCC, July 15, 1997 (Ameritech July 15 *Ex Parte*) attaching Reply Brief in Support of Application by Ameritech Michigan for Provision of In-Region, InterLATA Services in Michigan at 22-23 (Ameritech 271 Michigan Application Reply). As we held in our *Local Competition Order*, however, a determination of technical feasibility does not include consideration of billing concerns. 47 C.F.R. §51.5. *Accord Iowa Utilities Bd.* at *21. Moreover, as noted above, Ameritech is the only party to contend that it is not currently able to measure and bill for shared transport. In contrast, Bell Atlantic, NYNEX, and PacTel have stated that they offer shared transport in conjunction with unbundled local switching. Letter from Patricia E. Koch, Assistent Vice President - Government Relations - FCC, Bell Atlantic, to William F. Caton, Acting Secretary, FCC, August 4, 1997. Letter from G.R. Evans, Vice President Federal Regulatory Affairs, NYNEX, to William F. Caton, Acting Secretary, FCC, July 18, 1997; Letter from M.E. Garber, Senior Counsel, Pacific Telesis, to William F. Caton, Acting Secretary, FCC, Mar. 3, 1997. In any event, we note that Ameritech has stated in another proceeding that it has proposed a settlement mechanism as an interim solution until it develops a long-term solution. Ameritech 271 Michigan Application Reply, CC Docket No. 97-137, at 22. Ameritech has also stated that it "is operationally capable of furnishing the 'platform' (unbundled local switching and shared transport) upon request." Ameritech 271 Michigan Application Reply, CC Docket No. 97-137, at 23. We thus find no evidence that it is not technically feasible to provide shared transport.

facilities between LEC central offices or between end offices and those of competing carriers."[78] This could be read to suggest that incumbent LECs are only required to provide dedicated (but not shared) interoffice transport facilities between their end offices, or serving wire centers, and points in the requesting carrier's network. The rule that defines interoffice transmission facilities, however, is less clear, and could be read to require incumbent LECs to provide shared transport between incumbent LECs' switches, or serving wire centers, and requesting carriers' switches.[79]

28. We therefore clarify here that incumbent LECs must offer only *dedicated transport*, and not shared transport, between their switches, or serving wire centers, and requesting carriers' switches, as set forth in the *Local Competition Order*. We also note that the *Local Competition Order* expressly limited the requirement to provide unbundled interoffice transport facilities to *existing* incumbent LEC facilities.[80]

29. On reconsideration, we further clarify that incumbent LECs are not required to provide shared transport between incumbent LEC switches and serving wire centers.[81] We stated above that shared transport must be provided between incumbent LEC switches. Serving wire centers are merely points of demarcation in the incumbent LEC's network, and are not points at which traffic is switched. Traffic routed to a serving wire center is traffic dedicated to a particular carrier. We thus conclude that unbundled access to the transport links between incumbent LEC switches and serving wire centers must only be provided by incumbent LECs on a *dedicated* basis.[82]

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[78] *Local Competition Order*, 11 FCC Rcd at 15718, para. 440 (emphasis added).

[79] 47 C.F.R. 51.319(d)(1) states:

> Interoffice transmission facilities are defined as incumbent LEC transmission facilities dedicated to a particular customer or carrier, or shared by more than one customer or carrier, that provide telecommunications between wire centers owned by incumbent LECs or requesting telecommunications carriers, or between switches owned by incumbent LECs or requesting telecommunications carriers.

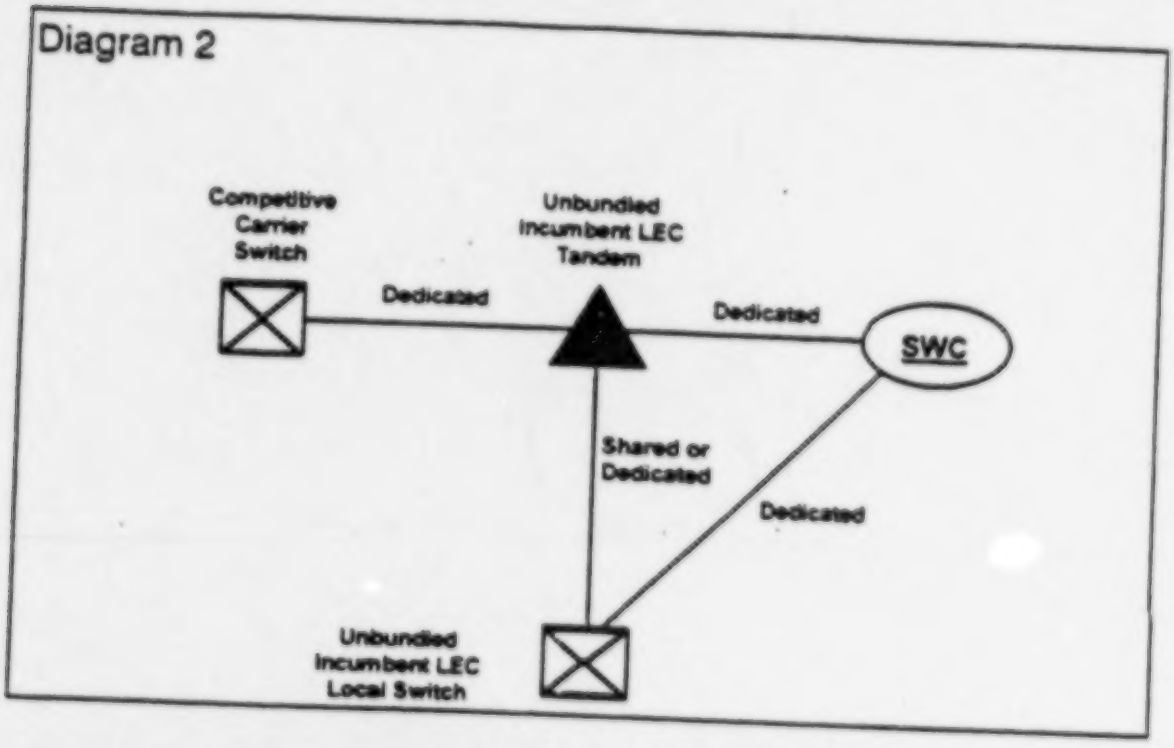
47 C.F.R. 51.319(d)(1).

[80] *Local Competition Order*, 11 FCC Rcd at 15722, para. 451.

[81] We note that this clarification finds some support in the *Local Competition Order*, where we concluded that: "[t]his requirement [that incumbent LECs provide access to dedicated transmission facilities] includes, at a minimum, interoffice facilities between end offices and serving wire centers . . ." *Local Competition Order* at 15718, para 440.

[82] *See* Diagram 2.

Diagram 2



30. Finally, we note that, traditionally, shared facilities are priced on a usage-sensitive basis, and dedicated facilities are priced on a flat-rated basis. We believe that this usage-sensitive pricing mechanism provides a reasonable and fair allocation of cost between the users of shared transport facilities. For example, in the *Access Charge Reform Order*, specifically the sections dealing with rate structure issues for interstate access charges, we required that the cost of switching, a shared facility, be recovered on a per minute of use basis, while the cost of entrance facilities, which are dedicated to a single interexchange carrier, be recovered on a flat-rated basis.[83] We note that several state commissions, in proceedings conducted pursuant to section 252 of the Act, have required incumbent LECs to offer shared transport priced on a usage-sensitive basis.[84] We acknowledge that, under the Eighth Circuit's decision, we may not establish pricing rules for shared transport. However, in situations where the Commission is required to arbitrate interconnection agreements

[83] Access Charge Reform, First Report and Order, CC Docket 96-262, FCC 97-158 (rel. May, 16, 1997) (*Access Charge Reform Order*) at paras. 135, 153.

[84] *See, e.g.*, Michigan Public Service Commission, Case No. U-11280, July 14, 1997, Order at 26; Public Service Commission of Wisconsin, Case No. 6720-TI-120, Findings of Fact, Conclusions of Law, and Second Order, May 30, 1997.

pursuant to subsection 252(e)(5), we intend to establish usage-sensitive rates for recovery of shared transport costs unless parties demonstrate otherwise.[85]

B. Application of the requirements of section 251(d)(2) to shared transport

31. Shared transport, as defined in this order, satisfies the two-prong test set forth in section 251(d)(2) of the Act. Section 251(d)(2) requires the Commission, in determining what network elements should be made available under section 251(c)(3), to consider "at a minimum, whether (A) access to such network elements as are proprietary in nature is necessary; and (B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer."[86] In the *Local Competition Order*, we held that an incumbent could refuse to provide access to a network element pursuant to section 251(d)(2) only if the incumbent LEC demonstrated that "the element is proprietary and that gaining access to that element is not necessary because the competing provider can use other, nonproprietary elements in the incumbent LEC's network to provide service."[87] We further held that, under section 251(d)(2)(B), we must consider "whether the failure of an incumbent to provide access to a network element would decrease the quality, or increase the financial or administrative cost of the service a requesting carrier seeks to offer, compared with providing that service over other unbundled elements in the incumbent LEC's network."[88] The Eighth Circuit affirmed the Commission's interpretation of section 251(d)(2).[89]

32. In the *Local Competition Order*, we concluded that, with respect to transport facilities, "the record provides no basis for withholding these facilities from competitors based on proprietary considerations."[90] We also concluded that section 251(d)(2)(B) requires incumbent LECs to provide access to shared interoffice facilities and dedicated interoffice facilities.[91] With respect to the unbundled local switch, we held that, even assuming that

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[85] *See* 47 U.S.C. § 252(e)(5). *See also Local Competition Order*, 11 FCC Rcd at 16127-32, paras. 1283-95 (giving notice of certain minimum procedural rules and substantive standards that the Commission will use if it assumes jurisdiction pursuant to section 252(e)(5)).

[86] 47 U.S.C. § 251(d)(2).

[87] *Local Competition Order*, 11 FCC Rcd at 15710, para. 419. *See also id.* at 15642, para. 283.

[88] *Local Competition Order*, 11 FCC Rcd at 15643, para. 285.

[89] *Iowa Utilities Bd. v. FCC*, at *22-24.

[90] *Local Competition Order*, 11 FCC Rcd at 15720, para. 446.

[91] *Local Competition Order*, 11 FCC Rcd at 15720-21, para. 447.

switching may be proprietary, at least in some respects, "access to unbundled local switching is clearly 'necessary' under our interpretation of section 251(d)(2)(A)."[92] We also concluded that a requesting carrier's ability to offer local exchange service would be "impaired, if not thwarted," without access to the unbundled local switch, and therefore, that section 251(d)(2)(B) requires incumbent LECs to provide access to the unbundled local switch.[93]

33. Upon reconsideration, we herein affirm that incumbent LECs are obligated under section 251(d)(2) to provide access to shared transport, as we here define it, as an unbundled network element. Parties in the record have not contended that interoffice transport facilities are proprietary, and we have no basis for modifying our prior conclusion that interoffice transport facilities are not proprietary. Thus, there is no basis under section 251(d)(2)(A) for incumbent LECs to refuse to provide interoffice transport facilities on a shared as well as a dedicated basis.

34. We also note that the failure of an incumbent LEC to provide access to all of its interoffice transport facilities on a shared basis would significantly increase the requesting carriers' costs of providing local exchange service and thus reduce competitive entry into the local exchange market. In the *Local Competition Order*, we observed that:

> By unbundling various dedicated and shared interoffice facilities, a new entrant can purchase *all* interoffice facilities on an unbundled basis as part of a competing local network, or it can combine its own interoffice facilities with those of the incumbent LEC. The opportunity to purchase unbundled interoffice facilities will decrease the cost of entry compared to the much higher cost that would be incurred by an entrant that had to construct all of its own facilities. An efficient new entrant might not be able to compete if it were required to build interoffice facilities where it would be more efficient to use the incumbent LEC's facilities.[94]

We continue to find the foregoing statements to be true with respect to shared as well as dedicated transport facilities. Requesting carriers should have the opportunity to use *all* of the incumbent LEC's interoffice transport facilities. Moreover, the opportunity to purchase transport facilities on a shared basis, rather than exclusively on a dedicated basis, will decrease the costs of entry.

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[92] *Local Competition Order*, 11 FCC Rcd at 15710, para. 419. In the *Local Competition Order*, we defined "necessary" in this specific context as meaning "that an element is a prerequisite for competition." *Id.* at para. 282. We also note that the Eighth Circuit affirmed this definition. *Iowa Utilities Bd.* at *22-23.

[93] *Local Competition Order*, 11 FCC Rcd at 15710-11, para. 420.

[94] *Local Competition Order*, 11 FCC Rcd at 15718-19, para. 441 (emphasis added).

35. We believe that access to transport facilities on a shared basis is particularly important for stimulating initial competitive entry into the local exchange market, because new entrants have not yet had an opportunity to determine traffic volumes and routing patterns. Moreover, requiring competitive carriers to use dedicated transport facilities during the initial stages of competition would create a significant barrier to entry because dedicated transport is not economically feasible at low penetration rates. In addition, new entrants would be hindered by significant transaction costs if they were required to continually reconfigure the unbundled transport elements as they acquired customers. We note that incumbent LECs have significant economies of scope, scale, and density in providing transport facilities. Requiring transport facilities to be made available on a shared basis will assure that such economies are passed on to competitive carriers. Further, if new entrants were forced to rely on dedicated transport facilities, even at the earliest stages of competitive entry, they would almost inevitably miscalculate the capacity or routing patterns. We recognize, however, that the need for access to all of the incumbent LEC's interoffice facilities on a shared basis may decrease as competitive carriers expand their customer base and have an opportunity to identify traffic volumes and call routing patterns. We therefore may revisit at a later date whether incumbent LECs continue to have an obligation, under section 251(d)(2), to provide access to all of their interoffice transmission facilities on a shared, usage sensitive basis.[95]

36. As noted above, although interoffice transport, as we define the element pursuant to section 251(c)(3), refers to the transport links in the incumbent LEC's network, access to those links on a shared basis effectively requires a requesting carrier to utilize the routing table contained in the incumbent LEC's switch. Ameritech contends that the routing table contained in the switch, which is used in conjunction with shared transport, is proprietary. Ameritech and other incumbent LECs further allege that requesting carriers may obtain the functional equivalent of shared transport either by purchasing transport as an access service, or by purchasing dedicated transport facilities. These parties thus contend that, under section 251(d)(2)(A), incumbent LECs are not required to provide shared transport (including use of the routing table contained in the switch) as a network element.

37. Issues regarding intellectual property rights associated with network elements are before us in a separate proceeding.[96] For purposes of this Order only, we therefore assume without deciding that the routing table is proprietary. We nevertheless conclude that section

[95] We note that, if, in the future, competitive carriers gain sufficient market penetration to justify obtaining dedicated transport facilities, either through the use of unbundled elements or through building their facilities, shared transport may no longer meet the section 251(d)(2) requirements. In that event, the Commission can evaluate at that time whether incumbent LECs must continue to provide access to shared transport as a network element.

[96] *See* MCI Petition for Declaratory Ruling, CC Docket No. 96-98, CCB Pol. 97-4 (Mar. 11, 1997).

251(d)(2) requires an incumbent LEC to provide access to both its interoffice transmission facilities and to the routing tables contained in the incumbent LEC's switches.[97] We affirm our finding in the *Local Competition Order* that transport provided as part of access service, or as a wholesale usage service, is not a viable substitute for shared transport as a network element.[98] All incumbent LECs are not required to offer transport as an access service on a stand alone basis. Only Class A carriers are required, under our *Expanded Interconnection* rules, to unbundle interstate transport service.[99] Moreover, transport service that incumbents offer under the *Expanded Interconnection* tariffs may include only interstate transport facilities (transport provided either via a tandem switch or direct trunked between a local switch and the serving wire center), not interoffice transport facilities directly connecting two local switches. In the *Local Competition Order*, moreover, we expressly rejected the suggestion that requesting carriers "are not impaired in their ability to provide a service . . . if they can provide the proposed service by purchasing the service at wholesale rates from a LEC."[100]

C. Use of shared transport facilities to provide exchange access service

38. In this order on reconsideration, we clarify that requesting carriers that take shared or dedicated transport as an unbundled network element may use such transport to provide interstate exchange access services to customers to whom it provides local exchange service. We further clarify that, where a requesting carrier provides interstate exchange access services to customers, to whom it also provides local exchange service, the requesting carrier is entitled to assess originating and terminating access charges to interexchange carriers, and it is not obligated to pay access charges to the incumbent LEC.

39. In the *Local Competition Order*, we held that, if a requesting carrier purchases access to a network element in order to provide local exchange service, the carrier may also use that element to provide exchange access and interexchange services.[101] We did not impose any restrictions on the types of telecommunications services that could be provided over network elements. We did not specifically consider in the *Local Competition Order*,

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[97] The Eighth Circuit recognized that "the Act itself expressly contemplates that requesting carriers will have access to network elements that are proprietary in nature." *Iowa Utilities Bd.* at *32, n.37.

[98] *See Local Competition Order*, 11 FCC Rcd at 15721, para. 448.

[99] Class A carriers are those exchange carriers that have more than $100 million in total company regulated revenues. 47 C.F.R. §§ 32.11(a)(1), 32.9000.

[100] *Local Competition Order*, 11 FCC Rcd at 15643-44, para. 286. *See also id.* at 15644, para. 287. *See also Iowa Utilities Bd.* at *21 (stating that the fact that a capability may be available as a service does not necessarily preclude that capability from being available as a network element).

[101] *Local Competition Order*, 11 FCC Rcd at 15679, para. 356.

however, whether a requesting carrier may use interoffice transport to provide exchange access service. We conclude here that a requesting carrier may use the shared transport unbundled element to provide exchange access service to customers for whom the carrier provides local exchange service.[102] We find that this is consistent with our initial decision.[103]

D. Response to Specific Arguments Raised by Parties

40. As discussed above, we define the unbundled network element of shared transport under section 251(c)(3) as interoffice transmission facilities, shared between the incumbent LEC and one or more requesting carriers or customers, that connect end office switches, end office switches and tandem switches, or tandem switches, in the incumbent LEC's network. We exclude from this definition interoffice transmission facilities that connect an incumbent LEC's switch and a requesting carrier's switch, and those connecting an incumbent LEC's end office switch, or tandem switch, and a serving wire center. This definition of shared transport assumes the interconnection point between the two carriers' networks, pursuant to section 251(c)(2), is at the incumbent LEC's switch. This definition is consistent with the statutory definition of network elements, which defines a network element as a facility or equipment used in the provision of a telecommunications service, including the features, functions, and capabilities provided by means of such facility or equipment.[104]

41. As an initial matter, we reject Ameritech's contention that, by definition, network elements must be partly or wholly dedicated to a customer.[105] To the contrary, we held in the *Local Competition Order* that some network elements, such as loops, are provided exclusively to one requesting carrier, and some network elements, such as interoffice transport provided on a shared basis, are provided on a minute-of-use basis and are shared with other carriers.[106] In the *Local Competition Order*, we also identified signalling, call-related databases, and the

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[102] We issue a further notice of proposed rulemaking below seeking comment on whether carriers may use dedicated and shared unbundled transport facilities to carry originating to, and terminating access traffic from, customer to whom the requesting carrier does not also provide local exchange service. *See infra* paras. 51-52.

[103] *See, e.g., Local Competition Order*, 11 FCC Rcd at 15679, para. 356 (section 251(c)(3) permints interexchange carriers and all other requesting telecommunications carriers, to purchase unbundled elements for the purpose of offering exchange access services). *See also* NYNEX July 18 *Ex Parte* (recognizing that, when a requesting carrier "wins a local service customer," and uses an unbundled network element such as shared transport to serve that customer, that the carrier "is entitled to use that same element to provide other telecommunications services, such as exchange access, to IXCs.")

[104] 47 U.S.C. § 153(29).

[105] *See* Ameritech Reply at 19.

[106] *Local Competition Order*, 11 FCC Rcd at 15631, para. 258.

switch, as network elements that necessarily must be shared among the incumbent and multiple competing carriers.[107]

42. We also reject Ameritech's and BellSouth's contention that, because WorldCom and other requesting carriers seek access to an element -- shared transport -- that cannot be effectively disassociated from another element -- local switching, the requesting carriers are in fact seeking access to a bundled service rather than to transport as a network element unbundled from switching.[108] As previously discussed, several of the network elements we identified in the *Local Competition Order* depend, at least in part, on other network elements. In particular, although we identified the signalling network as a network element, the information necessary to utilize signalling networks resides in the switch, which we identified as a separate network element. In addition, we required incumbent LECs, upon request, to provide access to unbundled loops conditioned to provide, among other things, digital services such as ISDN, even though the equipment used to provide ISDN service typically resides in the local switch, rather than in the loop.[109] We thus find no basis for concluding that each network element must be functionally independent of other network elements.

43. We reject as well Ameritech's contention that a network element must be identifiable as a limited or pre-identified portion of the network. We find nothing in the statutory definition of network elements that prohibits requesting telecommunications carriers from seeking access to every transport facility within the incumbent's network. Our definition of signalling as a network element does not require requesting carriers to identify in advance a particular portion of the incumbent LEC's signalling facilities, but instead permits requesting carriers to obtain access to multiple signalling links and signalling transfer points in the incumbent LEC's network on an as-needed basis.[110] We also reject Ameritech's assertion that shared transport cannot be physically separated from switching.[111] Both dedicated and shared transport facilities are transport links between switches. These links are physically distinct from the end office and tandem switches themselves.

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[107] *See* 47 C.F.R. § 51.319(e). *See also Iowa Utilities Bd.* at *18 (affirming determination that signalling and databases are network elements).

[108] *See* Ameritech Opposition at 7 and Bell South Reply at 6. Ameritech also contends that incumbent LECs are not required to provide bundled services at cost-based rates under section 251(c)(3) and section 252(d)(1). *See* Ameritech Opposition at 7.

[109] *Local Competition Order*, 11 FCC Rcd at 15691, para. 380.

[110] *See generally Local Competition Order*, 11 FCC Rcd at 15738-41, paras. 479-483.

[111] *See* May 9, 1997 *ex parte* from Jim Smith, Director, Federal Relations, Ameritech, to William Caton, Acting Secretary, FCC, attaching Supplemental Rebuttal Testimony of David H. Gebhardt at 2 (Gebhardt Supplemental Rebuttal Testimony).

44. Although we conclude that shared transport is physically severable from switching, incumbent LECs may not unbundle switching and transport facilities that are already combined, except upon request by a requesting carrier. Although, the Eighth Circuit struck down the Commission's rule that required incumbent LECs to rebundle separate network elements,[112] the court nevertheless stated that it: "upheld the remaining unbundling rules as reasonable constructions of the Act, because, as we have shown, the Act itself calls for the rapid introduction of competition into the local phone markets by requiring incumbent LECs to make their networks available to . . . competing carriers."[113] Among other things, the court left in effect section 51.315(b) of the Commission's rules, which provides that, "[e]xcept upon request, an incumbent LEC shall not separate requested network elements that the incumbent LEC currently combines."[114] Therefore, although incumbent LECs are not required to combine transport and switching facilities to the extent that those elements are not already combined, incumbent LECs may not separate such facilities that are currently combined, absent an affirmative request. In addition to violating section 51.315(b) of our rules, such dismantling of network elements, absent an affirmative request, would increase the costs of requesting carriers and delay their entry into the local exchange market, without serving any apparent public benefit. We believe that such actions by an incumbent LEC would impose costs on competitive carriers that incumbent LECs would not incur, and thus would violate the requirement under section 251(c)(3) that incumbent LECs provide nondiscriminatory access to unbundled elements. Moreover, an incumbent LEC that separates shared transport facilities that are already connected to a switch would likely disrupt service to its own customers served by the switch because, by definition, the shared transport links are also used by the incumbent LEC to serve its customers. Thus, incumbent LECs would seem to have no network-related reason to separate network elements that it already combines absent a request.

45. We likewise reject Ameritech's contention that purchasing access to the switch as a network element does not entitle a carrier to use the routing table located in that switch.[115] According to Ameritech, vendors provide switches that are capable of acting on routing instructions, but the switch itself does not include routing instructions; those instructions are added by the carrier after it purchases the switch from the vendor and are contained in a routing table resident in the switch. Ameritech asserts that its routing tables are proprietary products, and "are not a feature of the switch."[116] In the *Local Competition Order*, we

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[112] *Iowa Utilities Bd.* at *25. *See also* 47 C.F.R. § 51.315(c)-(f) (vacated rules).

[113] *Iowa Utilities Bd.* at *28.

[114] 47 C.F.R. § 51.315(b).

[115] Gebhardt Supplemental Rebuttal Testimony at 6-7.

[116] Gebhardt Supplemental Rebuttal Testimony at 6-7.

determined that "we should not identify elements in rigid terms, but rather by function."[117] Routing is a critical and inseverable function of the local switch. One of the most essential features a switch performs is to provide routing information that sends a call to the appropriate destination. We find no support in the statute, the *Local Competition Order*, or our rules for Ameritech's assertion that the switch, as a network element, does not include access to the functionality provided by an incumbent LEC's routing table. In fact, the only question addressed in the *Local Competition Order* was whether requesting carriers could obtain *customized* routing, that is, routing different from the incumbent LEC's existing routing arrangements.[118]

46. We further find that access to unbundled switching is not necessarily limited to the product the incumbent LEC originally purchased from a vendor. As we noted in the *Local Competition Order*, incumbent LECs may in some instances be required to modify or condition a network element to accommodate a request under section 251(c)(3).[119] Moreover, we held that unbundled local switching includes access to the vertical features of the switch, regardless of whether the vertical features were included in the switch when it was purchased, or whether the vertical features were purchased separately from the vendor or developed by the incumbent.[120] We held that network elements include physical facilities "as well as logical features, functions, and capabilities that are provided by, *for example, software located in a physical facility such as a switch*."[121] We also note that the Eighth Circuit affirmed the Commission's interpretation of the Act's definition of "network elements." The court stated that "the Act's definition of network elements is not limited to only the physical components of a network that are directly used to transmit a phone call from point A to point B" and that the Act's definition explicitly made reference to "databases, signaling systems, and information sufficient for billing and collection."[122] Thus, just as databases and signaling systems may include software created by the incumbent LEC, which must be made available to competitive carriers purchasing those elements on an unbundled basis, we believe that the

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[117] *Local Competition Order*, 11 FCC Rcd at 15631-32, para. 259.

[118] *Local Competition Order*, 11 FCC Rcd at 15709, para. 418. We concluded that incumbent LECs must offer customized routing unless they prove to the state commission that doing so would not be technically feasible in a particular switch.

[119] *See, e.g., Local Competition Order*, 11 FCC Rcd at 15692, para. 382. This determination was specifically "endorsed" by the Eighth Circuit. *Iowa Utilities Bd.* at *32, n.33. *See also* 47 C.F.R. § 51.307.

[120] *See generally Local Competition Order*, 11 FCC Rcd at 15706, para. 412. *See also* 47 C.F.R. § 51.319(c)(1)(i)(C).

[121] *Local Competition Order*, 11 FCC Rcd at 15632, para. 260 (emphasis added).

[122] *Iowa Utilities Bd.* at *20.

routing table created by the incumbent LEC that is resident in the switch must be made available to requesting carriers purchasing unbundled switching. Finally, we note that Ameritech is the only incumbent LEC that has argued in this record that the routing table is not included in the unbundled local switching element. Other incumbent LECs have stated that they offer shared transport in conjunction with unbundled local switching.[123] This suggests that other incumbent LECs recognize that the routing table is a feature, function, or capability of the switch.

47. We also disagree with Ameritech's and BellSouth's argument that defining the unbundled network element shared transport as all transport links between any two incumbent LEC switches would be inconsistent with Congress's intention to distinguish between resale services and unbundled network elements. Section 251(c)(3) requires incumbent LECs to make available unbundled network elements at cost-based rates; sections 251(c)(4) and 252(d)(3) require incumbent LECs to make available for resale, at retail price less avoided costs, services the incumbent LEC offers to retail users. In the *Local Competition Order*, we held that a key distinction between section 251(c)(3) and section 251(c)(4) is that a requesting carrier that obtains access to unbundled network elements faces greater risk than a requesting carrier that only offers services for resale.[124] A requesting carrier that takes a network element dedicated to that carrier, and recovered on a flat-rated basis, must pay for the cost of the entire element, regardless of whether the carrier has sufficient demand for the services that the element is able to provide. The carrier thus is not guaranteed that it will recoup the costs of the element. By contrast, a carrier that uses the resale provision will not bear the risk of paying for services for which it does not have customers.[125] In particular, a requesting carrier that takes an unbundled local switch must pay for all of the vertical features included in the switch, even if it is unable to sell those vertical features to end user customers.[126] Requesting carriers that purchase shared transport as a network element to provide local exchange service must also take local switching, for the practical reasons set forth herein, and consequently will be forced to assume the risk associated with switching.[127]

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[123] *See* n.77 *supra*.

[124] *Local Competition Order*, 11 FCC Rcd at 15668-69, para. 334.

[125] *Iowa Utilities Bd.* at *26-27.

[126] *Local Competition Order*, 11 FCC Rcd at 15707-08, para. 414.

[127] A requesting carrier that uses its own self-provisioned local switches, rather than unbundled local switches obtained from an incumbent LEC, to provide local exchange and exchange access service would use dedicated transport facilities to carry traffic between its network and the incumbent LEC's network. Thus, the only carrier that would need shared transport facilities would one that was using an unbundled local switch.

48. BellSouth's arguement. that assessing a usage-sensitive rate for shared transport would be inconsistent with the 1996 Act because it would not reflect the manner in which costs are incurred. is similarly unpersuasive. BellSouth's argument is premised on the assumption that incumbent LECs would be required to provide shared transport over facilities between the tandem switch and the serving wire center. In this order, however, we make clear that incumbent LECs are required to provide transport on a dedicated, but not on a shared basis, over transport facilities between the incumbent LEC's tandem and the serving wire center. Thus, BellSouth's concern is misplaced.

49. We also find that there is no element in the incumbent LEC's network that is an equivalent substitute for the routing table. We agree with Ameritech that requesting carriers could duplicate the shared transport network by purchasing dedicated facilities. But in that instance, requesting carriers would be forced to develop their own routing instructions, and would not be utilizing a portion of the incumbent LEC's network to substitute for the routing table. In the *Local Competition Order*, we specifically rejected the suggestion that an incumbent LEC is not required to provide a network element if a requesting carrier could obtain the element from a source other than the incumbent LEC.[128] The Eighth Circuit affirmed the Commission's conclusion.[129]

50. Furthermore, we find that, at this stage of competitive entry, limiting shared transport to dedicated transport facilities, as Ameritech suggests, would impose unnecessary costs on new entrants without any corresponding, direct benefits. AT&T and Ameritech have both presented evidence regarding the costs of dedicated transport facilities linking every end office and tandem in a incumbent LEC's network as significant relative to the cost of "shared transport.". For example, AT&T contends that the cost is $.041767 per minute for dedicated transport plus associated non-recurring charges (NRCs).[130] AT&T claims that Ameritech would charge a total of $5008.58 per DS1 (including administrative charges and connection charges) and $58,552.87 per switch (including customized routing and billing development).[131] AT&T argues that this compares with $.000776 per minute for unbundled shared transport.[132]

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[128] *Local Competition Order*, 11 FCC Rcd at 15643-44, paras. 286-87. We found that requiring incumbent LECs to provide an element only where it is unavailable from any other source would nullify section 251(c)(3) because any new entrant, theoretically, could duplicate the incumbent LEC's entire network. Congress recognized that such duplication could delay entry and might be inefficient.

[129] *Iowa Utilities Bd.* at *22.

[130] Letter from Bruce Cox, Government Affairs Director, AT&T, to William F. Caton, Acting Secretary, FCC, March 20, 1997 (AT&T Mar. 20 *Ex Parte*).

[131] AT&T Mar. 20 *Ex Parte*.

[132] AT&T Mar. 20 *Ex Parte*.

Ameritech, on the other hand, contends the use of tandem routed dedicated facilities cost is $.0031148 per minute plus associated NRCs.[133] Ameritech claims that the nonrecurring charges per DS1 are $2769.27 (including administrative charges per order). Ameritech states that other NRCs include two trunk port connection charges ($770.29 initial, $29.16 subsequent), service ordering charge per occasion ($398.72 initial, $17.37 subsequent), billing development charge per switch ($35,328.87), custom routing charge, per line class code per switch ($232.24), and a service order charge ($398.73).[134] Nevertheless, under either AT&T's or Ameritech's cost calculations for dedicated transport, we conclude that the relative costs of dedicated transport, including the associated NRCs, is an unnecessary barrier to entry for competing carriers.

51. We also find that limiting shared transport to dedicated facilities, as defined by Ameritech, would be unduly burdensome for new entrants. First, we agree with MCI, AT&T, et al., that a new entrant may not have sufficient traffic volumes to justify the cost of dedicated transport facilities.[135] Second, a new entrant entering the local market with smaller traffic volumes would have to maintain greater excess capacity relative to the incumbent LEC in order to provide the same level of service quality (i.e., same level of successful call attempts) as the incumbent LEC.[136] As a new entrant gains market share and increased traffic volumes for local service, however, the relative amount of excess capacity necessary to prevent blocking should decrease. We do not rule out the possibility, therefore, that, once new entrants have had a fair opportunity to enter the market and compete, we might reconsider incumbent LECs' obligations to provide access to the routing table.[137]

52. As discussed above, requesting carriers may use shared transport to provide exchange access service to customers for whom they also provide local exchange service.

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[133] Letter from James K. Smith, Director Federal Relations, Ameritech, to William F. Caton, Acting Secretary, FCC, Mar. 28, 1997 (Ameritech Mar. 28 *Ex Parte*).

[134] Ameritech Mar. 28 *Ex Parte*.

[135] *See* n. 53 *supra*.

[136] *See* William W. Sharkey, *The Theory of Natural Monopoly* 184-85, (1982) ("that for a given number of circuits the economies [of scale] are more pronounced at higher grades of service (lower blocking probability). The economics of scale, however, decline substantially as the number of circuits increases. *Therefore for small demands a fragmentation of the network could result in a significant cost penalty, because more circuits would be required to maintain the same grade of service. At larger demands the costs of fragmentation are less pronounced.*") (emphasis added).

[137] As we held in the *Local Competition Order*, "the plain language of section 251(d)(2), and the standards articulated there, give us the discretion to limit the general obligation imposed by section 251(c)(3), but they do not require us to do so." *Local Competition Order*, 11 FCC Rcd at 15643-44, para. 286.

Several competing carriers contend that an interexchange carrier (IXC) has the right to select a requesting carrier that has purchased unbundled shared transport to provide exchange access service.[138] The carriers further contend that, if the IXC selects a requesting carrier, rather than the incumbent LEC, as the exchange access provider, the competing carrier is entitled to bill the IXC for the access services associated with shared transport. We find that a requesting carrier may use shared transport facilities to provide exchange access service to originate or terminate traffic to its local exchange customers, regardless of whether the requesting carrier or another carrier is the IXC for that traffic. We further conclude that a requesting carrier that provides exchange access service to another carrier is entitled to assess access charges associated with the shared transport facilities used to transport the traffic. We believe that this necessarily follows from our decision in the *Local Competition Order*[139] where we stated that:

> [W]here new entrants purchase access to unbundled network elements to provide exchange access services, whether or not they are also offering toll services through such elements, the new entrants may assess exchange access charges to IXCs originating or terminating toll calls on those elements. In these circumstances, incumbent LECs may not assess exchange access charges to IXCs because the new entrants, rather than the incumbents, will be providing exchange access services . . . .[140]

We therefore find that requesting carriers that provide exchange access using shared transport facilities to originate and terminate local exchange calls may also use those same facilities to provide exchange access service to the same customers to whom the requesting carrier is providing local exchange service. Requesting carriers are then entitled to assess access charges to interexchange carriers that use the shared transport facilities to originate and terminate traffic to the requesting carrier's customers.

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[138] Letter from Bruce D. Cox, Government Affairs Vice President for AT&T, to William F. Caton, Acting Secretary, FCC, July 11, 1997; WorldCom June 27 *Ex Parte*.

[139] In the *Local Competition Order*, we adopted a limited, transitional plan to address public policy concerns raised by the potential for requesting carriers to bypass access charges through the use of unbundled network elements. *See Local Competition Order* at 15862-69, paras. 716-32. Our authority to adopt that interim plan generally was upheld in *Competitive Telecommunications Association v. FCC*, although the court noted that the Commission lacks authority to decide whether carriers are obligated to continue to pay intrastate access charges. *Competitive Telecommunications Association v. FCC*, 1997 WL 352284 (8th Cir. June 27, 1997) at *6, n.5. Outside the scope of that transitional plan, however, we held that parties that use network elements to provide interexchange or exchange access services are not required to pay access charges. *Local Competition Order*, 11 FCC Rcd at 15682, para. 363; *Access Charge Reform Order* at paras. 339-340.

[140] *Local Competition Order*, 11 FCC Rcd at 15682, para. 363 n.772.

E. Final Regulatory Flexibility Analysis

53. As required by the Regulatory Flexibility Act (RFA),[141] the Commission issued a Final Regulatory Flexibility Analysis (FRFA) in its *Local Competition Order* in this proceeding.[142] None of the petitions for reconsideration filed in Docket No. 96-98 specifically address, or seek reconsideration of, that FRFA. This present Supplemental Final Regulatory Flexibility Analysis addresses the potential effect on small entities of the rules adopted pursuant to the *Third Order on Reconsideration* in this proceeding, *supra*. This Supplemental FRFA incorporates and adds to our FRFA.

54. *Need for and Objectives of this Third Order on Reconsideration and the Rules Adopted Herein.* The need for and objectives of the rules adopted in this *Third Order on Reconsideration* are the same as those discussed in the *Local Competition Order*'s FRFA "Summary Analysis of Section V Access to Unbundled Network Elements."[143] In general, our rules adopted in Section V were intended to facilitate the statutory requirement that incumbent local exchange carriers (LECs) are required to provide nondiscriminatory access to unbundled network elements.[144] In this *Third Order on Reconsideration*, we grant in part and deny in part the petitions filed for reconsideration and/or clarification of the *Local Competition Order*, in order to further the same needs and objectives. We conclude that the duty of incumbent LECs to provide access to unbundled network elements also includes the provision of "shared transport" as an unbundled network element between end offices, even if tandem switching is not used to route the traffic. We also hold that the term "shared transport" refers to all transmission facilities connecting an incumbent LEC's switches -- that is, between end office switches, between an end office switch and a tandem switch, and between tandem switches. We conclude that incumbent LECs are obligated under Section 251(d)(2) of the Communications Act of 1934, as amended, 47 U.S.C. § 251(d)(2), to provide access to both their interoffice transmission facilities and their routing tables contained in the incumbent LEC's switches. Finally, we conclude that a requesting carrier may use the shared transport unbundled element to provide exchange access service to customers for whom the carrier provides local exchange service.

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[141] *See* 5 U.S.C. § 604. The RFA, *see* 5 U.S.C. § 601 et seq., has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

[142] *Local Competition Order*, 11 FCC Rcd at 16143-80, paras. 1324-441.

[143] *Local Competition Order* at 16161, paras. 1374-1383.

[144] *Local Competition Order* at 16161, para. 1374.

55. *Description and Estimate of the Number of Small Entities To Which the Rules Will Apply.* In determining the small entities affected by our *Third Order on Reconsideration* for purposes of this Supplemental FRFA, we adopt the analysis and definitions set forth in the FRFA in our *Local Competition Order*.[145] The RFA directs the Commission to provide a description of and, where feasible, an estimate of the number of small entities that might be affected by the rules we have adopted. The RFA defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small business concern" under Section 3 of the Small Business Act.[146] A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).[147] The SBA has defined a small business for Standard Industrial Classification (SIC) categories 4812 (Radiotelephone Communications) and 4813 (Telephone Communications, Except Radiotelephone) to be an entity with no more than 1,500 employees.[148] Consistent with our FRFA and prior practice, we here exclude small incumbent local exchange carriers (LECs) from the definition of "small entity" and "small business concern."[149] While such a company may have 1500 or fewer employees and thus fall within the SBA's definition of a small telecommunications entity, such companies are either dominant in their field of operations or are not independently owned and operated. Out of an abundance of caution, however, for regulatory flexibility analysis purposes, we will consider small incumbent LECs within this present analysis and use the term "small incumbent LECs" to refer to any incumbent LEC that arguably might be defined by SBA as a small business concern.

56. In addition, for purposes of this Supplemental FRFA, we adopt the FRFA estimates of the numbers of telephone companies, incumbent LECs, and competitive access providers (CAPs) that might be affected by the *Local Competition Order*. In the FRFA, we determined that it was reasonable to conclude that fewer than 3,497 telephone service firms are small entity telephone service firms or small incumbent LECs that might be affected.[150] We further estimated that there are fewer than 1,347 small incumbent LECs that might be

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[145] *See Local Competition Order* at 16149-57, paras. 1341-60.

[146] *See* 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in 5 U.S.C. § 632). The Commission may also develop additional definitions that are appropriate to its activities.

[147] 15 U.S.C. § 632.

[148] *Id.* (*citing* 13 C.F.R. § 121.201).

[149] *See Local Competition Order*, 11 FCC Rcd at 16150, para. 1342.

[150] *Local Competition Order* at 16150, para. 1343.

affected.[151] Finally, we estimated that there were fewer than 30 small entity CAPs that would qualify as small business concerns.[152]

57. *Summary of Projected Reporting, Recordkeeping and Other Compliance Requirements.* As a result of the rules adopted in the *Third Order on Reconsideration*, we require incumbent LECs to provide requesting carriers with access to the same shared transport for all transmission facilities connecting incumbent LECs' switches. No party to this proceeding has suggested that changes in the rules relating to access to unbundled network elements would affect small entities or small incumbent LECs. We determine that complying with this rule may require use of engineering, technical, operational, accounting, billing, and legal skills. For example, a new entrant may be required to combine its own interoffice facilities with those of the incumbent LEC, or be required to combine purchased unbundled network elements into a package unique to its own needs.

58. *Steps Taken to Minimize Significant Economic Impact on Small Entities, and Alternatives Considered.* As stated in our FRFA, we determined that our decision to establish minimum national requirements for unbundled elements should facilitate negotiations and reduce regulatory burdens and uncertainty for all parties, including small entities and small incumbent LECs.[153] National requirements for unbundling may allow new entrants, including small entities, to take advantage of economies of scale in network design, which may minimize the economic impact of our decision in the *Local Competition Order*. As stated above, no petitioner has challenged this finding. We further find that our new rules, which clarify the definition of "shared transport," will likely ensure that small entities obtain the unbundled elements that they request.

59. **Report to Congress**: The Commission will send a copy of the *Third Order on Reconsideration*, including this Supplemental FRFA, in a report to be sent to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996, *see* 5 U.S.C. § 801(a)(1)(A). A copy of the *Third Order on Reconsideration* and this supplemental FRFA (or summary thereof) will also be published in the Federal Register, *see* 5 U.S.C. § 604(b), and will be sent to the Chief Counsel for Advocacy of the Small Business Administration.

IV. FURTHER NOTICE OF PROPOSED RULEMAKING

A. Discussion

[151] *Local Competition Order* at 16151, para. 1345.

[152] *Local Competition Order* at 16151, para. 1347.

[153] *Local Competition Order* at 16162, para 1376.

60. In the *Local Competition Order*, we did not condition use of network elements on the requesting carrier's provision of local exchange service to the end-user customer. We recognized, however, that, as a practical matter, a requesting carrier using certain network elements would be unlikely to obtain customers unless it offered local exchange service as well as exchange access service over those network elements. In particular, we found that local loops are dedicated to the premises of a particular customer.[154] Therefore, we stated that a requesting carrier would need to provide all services requested by the customer to whom the local loops are dedicated, and that, as a practical matter, requesting carriers usually would need to provide local exchange service over any unbundled local loops that it purchases under section 251(c)(3).[155] We similarly held in our *Order on Reconsideration* that the unbundled switch, as defined in the *Local Competition Order*, includes the line card, which is typically dedicated to a particular customer. We concluded that:

> Thus, a carrier that purchases the unbundled switching element to serve an end user effectively obtains the exclusive right to provide all features, functions, and capabilities of the switch, including switching for exchange access and local exchange service, for that end user. A practical consequence of this determination is that the carrier that purchases the local switching element is likely to provide all available services requested by the customer served by that switching element, including switching for local exchange and exchange access.[156]

61. Neither of the petitions for reconsideration expressly asked the Commission to determine whether requesting carriers may purchase shared transport facilities under section 251(c)(3) of the Act to originate or terminate interexchange traffic to customers to whom the requesting carrier does not provide local exchange service.[157] Moreover, the oppositions and replies to the two petitions for reconsideration, as well as the *ex partes*, focused on the issue of whether requesting carriers may use unbundled shared transport facilities, in conjunction

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[154] *Local Competition Order*, 11 FCC Rcd at 15679, para. 357.

[155] *Local Competition Order*, 11 FCC Rcd at 15679, para. 357.

[156] *Order on Reconsideration*, 11 FCC Rcd at 13048, para. 11.

[157] *See, e.g.*, WorldCom Petition at 6 (new local entrants may need to use shared transport facilities between end offices as well as between an end office and a tandem); WorldCom Opposition at 4 (contending that requesting carriers that purchase unbundled local switching should be able to route calls over the same facilities the incumbent LEC uses to transport its traffic); LECC Petition at 33 ("the Order requires incumbent LECs to provide unbundled access to shared transmission facilities between end offices and tandem switches . . . [t]he Commission, however, should clarify that such shared transmission facilities may be provided to a requesting carrier only in conjunction with local switching and tandem capability).

with unbundled switching, to compete in the local exchange market.[158] In fact, the issue of whether requesting carriers may purchase unbundled shared transport facilities to originate or terminate interexchange traffic to customers to whom the requesting carrier does not provide local exchange service was specifically addressed only in two recent *ex parte* submissions.[159] In order to develop a complete record on this issue, we issue this further notice of proposed rulemaking specifically asking whether requesting carriers may use unbundled dedicated or shared transport facilities in conjunction with unbundled switching, to originate or terminate interstate toll traffic to customers to whom the requesting carrier does not provide local exchange service. Absent restrictions requiring carriers to provide local exchange service in order to purchase unbundled shared or dedicated transport facilities, an IXC, for example, could request shared or dedicated transport under section 251(c)(3) for purposes of carrying originating interstate toll traffic between an incumbent LEC's end office and the IXC's point of presence (POP). Likewise, an IXC could request such transport network elements for purposes of terminating interstate toll traffic from its POP to an incumbent LEC's end office. Parties that advocate the use of transport network elements for the transmission of such access traffic should address whether that approach is consistent with our *Order on Reconsideration* regarding the use of the unbundled local switching element to provide interstate access service[160] as well as recent appellate court decisions interpreting section 251(c)(2) and (3).[161] Parties that advocate restricting the use of transport network elements should address whether such restrictions are consistent with section 251(c)(3) of the Act, which requires an incumbent LEC to provide access to unbundled network elements "for the provision of a telecommunications service." Moreover, those parties should also address the technical feasibility of requiring an IXC to identify terminating toll traffic that is destined for customers that are not local exchange customers of the incumbent LEC.

B. Procedural Matters

1. Ex Parte Presentations

[158] WorldCom April 16 *Ex Parte* (asserting that carriers that purchase unbundled local switching have the right to use incumbent LECs' interoffice transport facilities to complete local calls); AT&T Jan. 28 *Ex Parte* (noting that the Commission had held that carriers that seek to enter the local exchange market should be able to take advantage of the incumbent LEC's economies of scale); Bell Atlantic Reply at 10 (requesting carriers are entitled to purchase shared transport in conjunction with local switching to route local calls).

[159] WorldCom June 27 *Ex Parte*; NYNEX July 18 *Ex Parte*.

[160] *Order on Reconsideration*, 11 FCC Rcd at 13048-49, para. 12-13.

[161] *CompTel*, 11 F.3d at 1073-75; *Iowa Utilities Bd.* at n. 20.

62. This *Further Notice* is a permit-but-disclose notice-and-comment rulemaking proceeding. *Ex parte* presentations are permitted, in accordance with the Commission's rules, provided that they are disclosed as required.[162]

2. Initial Regulatory Flexibility Analysis

63. As required by the Regulatory Flexibility Act (RFA),[163] the Commission has prepared this present Initial Regulatory Flexibility Analysis (IRFA) of the expected significant economic impact on small entities by the policies and rules proposed in the *Further Notice of Proposed Rulemaking* (*Further Notice*). Written public comments are requested on the IRFA. These comments must be filed by the deadlines for comment on the remainder of the Further Notice, and should have a separate and distinct heading designating them as responses to the IRFA. The Commission will send a copy of the *Further Notice*, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA) in accordance with the RFA, 5 U.S.C. § 603(a).

64. *Need for and Objectives of the Proposed Rules.* We seek comment on whether requesting carriers may use unbundled shared transport facilities in conjunction with unbundled switching, to originate or terminate interexchange traffic to customers to whom the requesting carrier does not provide local exchange service. We also seek comment on whether similar use restrictions may apply to the use of unbundled dedicated transport facilities. We propose no new rules at this time. In light of comments received in response to the *Further Notice*, we might issue new rules.

65. *Legal Basis.* The legal basis for any action that may be taken pursuant to the Further Notice is contained in Sections 1, 2, 4, 201, 202, 274, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154, 201, 202, 274, and 303(r).

66. *Description and Estimate of the Number of Small Entities That May Be Affected by the Further Notice of Proposed Rulemaking.* In determining the small entities affected by our *Further Notice* for purposes of this Supplemental FRFA, we adopt the analysis and definitions set forth in the FRFA in our *First Report and Order*.[164] The RFA directs the Commission to provide a description of and, where feasible, an estimate of the number of

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[162] *See generally* 47 C.F.R. §§ 1.1200, 1.1202, 1.1204, 1.1206.

[163] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 et seq., has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

[164] *Local Competition Order*, 11 FCC Rcd at 16149-57, paras. 1341-60.

small entities that might be affected by proposed rules. The RFA defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small business concern" under Section 3 of the Small Business Act.[165] A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by SBA.[166] The SBA has defined a small business for Standard Industrial Classification (SIC) categories 4812 (Radiotelephone Communications) and 4813 (Telephone Communications, Except Radiotelephone) to be an entity with no more than 1,500 employees.[167] Consistent with our FRFA and prior practice, we here exclude small incumbent local exchange carriers (LECs) from the definition of "small entity" and "small business concern."[168] While such a company may have 1500 or fewer employees and thus fall within the SBA's definition of a small telecommunications entity, such companies are either dominant in their field of operations or are not independently owned and operated. Out of an abundance of caution, however, for regulatory flexibility analysis purposes, we will consider small incumbent LECs within this present analysis and use the term "small incumbent LECs" to refer to any incumbent LEC that arguably might be defined by SBA as a small business concern.

67. In addition, for purposes of this IRFA, we adopt the FRFA estimates of the numbers of telephone companies, incumbent LECs, and competitive access providers (CAPs) that might be affected by the *First Report and Order*. In the FRFA, we determined that it was reasonable to conclude that fewer than 3,497 telephone service firms are small entity telephone service firms or small incumbent LECs that might be affected.[169] We further estimated that there are fewer than 1,347 small incumbent LECs that might be affected.[170] Finally, we estimated that there are fewer than 30 small entity CAPs that might qualify as small business concerns.[171]

68. *Description of Projected Reporting, Recordkeeping and Other Compliance Requirements.* It is probable that any rules issued pursuant to the *Further Notice* would not

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[165] *See* 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in 5 U.S.C. § 632). The Commission may also develop additional definitions that are appropriate to its activities.

[166] 15 U.S.C. § 632.

[167] *Id.* (*citing* 13 C.F.R. § 121.201).

[168] *See Local Competition Order*, 11 FCC Rcd at 16150, para. 1342.

[169] *Local Competition Order* at 16150, para. 1343.

[170] *Local Competition Order* at 16151, para. 1345.

[171] *Local Competition Order* at 16151-52, para. 1347.

change the projected reporting, recordkeeping, or other compliance requirements already adopted in this proceeding.[172]

69. *Steps Taken to Minimize Significant Economic Impact on Small Entities, and Alternatives Considered.* As stated in our FRFA, we determined that our decision to establish minimum national requirements for unbundled elements would likely facilitate negotiations and reduce regulatory burdens and uncertainty for all parties, including small entities and small incumbent LECs.[173] National requirements for unbundling may allow new entrants, including small entities, to take advantage of economies of scale in network design, which may minimize the economic impact of our decision in the *First Report and Order*. This finding has not been challenged. We do not believe that any rules that may be issued pursuant to the *Further Notice* will change this finding. We seek comment on this tentative conclusion.

70. *Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rules.* None.

3. Comment Filing Procedures

71. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file comments on or before October 2, 1997, and reply comments on or before October 17, 1997. To file formally in this proceeding, you must file an original and six copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original and eleven copies. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, 1919 M Street, N.W., Room 222, Washington, D.C., 20554, with a copy to Janice Myles of the Common Carrier Bureau, 1919 M Street, N.W., Room 544, Washington, D.C., 20554. Parties should also file one copy of any documents filed in this docket with the Commission's copy contractor, International Transcription Services, Inc., 1231 20th Street, N.W., Washington, D.C., 20036. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, 1919 M Street, N.W., Room 239, Washington, D.C., 20554.

72. Comments and reply comments must include a short and concise summary of the substantive arguments raised in the pleading. Comments and reply comments must also

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[172] *See, e.g., Local Competition Order* at 16161-62, paras. 1374-1375.

[173] *Local Competition Order*, 11 FCC Rcd at 16162, para 1376.

comply with Section 1.49 and all other applicable sections of the Commission's Rules.[174] We also direct all interested parties to include the name of the filing party and the date of the filing on each page of their comments and reply comments. All parties are encouraged to utilize a table of contents, regardless of the length of their submission.

73. Parties are also asked to submit comments and reply comments on diskette. Such diskette submissions would be in addition to, and not a substitute for, the formal filing requirements addressed above. Parties submitting diskettes should submit them to Janice Myles of the Common Carrier Bureau, 1919 M Street, N.W., Room 544, Washington, D.C., 20554. Such a submission should be on a 3.5 inch diskette formatted in an IBM compatible form using MS DOS 5.0 and WordPerfect 5.1 software. The diskette should be submitted in "read only" mode. The diskette should be clearly labelled with the party's name, proceeding, type of pleading (comment or reply comments) and date of submission. The diskette should be accompanied by a cover letter.

74. In addition to filing comments with the Secretary, a copy of any comments on the information collections contained herein should be submitted to Judy Boley, Federal Communications Commission, Room 234, 1919 M Street, N.W., Washington, D.C., 20554, or via the Internet to jboley@fcc.gov, and to Timothy Fain, OMB Desk Officer, 10236 NEOB, 725 - 17th Street, N.W., Washington, D.C., 20503 or via the Internet to fain_t@al.eop.gov.

V. ORDERING CLAUSES

75. Accordingly, IT IS ORDERED that, pursuant to sections 1-4, 201-205, 214, 251, 252, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154, 201-205, 214, 251, 252, and 303(r), the Third Order on Reconsideration is ADOPTED.

76. IT IS FURTHER ORDERED that changes adopted on reconsideration in section III.B. and the rule appendix will be effective 30 days after publication in the Federal Register.

77. IT IS FURTHER ORDERED, pursuant to section 405 of the Communications Act of 1934, as amended, 47 U.S.C. § 405, and section 1.106 of the Commission's rules, 47 C.F.R. § 1.106 (1995), that the petitions for reconsideration filed by WorldCom, Inc. and the Local Exchange Carriers Coalition are DENIED IN PART and GRANTED IN PART to the extent indicated above.

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[174] *See* 47 C.F.R. § 1.49. However, we require here that a summary be included with all comments and reply comments, regardless of length. This summary may be paginated separately from the rest of the pleading (*e.g.*, as "i, ii").

78. IT IS FURTHER ORDERED, that the Commission SHALL SEND a copy of this Third Order on Reconsideration and Further Notice of Proposed Rulemaking, including the associated Supplemental Final Regulatory Flexibility Analysis and Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

79. IT IS FURTHER ORDERED that pursuant to sections 1, 2, 4, 201, 202, 274 and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154, 201, 202, 274, and 303(r), the FURTHER NOTICE OF PROPOSED RULEMAKING IS ADOPTED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Appendix A

Final Rules

Part 51--INTERCONNECTION

1. The authority citation for part 51 continues to read as follows:

Authority: Sections 1-5, 7, 201-05, 218,l 225-27, 251-54, 271, 48 Stat. 1070, as amended, 1077; 47 U.S.C. 151-55, 157, 201-05, 218, 225-27, 251-54, 271, unless otherwise noted.

2. Paragraph (d)(1) of Section 51.319 is revised to read as follows:

§ 51.319 Specific unbundling requirements.

•••••

(d) *Interoffice Transmission Facilities*.

(1) Interoffice transmission facilities include:

(i) Dedicated transport, defined as incumbent LEC transmission facilities dedicated to a particular customer or carrier that provide telecommunications between wire centers owned by incumbent LECs or requesting telecommunications carriers, or between switches owned by incumbent LECs or requesting telecommunications carriers;

(ii) Shared transport, defined as transmission facilities shared by more than one carrier, including the incumbent LEC, between end office switches, between end office switches and tandem switches, and between tandem switches, in the incumbent LEC's network;

3. Section 51.515 is revised to read as follows:

§ 51.515 Application of access charges.

(d) Interstate access charges described in part 69 shall not be assessed by incumbent LECs on each element purchased by requesting carriers providing both telephone exchange and exchange access services to such requesting carriers' end users.

SEPARATE STATEMENT OF CHAIRMAN REED HUNDT

RE: Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Third Order on Reconsideration and Further Notice of Proposed Rulemaking

The Commission today reaffirms and clarifies a very important aspect of our Local Competition Order: the ability of a competitive local exchange carrier to obtain transport on a shared basis from the incumbent local exchange carrier. More fundamentally, this decision highlights the importance we place on incumbents making available to new entrants their network elements on a combined basis -- a combination sometimes referred to as the UNE platform.

In the Telecommunications Act of 1996, Congress mandated that new entrants into the formerly monopolized local exchange market have the ability to choose any or all of three entry strategies: interconnection, resale and unbundled network elements. Congress correctly foresaw that new entrants would need these flexible strategies if they are to compete successfully with the incumbents and their extraordinary economies of scale and scope.

In its decision last month, the Eighth Circuit explicitly affirmed our authority under the Act to define unbundled network elements. This is a very important aspect of our local competition policies. Where the purpose or effect of moves by an incumbent LEC to break apart currently combined elements is to create a barrier to competition, we will take action to tear down or prevent the erection of such barriers.

ORIGINAL

Supreme Court, U.S.
FILED
JAN 5 1998
CLERK

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

Nos. 97-826, 97-829, 97-831

DISTRIBUTED
JAN 6 1998

AT&T CORP., et al.,

Petitioners,

v.

IOWA UTILITIES BOARD, et al.,

Respondents.

RECEIVED
AFTER HOURS
JAN 05 1997
Office of the Clerk
SUPREME COURT, U.S.

On Petitions for Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

OPPOSITION OF THE REGIONAL BELL COMPANIES AND GTE TO MOTIONS TO EXPEDITE CONSIDERATION OF PETITIONS FOR CERTIORARI

Respondents Ameritech Corporation, Bell Atlantic Corporation, BellSouth Corporation, SBC Communications Inc., U S WEST, Inc., and GTE Entities ("respondents") respectfully oppose the motions of the FCC and AT&T et al. ("AT&T") to expedite consideration of the petitions for certiorari.

Respondents address this opposition primarily to the request that the Court depart from its normal procedures in order to act on a group of related petitions at the Court's conference on January 23, 1998. AT&T's alternative request for accelerated merits briefing is obviously premature. If the Court were to deny certiorari, the issue would be moot. And if the Court were

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to grant certiorari on one or more questions, only then would it be in a position effectively to judge whether the question or questions to be reviewed could be manageably briefed, argued, and decided this Term.

The pending petitions and conditional cross-petitions, and any additional timely petitions and cross-petitions that may be filed in the coming days, should be decided after full briefing by all parties. Indeed, for the reasons set forth below, it is difficult to imagine a case less well suited to rushed decision.

1. The time for filing petitions or cross-petitions for certiorari from the Eighth Circuit's decision in Iowa Utilities Board v. FCC does not expire until 90 days from the court of appeals' order on rehearing entered October 14, 1997: that is, on January 12, 1998. 28 U.S.C. § 2101(c); Sup. Ct. R. 13. The six petitions and conditional cross-petitions filed to date have already generated hundreds of pages of briefs addressing complicated -- and, in some cases, highly technical -- questions arising from a 700-page administrative order.

AT&T and the FCC nevertheless propose expedited consideration of all petitions and cross-petitions before they can even know what that would entail. Well over 100 entities, including a score of state regulatory commissions as well as interest groups and telecommunications industry participants of all description, were parties to the proceedings below. As

matters now stand, no one can say how many petitions there ultimately will be, what issues the petitions and cross-petitions will present, or how many responses and replies will be filed.

What is certain is that AT&T and the FCC would deny numerous parties important rights afforded under this Court's Rules. For example, the time for parties to respond to the Regional Bell Companies' conditional cross-petition will not expire until January 23, 1998. The time for parties to respond to the conditional cross-petition of GTE Midwest Incorporated will not expire until January 28, 1998. The cross-petitioners would then have a right to file timely replies under the Court's usual procedures. Sup. Ct. R. 15.5, 15.6.

Under AT&T's and the FCC's proposal, however, parties who wish to respond to these cross-petitions would be denied their full opportunity to do so. (In fact, counsel for respondents understand from discussions with counsel for certain state commissions that the States will soon consult among themselves to determine whether and how to respond to the cross-petitions.) If these parties did accelerate preparation of their responses to file just before the January 23 conference, the cross-petitioners would then be denied an opportunity to reply. In their haste for a hearing on their own petitions, AT&T and the FCC would have the Court disregard the legitimate interests of dozens of other parties to the case below, on all sides of the issues.

2. AT&T and the FCC suggest that compromising numerous other parties' rights is appropriate because respondents supposedly "withheld" or "postponed" filing their cross-petitions. AT&T Motion at 3, 8; FCC Motion at 6. The assertion is baseless. We will let the facts speak for themselves.

On December 18, 1997 -- within 30 days of being bombarded with four separate petitions -- all five Regional Bell Companies filed a single opposition to all four petitions. On the same day, GTE likewise filed its opposition to all four petitions. Although a request for additional time might well have been justified under the circumstances, respondents did not seek an extension.

Respondents then filed their cross-petitions weeks before they were due. On December 24, 1997 -- nearly three weeks before the deadline and just six days after filing their opposition -- the Regional Bell Companies filed a conditional cross-petition (No. 97-1075). On December 30, 1997 -- nearly two weeks before the deadline -- GTE Midwest filed its conditional cross-petition (No. 97-1087).[1] Each cross-petition was filed as soon as it was ready.

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[1] Respondent U S WEST, Inc. will file today a conditional cross-petition. U S WEST has moved with dispatch to prepare this cross-petition and accordingly will file a week before the deadline. To avoid any needless delay, moreover, it will make clear in its transmittal letter to the Clerk that it will not object if other parties wish to treat their responses to other cross-petitions as responses to U S WEST's cross-petition.

AT&T and the FCC fault respondents for violating a rule of their own imagining, which would require filing cross-petitions on the same day as briefs in opposition. AT&T Motion at 3, 8; FCC Motion at 6. There is no such rule. See Sup. Ct. R. 13.4 (time for filing cross-petitions). Nor could anyone suggest that these cross-petitions were unwarranted: In their responses to the cross-petitions, AT&T and the FCC have both agreed that, if their own petitions are granted, the conditional cross-petitions should be granted in large part as well.

3. Efforts to fault respondents' timely -- indeed, early -- filings are especially inappropriate given that neither AT&T nor the FCC did what they could have done to ensure expedited consideration of their petitions. The Eighth Circuit issued its decision in this case on July 18, 1997. Among other things, that decision resolved the jurisdictional issue on which AT&T and the FCC principally focus in their petitions for certiorari. Because no party sought rehearing with respect to the court's jurisdictional ruling, AT&T and the FCC had ample time to prepare their petitions for certiorari on that issue well before the Eighth Circuit issued its order on rehearing in October.

The other issues raised by AT&T and the FCC do not explain their delay in filing petitions for certiorari. The Eighth Circuit's order on rehearing did not amend that court's prior ruling with respect to the FCC's "pick and choose" rule. See

Regional Bell Company Conditional Cross-Pet. 9-12 (discussing rehearing decision). Although the court of appeals did address FCC Rule 51.315(b) on rehearing, AT&T and the FCC simply repeat in their petitions for certiorari the same arguments they presented to the Eighth Circuit in their responses to the rehearing petitions.

All but a paragraph of the Eighth Circuit's final decision was available to AT&T and the FCC on July 18. If they had been truly intent on doing "everything within their power" (AT&T Motion at 7) to secure this Court's consideration of their petitions in January, AT&T and the FCC would have filed their petitions within days after the court of appeals' October 14 order on rehearing. Likewise, they would have made their request for expedited scheduling at the time they filed their petitions. Instead, AT&T and the FCC waited nearly five weeks after the rehearing decision before filing their petitions for certiorari. See AT&T Motion at 8 n.4. And even then, they did not submit their motions to expedite until six weeks after that. Having chosen to proceed at that pace, neither AT&T nor the FCC can fairly expect this Court to compensate for their delay by short-circuiting its own procedures to the detriment of other parties.

4. Movants' new-found interest in hurrying the Court's deliberations is particularly curious in light of the Eighth Circuit's recent order scheduling oral argument on January 15,

1998, to consider petitions filed by some 33 state commissions, the Regional Bell Companies, GTE, and others to enforce the court's mandate. These petitions argue that the FCC has continued improperly to assert jurisdiction over local pricing matters in violation of the court of appeals' ruling. When it addresses these petitions, the Eighth Circuit may well elaborate on the limits of federal jurisdiction in the pricing area.

Any such elaboration would assist the Court's consideration of the certiorari petitions, particularly because interpretation of the court of appeals' ruling is a matter of dispute between the parties. Compare, e.g., AT&T Pet. 13-16 (claiming that jurisdictional ruling turned on section 2(b) of the Communications Act of 1934), with GTE Opp. 15-21 (explaining that ruling rested on plain language of 1996 Act). Rushing to act on the petitions and cross-petitions shortly before such assistance would be offered would not serve the interests of sound decisionmaking.

5. In attempting to manufacture a reason for granting certiorari, AT&T has alleged that the decision below "squarely conflicts" with a recent D.C. Circuit decision interpreting different provisions of the Telecommunications Act of 1996. See AT&T Pet. 20. There is no conflict between these appellate decisions. See Regional Bell Company Opp. 17 n.8. As it happens, however, the supposedly conflicting decision is itself

the subject of a recent certiorari petition filed by two state agencies. Virginia State Corp. Comm'n, et al. v. FCC, No. 97-1072 (filed Dec. 29, 1997). That petition will be on essentially the same timetable as this case if the Court holds to its customary procedures. This Court's consideration of the statutory provisions at issue in that case -- particularly when contrasted with those on which petitioners rely in this case -- will demonstrate vividly that Congress, in crafting the 1996 Act, knew precisely how to give the FCC intrastate jurisdiction when it wanted to do so. There is thus good reason not to disrupt a schedule that would allow the Court to consider these two cases concurrently.

6. AT&T and the FCC argue that the issues they present are of such pressing national importance that the petitions should be moved to the front of the Court's queue. These claims ring hollow. The same parties presented nearly identical arguments more than 14 months ago in three separate applications to vacate the Eighth Circuit's interim stay of the FCC's pricing rules. They there trumpeted the same dire warnings that they echo here. All three applications to vacate the stay were denied (initially by Justice Thomas, and subsequently by the full Court after referral by Justices Stevens and Ginsburg). See 117 S. Ct. 378 (1996); 117 S. Ct. 379 (1996); 117 S. Ct. 429 (1996). This Court

rightly rejected these inflated claims of extraordinary urgency in 1996, and it should do so again in 1998.

As demonstrated in respondents' briefs in opposition, the AT&T and FCC petitions are not even worthy of review, much less extraordinary expedition. See Regional Bell Company Opp. 10-29; GTE Opp. 12-30. In particular, the assertion that the Eighth Circuit is "largely responsible for the virtual absence of competition in local telephone markets" is preposterous. FCC Motion at 5.

As Congress contemplated, the States have moved ahead with implementation of local competition since enactment of the Telecommunications Act in February 1996. Nationwide, state commissions have reviewed some 1700 negotiated agreements between local carriers and have completed numerous arbitration proceedings to resolve disputed issues under 47 U.S.C. § 252. On the strength of these negotiated and arbitrated agreements, dozens of national and regional companies that are genuinely interested in entering the local telephone business are doing so.

This activity confirms that legal disputes over a few portions of the FCC's Local Interconnection Order have not stalled the development of local competition. The Eighth Circuit upheld, or was not even asked to consider, the vast majority of the rules established by the FCC's 700-page decision. Although the Eighth Circuit did invalidate the FCC's pricing rules, that

action, by the FCC's own account, had little impact because "virtually every state in the union has adopted [the FCC's] policies."[2] It is bizarre for the FCC to argue that state jurisdiction over local pricing prevents competition, when nearly every State has adopted the FCC's own pricing approach. Nor are AT&T's claims of crippling uncertainty defensible where state commissions and the FCC are in accord. See AT&T Motion at 3-6.

The Eighth Circuit's decision to strike down 47 C.F.R. § 51.315(b) also has not slowed local competition. See FCC Motion at 5; AT&T Motion at 7. Rule 51.315(b) was in force from August 1996 to October 1997, yet AT&T and its co-movants -- who now say the rule allowed "the immediate introduction of . . . broad-based local exchange competition" -- by their own admission did not take advantage of it. AT&T Motion at 7.

The Eighth Circuit's decision to vacate Rule 51.315(b) will in fact foster, rather than hinder, the construction of competitive local telephone networks that Congress wished to promote.[3] The issue is whether new local telephone companies will have any incentive to build networks of their own (as

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[2] Reed Hundt, Chairman, Federal Communications Commission, remarks to the Chamber of Commerce, Washington, D.C. (May 29, 1997) (as prepared for delivery).

[3] See, e.g., S. Conf. Rep. No. 104-230, at 1 (1996) (Telecommunications Act "designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies").

Congress intended) or whether they will use existing networks at subsidized prices (as AT&T would like). See Regional Bell Company Conditional Cross-Pet. 14-22; GTE Midwest Conditional Cross-Pet. 18-21. Companies that do seek to build new local networks in competition with incumbent carriers have strongly endorsed the Eighth Circuit's decision. One such new entrant recently said that it "owe[s] a debt of gratitude to the Eighth Circuit" for denying AT&T and others a "free ride."[4] Another explained that the Eighth Circuit's approach restored "the careful balance crafted by Congress," whereas the policies urged by AT&T and the FCC would "frustrate" the congressional goal of opening local markets to full competition.[5]

Whatever the long-term importance of the issues raised, the fate of local telephone competition will not remotely turn on whether the petitions and conditional cross-petitions are considered at the Court's January 23 conference, before the close of the pleading cycle, or in due course under the Court's normal procedures.

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[4] Telecommunications Reports, at 18 (Nov. 10, 1997) (quoted in Regional Bell Company Conditional Cross-Pet. 15 & n.10).

[5] Time Warner Communications Memorandum in Support of Petitions for Rehearing, at 3 (8th Cir. Oct. 1, 1997) (quoted in Regional Bell Company Conditional Cross-Pet. 15-16 & n.12).

January 5, 1998

Respectfully submitted,

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No. 97-831

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

FEDERAL COMMUNICATIONS COMMISSION AND
THE UNITED STATES OF AMERICA, PETITIONERS

v.

IOWA UTILITIES BOARD, et al.

REPLY BRIEF IN SUPPORT OF THE MOTION OF THE UNITED STATES AND THE FEDERAL COMMUNICATIONS COMMISSION TO EXPEDITE CONSIDERATION OF THE PETITION FOR CERTIORARI

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1. In their opposition to our motion to expedite consideration of the petition in this case, the nation's largest local carriers make one thing clear: they do not want the Court to hear this case this Term. There is a reason for that. At present, 98% of local telephone revenues still belong to the local monopolists. The longer that respondents succeed in keeping competition out of local markets, the longer they will sustain their monopoly market shares. But immediate competition is what Congress intended, and respondents well know that they would have much to gain from a year's delay in this Court's review. That gain, however, would be the public's loss.

Review this Term is needed to prevent the confusion that would result from an additional year's worth of private agreements negotiated under an erroneous and exceptionally destabilizing legal regime. Unless and until this Court corrects that decision, which invalidates the core of the FCC's national regulatory framework for implementing the 1996 Act, the basic

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controversies under the Act will be litigated and relitigated in various federal district courts and courts of appeals rather than resolved in a single administrative proceeding. See Fed. Pet. 22-24. For example, respondents themselves have already challenged state commission pricing determinations in dozens of separate district court proceedings. See Reply Br. in Support of Fed. Pet. 5-6. Each change in the law under that regime -- and there would be many -- would subject numerous private interconnection agreements to a potential need for renegotiation. Delaying consideration of this case until next Term would create another year's worth of agreements negotiated in that climate of uncertainty. Because uncertainty discourages the investment necessary for competition, the only beneficiaries of postponing legal clarity for another year are the incumbent local carriers -- which, in their opposition to our motion, essentially ignore this concern.

2. We have asked this Court to schedule consideration of our petition for the January 23 Conference because, in our view, that course would be the best means of hearing this case during this judicial Term. Respondents, however, contend that it would be unfair -- not to themselves, but to unnamed other parties -- to decide on that date whether this case should be briefed and argued. We disagree. We filed our petition nearly two months ahead of schedule, on November 19, 1997, and responses to it, as well as our reply brief, have now been filed. By January 12 -- 90 days from the final judgment -- the procession of staggered

cross-petitions must run its course, and this Court will know exactly what issues it has been asked to review. We have now filed responses to each of the three separate cross-petitions filed by respondents, and we will respond to any additional cross-petitions with similar expedition. Given the unusual stature and public importance of this case, we do not believe that it would be at all unfair to ask other interested parties to disclose their own views before January 23, more than two months after the filing of our petition.[1]

3. Finally, respondents encourage this Court to postpone review of the petitions until after the Eighth Circuit has ruled on several mandamus petitions "to enforce the court's mandate." See Opp. 6-7. We addressed those mandamus petitions in our petition for certiorari and explained why they should not "delay this Court's disposition of the pressing issues presented in this petition." See Fed. Pet. 11 n.4 (citing Pet. App. 68a). In the various briefs in opposition to certiorari, no party disagreed with that position, and nothing has changed since then other than the scheduling of oral argument in the Eighth Circuit.

The mandamus petitions in the court of appeals involve

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[1] Respondents argue that this Court should delay consideration of this case, not on their own behalf, but because they "understand" that "the States will soon consult among themselves to determine whether and how to respond to the cross-petitions." Opp. 3. We note, moreover, that those cross-petitions are all explicitly conditioned upon a grant of certiorari on the second question presented in our petition, and that, except for California, "the States" have not even opposed certiorari on that question. See Joint Brief for State Commission Respondents and the National Association of Regulatory Utility Commissioners in Opposition, in No. 97-826 et al.

issues arising under 47 U.S.C. 271, which governs the terms under which the Bell Operating Companies may apply to the Federal Communications Commission to enter the interstate long-distance market.[2] Our petition for certiorari addresses separate provisions of the Telecommunications Act of 1996 governing competition in local telephone markets. See 47 U.S.C. 251 et seq. We have challenged, among other things, the Eighth Circuit's ruling that the FCC lacks statutory jurisdiction to implement many of those local competition provisions. The mandamus petitions argue that that aspect of the Eighth Circuit's decision has binding effect on the FCC's dispositions of the Bell Companies' applications to enter the long-distance market under Section 271 -- and that the Eighth Circuit is the appropriate forum to determine what that effect is, even though the District of Columbia Circuit has exclusive jurisdiction to adjudicate denials of all such applications. See 47 U.S.C. 402(b)(9).

The pendency of those mandamus petitions provides no plausible basis for delaying this Court's review of the underlying final judgment, which, if left uncorrected, would have

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[2] In a separate proceeding, a federal district court in Wichita Falls, Texas, recently held that Section 271 is an unconstitutional "bill of attainder" on the theory that it improperly "punishes" the Bell Companies by subjecting them to more regulation than other local telephone companies. See SBC Communications, Inc. v. FCC, Civ. No. 7-97-CV-163-X (N.D. Tex. Dec. 31, 1997). That decision is subject to review in the court of appeals, and, on January 6, 1998, the Solicitor General authorized an appeal. That district court ruling has no bearing on the need for this Court to grant expeditious review of the local competition issues presented in this case, and respondents do not suggest otherwise.

irreversibly binding effects on judicial interpretation of the Act. In particular, the Eighth Circuit's disposition of the mandamus petitions, whenever it may come, could not change the legal basis for the holdings as to which we seek review. Those holdings require prompt correction whether or not the Eighth Circuit seeks to extend their practical effect beyond local telephone markets to proceedings concerning the long-distance market under Section 271.[3]

CONCLUSION

The motion to expedite consideration of the petition should be granted, and the petition should be scheduled for Conference on January 23, 1998.

Respectfully submitted.

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JANUARY 1998

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[3] Respondents also ask this Court to hold our petition pending disposition of the recently filed petition in Virginia State Corp. Comm'n v. FCC, No. 97-1072 (filed Dec. 29, 1997). The ordinary procedure, however, is to hold later-filed petitions (if at all) pending disposition of earlier-filed petitions, and respondents present no plausible reason for doing the opposite here.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

Nos. 97-826, 97-829, 97-830, 97-831, 97-1075, 97-1087, 97-1099, and 97-1141

97-531

AT&T CORP., ET AL., PETITIONERS

v.

IOWA UTILITIES BOARD, ET AL., RESPONDENTS

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

AND RELATED CASES

RECEIVED
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COMMENTS OF THE ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES ON MOTION OF THE LOCAL EXCHANGE CARRIERS REGARDING ORAL ARGUMENT

Pursuant to Rules 21 and 28 of the Rules of this Court, the Association for Local Telecommunications Services (ALTS) hereby submits its comments on the motion of the local exchange carriers ("LEC Movants") regarding oral argument and states as follows:

ALTS is the petitioner in Case No.97-830. ALTS concurs with the LEC Movants that the number of issues, the complexity of the FCC regulations before the Court in these cases, and the range of interests of the parties warrants an additional one hour of oral argument time beyond the hour already allotted. Accordingly, ALTS supports that portion of the LEC Movants' motion requesting an additional hour or oral argument time.

ALTS does not support the other aspects of the LEC Movants' motion and it respectfully urges the Court not to act on those aspects of the motion at this time. Specifically, ALTS requests that the Court defer consideration of LEC Movants' proposals to restructure the oral argument and to permit the LEC Movants and the State petitioners both to argue the jurisdictional issues.

Those aspects of the motion are premature for several reasons. First, on March 13, 1998, two additional petitions for certiorari were filed with the Court asking the Court to review a related order issued by the U.S. Court of Appeals for the Eighth Circuit. One petition was filed by the FCC and the United States of America (Federal Communications Commission and the United States of America v. Iowa Utilities Board, *et al* Case No. 97-1519); the other petition was filed by a group of private petitioners (AT&T Corp. *et al* v. Iowa Utilities Board, Case No. 97-1520). At this time, it is not known whether the Court will grant either or both of those petitions for certiorari, nor is it known whether those cases will be consolidated with this case. Until those decisions are made, it cannot be determined whether additional issues will be before the Court, nor can it be determined whether such consolidation would necessitate increasing oral argument time.

Second, not all parties to the pending case have formulated their positions on each issue before the Court. ALTS, for example, does not expect to finalize its position on certain issues until it has reviewed the initial briefs of petitioners.

Under the current briefing schedule established by the Court, there will be ample opportunity for LEC Movants and other parties to bring their concerns to the Court regarding the structure for oral argument well in advance of oral argument.

For the foregoing reasons, ALTS supports the LEC Movants' request that the Court order one additional hour for oral argument, but asks that the Court defer decision on the other aspects of the motion until completion of the briefing in this case.

Respectfully submitted,

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March 20, 1998

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CERTIFICATE OF SERVICE

I, Antoinette M. Thorne herby certify that on this 20th day of March, 1998 copies of the foregoing *Comments of the Association for Local Telecommunications Services on Motion of the Local Exchange Carriers Regarding Oral Argument* were served to the parties listed on the attached service list via regular mail.

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In the Supreme Court of the United States

OCTOBER TERM, 1997

AT&T CORP., ET AL., PETITIONERS

v.

IOWA UTILITIES BOARD, ET AL., RESPONDENTS

AMERITECH CORPORATION, ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION,
ET AL., RESPONDENTS

**On Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit**

OPENING BRIEF FOR RESPONDENT/CROSS-PETITIONER AMERITECH CORPORATION

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QUESTIONS PRESENTED

Respondent/Cross-Petitioner Ameritech Corporation will address the following questions:

1. Whether FCC Rule 315(b), which requires incumbent local exchange carriers to provide their competitors with preassembled combinations of network elements, (i) violates the plain language of 47 U.S.C. § 251(c)(3), which imposes an obligation on incumbent carriers to provide "access" to "network elements on an unbundled basis at a technically feasible point" "in a manner that allows requesting carriers to combine such elements," and (ii) destroys the statutory distinction between the unbundled network element and resale provisions of the Telecommunications Act of 1996.

2. Whether the FCC's "all elements" rule violates the statutory distinction between resale of finished telecommunications services and unbundled network elements by allowing new entrants to provide telecommunications services *entirely* through the incumbent's network elements, not at the statutory wholesale rates for resale, but at the cost-based rates reserved by Congress for competitors with some of their own facilities who purchase access to individual network elements.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The parties to the underlying proceedings are listed in the appendix to the petition for a writ of certiorari in *AT&T Corp., et al.* v. *Iowa Utilities Board, et al.*, No. 97-826, at 1a-4a, 73a-78a, 92a.

Respondent/Cross-Petitioner Ameritech Corporation has no parent corporation and no non-wholly owned subsidiaries.

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BRIEF FOR RESPONDENT/CROSS-PETITIONER AMERITECH CORPORATION

For the reasons set forth in the briefs submitted by other respondents/cross-petitioners,[1] the Eighth Circuit correctly held that FCC Rule 315(b) is inconsistent with the plain text of section 251(c)(3) of the Telecommunications Act of 1996 ("1996 Act"), Pub. L. No. 104-104, 110 Stat. 56, and the structure of section 251(c) as a whole. Those briefs also demonstrate that the Eighth Circuit's decision to uphold the FCC's "all elements" rule must be reversed.

Ameritech submits this separate brief to address the central issue underlying the controversy over Rule 315(b) and the "all elements" rule. That issue is whether incumbent local exchange carriers may be required to provide new entrants with "assembled platform(s) of combined network elements" (Pet. App. 71a) — which are commonly known as "unbundled network element platforms" or "UNE platforms." The battles fought in the court of appeals and this Court over Rule 315(b) and the "all elements" rule are, in large measure, skirmishes in the larger battle over the UNE platform.

As defined by the FCC and new entrants such as AT&T and MCI, the UNE platform is a purported combination of unbundled network elements that consists of *precisely* the same facilities, in *exactly* the same configuration, as the network designed by the incumbent carrier to provide its own retail telecommunications services to customers and resale services to new entrants. Contrary to the network element entry option established by Congress in section 251(c)(3),

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[1] Ameritech Corporation endorses the arguments set forth in the Brief for Respondents/Cross-Petitioners Bell Atlantic, *et al.* ("Bell Atlantic Brief"); the Brief for Respondent/Cross-Petitioner U S WEST, Inc. ("U S WEST Brief"); and the Brief for Respondents/Cross-Petitioners the GTE Entities ("GTE Brief").

however, entrants acquiring the UNE platform would not design and establish an alternative network, would not determine the amount of network elements necessary to carry their customers' traffic, and would not make any effort even to identify the particular network elements they need. Rather, the platform would allow new entrants to use the incumbent's entire preassembled network — identical to what an entrant acquires when purchasing resale services under section 251(c)(4). Yet the platform would give new entrants such access *not* at the statutory wholesale discount mandated by Congress for the resale of retail services, but rather at the lower cost-based rates reserved for unbundled network elements. Requiring incumbent carriers to provide the UNE platform therefore would create arbitrage opportunities that undermine Congress' distinction between unbundled network elements and resale services. For these reasons and others, the UNE platform is flatly inconsistent with the 1996 Act.

Before the Eighth Circuit vacated Rule 315(b), petitioners consistently maintained that the Rule, together with the "all elements" rule, required incumbent carriers to provide the UNE platform at rates below those charged for resale services. When apprised of this gambit, the court of appeals invalidated Rule 315(b). The court explained that section 251(c)(3) "does not permit a new entrant to purchase the incumbent [carrier's] assembled platform(s) of combined network elements" to serve local customers. Pet. App. 71a. The court added that "[t]o permit the acquisition" of the platform "at cost based rates for unbundled access would obliterate the careful distinctions Congress has drawn in subsections 251(c)(3) and (4) between access to unbundled network elements * * * and * * * resale." *Id.*

As we explain below, the court of appeals correctly concluded that the UNE platform is incompatible with the 1996 Act. Accordingly, this Court should affirm the Eighth Circuit's invalidation of Rule 315(b) and strike down the "all elements" rule. And even if this Court were to find that Rule

315(b) and the "all elements" rule are valid on their face, the Court should hold that the rules are invalid insofar as they require incumbent carriers to provide the UNE platform at the cost-based rates reserved by Congress for unbundled network elements.

STATEMENT

The network element issues presented here require some understanding of the basic architecture of the local telephone network. Understanding this architecture will allow the Court to appreciate the distinction between unbundled network elements available under section 251(c)(3) and resale services available under section 251(c)(4), and therefore to comprehend why the UNE platform is flatly inconsistent with the 1996 Act. The following describes the statutory distinction between unbundled network elements and resale, and traces the history of the FCC's campaign to subvert that distinction by requiring incumbent carriers to provide the UNE platform.

1. The Local Telephone Network. The local telephone network consists of several types of facilities constructed, installed, and combined by the incumbent local exchange carrier ("incumbent carrier" or "incumbent LEC"). Each customer's telephone is connected to the network by wires called "local loops." The loops connect the customer's premises to an "end office," which consists largely of a "local switch." The principal function of the local switch is to read the telephone number dialed by the calling party and, based on routing instructions programmed into the switch by the incumbent carrier to reflect its network configuration, connect the call to a transmission path so that the call reaches the called party.

If the party being called is connected to the same end office as the calling party, the local switch connects the call directly. Thus, in Figure 1, when Customer A calls Customer B, the call originates at Customer A's premises and

travels over the local loop to the end office. At the end office, the local switch routes and then connects the call to the local loop connecting the end office to Customer B's premises:

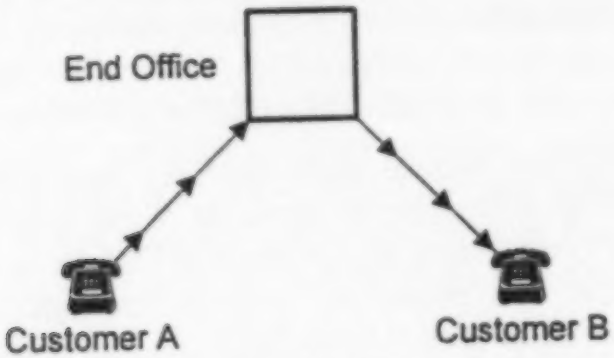

Figure 1

Most cities are served by numerous end offices. The end offices are connected to one another by "interoffice transmission facilities," which generally are fiber-optic cables that can be divided electronically into hundreds of circuits for voice and data transmission. These interoffice transmission facilities also connect end offices to one or more "tandem switches" in a hub-and-spoke-arrangement. A tandem switch directs calls from one end office to another. Tandem switches connect end offices that are not directly connected and provide an alternative means of connecting calls between customers served by different end offices that are directly connected.

The local network in a city with four end offices could look like this:

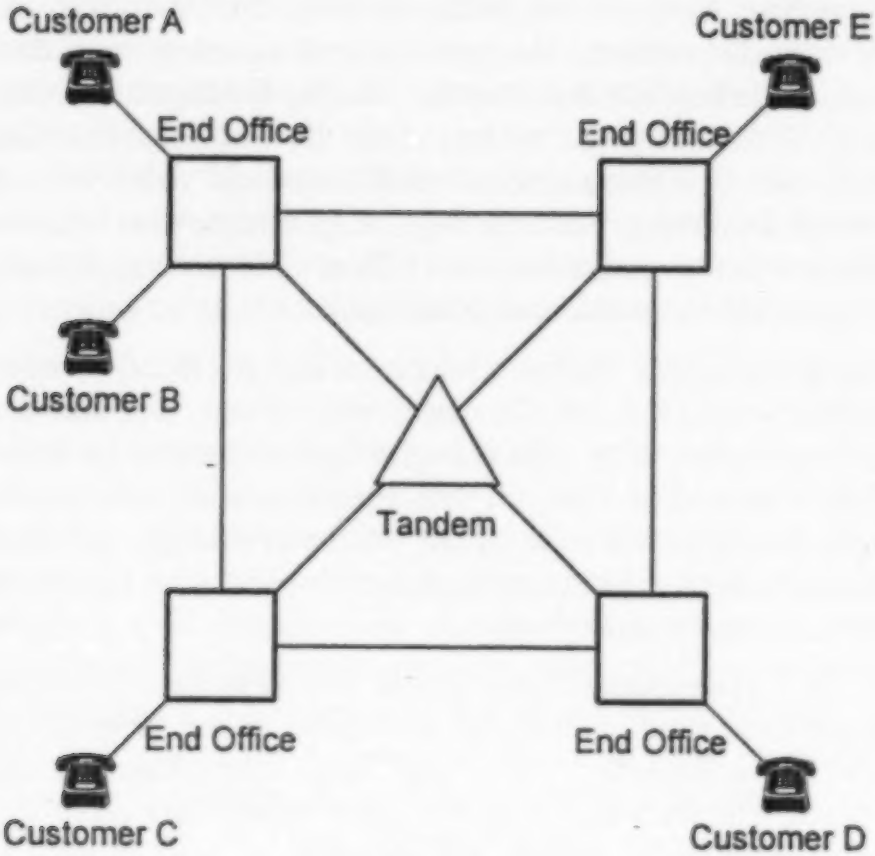

Figure 2

If the calling party and the called party are served by different end offices, the call must be "transported" from the calling party's end office to the called party's end office. The local switch uses a "routing table" — a list of steps the incumbent carrier has programmed into the switch to define how incoming calls should be handled — to select the particular physical "interoffice" pathways that will carry the call to its destination.

For example, in Figure 2, the first option for routing a call from Customer C to Customer D would be over interoffice transmission facilities directly linking their respective end offices. If that direct link is being used to capacity at the time the call is placed, the call would be routed over the

interoffice transmission facility linking Customer C's end office to the tandem, through the tandem switch, and then over the interoffice transmission facility linking the tandem to Customer D's end office. And, if Customer C called Customer E, Customer C's end office would route the call through the tandem because there is no direct route between the customers' respective end offices. More complex networks include tandem-to-tandem cables.

Accordingly, whether a telephone call is placed between customers served by the same end office, or between customers served by distant end offices connected by interoffice transmission facilities and a tandem switch, use of the local telephone network entails access to multiple facilities that have been constructed and combined into an integrated network by the incumbent.

2. **Competitive Entry Under The 1996 Act.** Congress enacted the local competition provisions of the 1996 Act to promote competitive entry into local telecommunications markets. In section 251(c), Congress established three distinct methods by which new entrants — also known as competitive local exchange carriers ("CLECs") or requesting carriers — may compete in local service markets. These three options require different levels of investment, impose different risks, and promise different rewards.

a. *Physically Constructing a New Network.* The most investment- and labor-intensive entry option is for a CLEC to build each component of its own local telephone network. This entry option requires the greatest investment in network facilities, and therefore entails the greatest risk, while promising the greatest opportunity for reward. The risk lies in the fact that a new entrant that designs and physically constructs an entire local network will not know whether it will be able to attract the customers (and, therefore, the revenue) necessary to recoup its investment.

Section 251(c)(2) of the 1996 Act facilitates entry for these new entrants by requiring an incumbent carrier to provide "interconnection" for the "facilities and equipment of" another carrier with the incumbent's network. 47 U.S.C. § 251(c)(2). Through this "interconnection," the new entrant's network is physically connected to the incumbent's network, so that the entrant's local customers can place calls to persons using the incumbent's network, and vice versa.

b. *Network Elements*. Congress "recognize[d] that it is unlikely that competitors will have a fully redundant network in place when they initially offer local service, because the investment necessary is so significant." H.R. Rep. No. 104-458, at 148 (1996) ("Conf. Rep."). Section 251(c)(3) establishes an alternate method of entry under which a new entrant may design and establish its own network without having to construct anew all of the facilities and equipment in that network. Specifically, section 251(c)(3) permits a new carrier to lease particular "network elements" from the incumbent on an "unbundled basis at any technically feasible point," and "to combine such elements in order to provide * * * telecommunications service." 47 U.S.C. § 251(c)(3). The 1996 Act defines "network element" as "*a* facility or equipment used in the provision of a telecommunications service," including "features, functions, and capabilities that are provided by means of *such* facility or equipment." *Id.* § 153(45) (emphasis added). That is, a "network element" is a particular building block ("facility or equipment") that the incumbent makes available separately to a new entrant, so that the new entrant can put together its own network to provide its own retail service to customers.

A CLEC that leases one or more unbundled network elements from an incumbent designs and establishes its own alternative, competing network without having to construct each facility from scratch. The new entrant simply combines unbundled network elements leased from the incumbent with other facilities (whether constructed by the entrant or

acquired from elsewhere) in order to provide local telephone service over its alternative network. See S. Rep. No. 104-23, at 19-20 (1995) ("unbundled access to the local exchange carrier's telecommunications facilities" is necessary to ensure "the interoperability of *both carriers' networks*") (emphasis added); *First Report and Order*, ¶ 441 ("[b]y unbundling various [network elements], a new entrant can purchase [network elements] on an unbundled basis as part of a *competing local network*") (emphasis added) (J.A. 97).[2] Under section 251(c)(2), such an entrant then would "interconnect" its own alternative network with the incumbent's existing network.

For example, consider a small telecommunications carrier with an advanced local switch but no local loops. To establish its own alternative network, that firm could lease local loops and then interconnect its local switch to the incumbent's tandem switch. Or consider a cable television provider that already has laid wires (loops) to its customers' homes and built a fiber-optic transport network covering a certain geographic region. That provider could establish its own alternative network by leasing local switches and a tandem switch from the incumbent.[3] The cable provider then could interconnect the leased local and tandem switches with the facilities it previously constructed to provide local service over its own network.

Although these two new entrants would lease different unbundled network elements, they would share certain characteristics common to all carriers that enter local service

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[2] *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, FCC 96-325, First Report and Order (rel. Aug. 8, 1996) ("*First Report and Order*").

[3] See Conf. Rep. at 148 ("Some facilities and capabilities (*e.g.*, central office switching) will likely need to be obtained from the incumbent local exchange carrier as network elements pursuant to new section 251.").

markets through unbundled network elements. In particular, both entrants would design and establish an alternative, competing local network by leasing network elements from the incumbent to fill the gaps between facilities they already have constructed or acquired from elsewhere. The FCC and commentators alike have recognized this distinguishing attribute of the network element entry option. See *First Report and Order*, ¶ 14 ("many new entrants will not have fully constructed their local networks when they begin to offer service. Although they may provide some of their own facilities, these new entrants will be unable to reach all of their customers without depending on the incumbent's facilities") (J.A. 414); Sidak & Spulber, *The Tragedy of the Telecommons: Government Pricing of Unbundled Network Elements Under the Telecommunications Act of 1996*, 97 Colum. L. Rev. 1081, 1082 (1997) (new entrant using unbundled network elements "can build its own network on an à la carte basis, leasing some inputs from the incumbent LEC and procuring other inputs from rivals already in the market * * * or directly from equipment vendors").

Congress specified a rate structure for leasing unbundled network elements that reflects the network-building nature of the network element entry option. The rates for access to a network element are to be "based on the cost" to the incumbent of providing that element. 47 U.S.C. § 252(d)(1).

Properly implemented, the "network element" mode of entry carries *some* risks and requires *some* investment, but not to the extent faced by new entrants that physically construct each facility in their own networks. For example, a new entrant may decide to serve a customer with an unbundled local switch leased from the incumbent carrier. If the customer then "migrates" to a different carrier, the entrant may terminate the lease and thereby limit its financial exposure (and hence its financial risk). By contrast, if the new entrant had acquired its own new local switch, it would have incurred sunk costs that could be neither recouped nor

limited if the customer subsequently migrated to a different carrier.

c. *Resale*. "Resale" entry is the least risk- and labor-intensive of the three options established by Congress. Section 251(c)(4) allows a new entrant to buy, at a wholesale discount, complete telecommunications services from the incumbent carrier — using precisely the same configuration of facilities and equipment that the incumbent carrier uses to provide local retail services — and then resell those services in competition with the incumbent.

In contrast to the first two methods of entry, CLECs that engage in "resale" do not design an alternative network or make *any* up-front investment in leased or constructed facilities. See H.R. Rep. No. 104-204, at 77 (1995) (unlike resellers, CLECs using network elements "offer[] * * * [a] competitive alternative" to the incumbent's network). When a new entrant buys an incumbent's finished service for resale, it uses the same local network already constructed and combined by the incumbent. Accordingly, a "reseller" relies upon the incumbent to design the entire local telephone network used by the entrant's customers and to determine how calls are switched or transported throughout the network.

The 1996 Act establishes a rate structure for the incumbent's "resale" services that differs markedly from the cost-based rate structure for network elements. Section 252(d)(3) provides that a new entrant may buy the incumbent's retail services at "wholesale" prices, a term defined by Congress as the incumbent's "retail rates" less the "marketing, billing, collection, and other costs that will be avoided" by the incumbent carrier in selling its services at wholesale rather than retail. 47 U.S.C. § 252(d)(3). The Eighth Circuit correctly recognized that the cost-based rates for unbundled network elements are lower than the wholesale rates for resale services. Pet. App. 54a-57a. As the Bell Atlantic, U S WEST and GTE Briefs explain in detail, the wholesale rates

for resale services are higher because they are calculated by taking a discount from the incumbent's *retail* rates (which reflect universal service cross-subsidies), while the rates for network elements are based on the *cost* to the incumbent of providing each individual element.

Nonetheless, by mandating a wholesale discount for the incumbent's retail services, Congress guaranteed a margin for new carriers entering through the "resale" route that makes "resale" an extremely low-risk entry option. Not only is the CLEC relieved of any need to invest in network facilities, but it can acquire customers first, and then purchase from the incumbent only the amount of retail services necessary to serve those customers.

3. The FCC's Network Element Regulations. The FCC implemented section 251(c) of the Act in its *First Report and Order*. That Order generally defined network elements to "correspond to distinct network facilities." *First Report and Order*, ¶ 678 (J.A. 137). Thus, the FCC defined the "local loop," "switching," and "interoffice transmission facilities" to be separate unbundled network elements. 47 C.F.R. § 51.319(a), (c), (d). In so doing, the FCC noted that Congress required Bell operating companies to provide these elements separately as a precondition for providing long distance services. *First Report and Order*, ¶¶ 377, 410, 439 (J.A. 71-72, 84-85, 96-97), citing 47 U.S.C. §§ 271(c)(2)(B)(iv) ("[l]ocal loop transmission from the central office to the customer's premises, *unbundled* from local switching"), 271(c)(2)(B)(vi) ("[l]ocal switching *unbundled* from transport [and] local loop transmission"), 271(c)(2)(B)(v) ("[l]ocal transport from the trunk side of a wireline local exchange carrier switch *unbundled* from switching") (emphasis added). The FCC's regulations permit new entrants to lease these and other network elements from the incumbent. See 47 C.F.R. § 51.319.

a. *Combinations*. In addition to defining which types of network elements an incumbent LEC must lease to

new entrants, the FCC also addressed how leased elements may be combined with other network elements or with facilities built by the new carrier. One such regulation permits new entrants to combine unbundled network elements with facilities constructed or otherwise acquired by the new entrant, or with other leased elements, and thereby to design an alternative network for providing local service to its customers. 47 C.F.R. § 51.315(a) ("Rule 315(a)"). Rule 315(a) states that an incumbent carrier "shall provide unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide a telecommunications service." Therefore, if the cable television operator described above seeks to combine the local loops it has installed with an unbundled local switch leased from the incumbent, the incumbent would have to provide the switch "in a manner that allows" the *cable operator* to combine its loops with the unbundled switch.

Rule 315(a) plainly complies with — and in fact tracks the second sentence of — section 251(c)(3). However, despite its claims to the contrary, the FCC went far afield from the statute in promulgating two other requirements related to combining network elements. *First*, the FCC required incumbents to combine, at the new entrant's request, network elements that are *not* currently combined in the incumbent's network. 47 C.F.R. § 51.315(c)-(f) ("Rules 315(c)-(f)"). That is, if a new entrant ordered two or more network elements that were not physically connected, Rules 315(c)-(f) obligated the incumbent to combine those elements on behalf of the new entrant.

Second, the FCC required incumbent carriers to provide new entrants with preassembled, or existing, combinations of network elements. 47 C.F.R. § 51.315(b) ("Rule 315(b)"). Rule 315(b) reads: "Except upon request, an incumbent LEC shall not separate requested network elements that the incumbent LEC currently combines." That is, Rule 315(b) gave new entrants the right to order, on a preassembled basis, two

or more network elements that were currently combined in the incumbent's network. Like Rules 315(c)-(f), Rule 315(b) relieves "requesting carriers" of their statutory obligation "to combine [network] elements" themselves. 47 U.S.C. § 251(c)(3).

b. *The "All Elements" Rule.* As described previously (pp. 7-9, *supra*), the network element entry option permits new entrants to fill the gaps in their own previously acquired facilities by leasing selected network elements from the incumbent on an unbundled basis. However, the FCC read section 251(c)(3) to permit a new entrant to acquire from an incumbent, at cost-based rates, *all* of the network elements necessary to provide a local telecommunications service. *First Report and Order*, ¶¶ 328-41 (J.A. 57-65). Put another way, the "all elements" rule allows a new carrier to provide local service entirely through a combination of unbundled network elements. Under the "all elements" rule, then, a new entrant may use the network element entry option even if it has constructed no network facilities of its own.

4. The Eighth Circuit's Initial Ruling. Incumbent carriers brought petitions for review to challenge, *inter alia*, Rules 315(c)-(f) (which required incumbents to combine network elements on behalf of new entrants) and Rule 315(b) (which required incumbents to provide preassembled combinations of network elements). The incumbent LECs argued that these rules violated the plain language of section 251(c)(3), which grants access to network elements only "on an unbundled basis" at "any technically feasible point" and specifies that *new entrants* have the obligation to combine network elements. The incumbent LECs also maintained that requiring incumbents to provide certain network elements combinations — in particular, a preexisting combination consisting of all of the elements required to provide a retail service — would destroy the distinction between the network element and resale entry options under sections 251(c)(3) and (c)(4).

a. *Combinations.* In a ruling that petitioners did not challenge in their petitions for certiorari, the Eighth Circuit invalidated Rules 315(c)-(f). The court of appeals explained that these Rules were contrary to the plain text of Section 251(c)(3), which requires incumbent carriers to provide "'unbundled network elements in a manner that allows *requesting carriers to combine* such elements.'" Pet. App. 70a (quoting 47 U.S.C. § 251(c)(3)) (emphasis added by Eighth Circuit). The statutory text "unambiguously indicates that requesting carriers will combine the unbundled elements themselves" and therefore "cannot be read to levy a duty on the incumbents to do the actual combining of elements" on behalf of new entrants. *Id.* The court's initial opinion left Rule 315(b) in place, without comment.

b. *The "All Elements" Rule.* At the same time, and based upon its vacatur of Rules 315(c)-(f), the Eighth Circuit upheld the "all elements" rule, which permits new entrants to provide local service entirely through unbundled network elements leased from the incumbent carrier. The incumbent carriers had maintained that new entrants would use the "all elements" rule to evade the distinctions between access to network elements under section 251(c)(3) and resale services under section 251(c)(4). Addressing those concerns, the Eighth Circuit held that the network element mode of entry differs from resale entry in critical respects, with "unbundled access ha[ving] several disadvantages that preserve resale as a meaningful alternative." Pet. App. 56a.

First, the court of appeals observed that, unlike pure resellers, new entrants providing local service entirely through network elements must "expend[] valuable time and resources recombining unbundled network elements." Pet. App. 57a. This distinction followed from the court's vacatur of Rules 315(c)-(f). As the court explained, "requiring the requesting carriers to combine the elements themselves increases the costs and risks associated with unbundled access as a method of entering the local telecommunications indus-

try and simultaneously makes resale a distinct and attractive option." *Id.* at 56a-57a. In other words, a new entrant providing local service entirely through network elements still must design and establish its own alternative network, while a reseller simply relies on the same preexisting local telephone network used by the incumbent to provide service to its own customers.

Second, the Eighth Circuit noted that a new carrier "entering the local telecommunications markets by purchasing unbundled network elements faces greater risks than those carriers that resell an incumbent [carrier's] services." Pet. App. 56a. Carriers leasing unbundled network elements "must make an up-front investment that is large enough to pay for the cost of acquiring access to all of the unbundled elements of the incumbent LEC's network * * * without knowing whether consumer demand will be sufficient to cover such expenditures." *Id.* By contrast, a reseller can "more easily match its supply with its demand because it can purchase telephone services from incumbent LECs on a unit-by-unit basis," and thus "is able to purchase only as many services (or as much thereof) as it needs to satisfy customer demand." *Id.* That is, an entrant leasing network elements as a means of providing service over its own competing network faces demand-contingent risks — risks that are not faced by carriers that simply resell the retail service provided by the incumbent over the incumbent's network.

Thus, although it upheld the "all elements" rule, the court of appeals recognized Congress's intent that to qualify for the lower cost-based prices applicable to unbundled network elements, a new entrant must be more than a passive reseller of the incumbent's retail services.

5. The Controversy Over The "UNE Platform." As noted above, the Eighth Circuit's initial ruling did not address Rule 315(b), which provided that "an incumbent LEC shall not separate requested network elements that the incumbent LEC currently combines." 47 C.F.R. § 51.315(b). In

the weeks that followed the court of appeals' ruling, the FCC and new entrants such as AT&T and MCI seized upon the survival of Rule 315(b) to advance an agenda that — in defiance of the Eighth Circuit's initial ruling — would have obliterated the statutory distinction between the unbundled network element and resale entry options.

In proceedings before State public utility commissions, AT&T maintained that Rule 315(b), together with the "all elements" rule, permitted new entrants to obtain the so-called "UNE platform" as a purported combination of network elements under section 251(c)(3). As defined by petitioners, the UNE platform is not an alternative, competing network that a new entrant establishes by combining unbundled network elements with facilities already owned by the new entrant. Rather, the platform consists of *precisely* the same facilities, configured in *exactly* the same manner, as the integrated local telephone network that the incumbent designed and constructed to provide its own retail services — the same retail services available to new entrants for resale under section 251(c)(4). In fact, the platform *is* the incumbent's integrated local telephone network.

As AT&T acknowledged, the UNE platform is particularly attractive because it can be acquired on an "as is" basis. That is, if AT&T served a customer with a resale service purchased under section 251(c)(4), AT&T would have the right instantaneously to "convert" that customer to the UNE platform under section 251(c)(3). Likewise, if AT&T won over one of the incumbent carrier's current retail customers, it could instantaneously "migrate" that customer to the UNE platform.[4] As AT&T put it, migration to the UNE

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[4] See Comments of AT&T Communications of Ohio Regarding the Effect of the Eighth Circuit Order, Case No. 96-922-TP-UNC (Pub. Util. Comm'n of Ohio), at 6-9 (filed Aug. 19, 1997) (arguing that Rule 315(b) requires "as is" migration to the UNE platform) ("AT&T Ohio Comments on Eighth Circuit Initial Order"). Accord, Comments of MCI Telecommunications on

platform is appropriate "for Ameritech retail customers who want to keep *the same type of service* * * * but simply want to switch local service providers from Ameritech to AT&T." In those circumstances, AT&T added, "no physical changes are necessary and no interconnection charge will be assessed."[5]

To accomplish these "as is" conversions and migrations to the UNE platform, a CLEC would not have to design an alternative network, combine unbundled network elements, make up-front investments in network elements, or even identify the particular network facilities (apart from the customer's local loop) used to carry the customer's telecommunications traffic. All the CLEC would have to do is utter the words "UNE platform" rather than "resale." As AT&T conceded, however, the actual product delivered would be the same: *undifferentiated use of the entire preexisting and integrated network designed by the incumbent carrier to provide retail services to its local customers.*

AT&T has been remarkably candid — at least to investment analysts — as to why it seeks to affix the "UNE platform" label, rather than the "resale" label, to its use of the incumbent's preexisting and preconfigured network. As John Zeglis, AT&T's current president, proclaimed, the UNE platform gives AT&T "another way to resell" the incumbent's retail services, but at a discount greater than that applicable to resale services under the 1996 Act.[6] Mr. Zeglis

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the Impact of the Decision of the Eighth Circuit, Case No. 96-922-TP-UNC (Pub. Util. Comm'n of Ohio), at 6-9 (filed Aug. 19, 1997) (relying upon both Rule 315(b) and the "all elements" rule).

[5] AT&T's Memorandum Contra to Ameritech Ohio's Application for Rehearing and Request for Stay, Case No. 96-922-TP-UNC (Pub. Util. Comm'n of Ohio), at 25-26 (filed May 4, 1998) (emphasis added).

[6] Transcript, AT&T Investment Community Meeting (Mar. 3, 1997) (comments of John Zeglis) (J.A. 255).

observed that while the wholesale discount for resold services in one State is only 25.9%, the UNE platform may be acquired at "a discount of 52 percent" or higher, depending upon a customer's particular calling patterns. The difference in price has absolutely nothing to do with the actual product sold by the incumbent LEC to the new entrant, since the UNE platform and the preassembled network used by the incumbent to provide resale services are one and the same.

Despite the Eighth Circuit's initial ruling, which held that the CLECs themselves must combine the unbundled network elements they lease from incumbent LECs, AT&T cobbled together a strained legal rationale to support the platform. Specifically, AT&T argued to State commissions that Rule 315(b), in tandem with the "all elements" rule, allowed new entrants to acquire all of the network elements necessary to provide retail service, and further prohibited the incumbent LECs from separating facilities that are already combined in their networks. AT&T claimed that because an incumbent carrier "currently combined" all of the facilities necessary to serve its own retail customers, Rule 315(b) required the incumbent to provide those facilities to CLECs as an "existing combination[]" of purported unbundled network elements at no extra charge.[7] Therefore, AT&T contended, new entrants could obtain the incumbent's retail services, not as a resale service under section 251(c)(4), but at lower rates as a preassembled UNE platform under section 251(c)(3).

While AT&T was pressing State commissions to use Rule 315(b) and the "all elements" rule as a means of approving the UNE platform, the FCC issued orders expressly

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[7] AT&T Ohio Comments on Eighth Circuit Initial Order, at 8. See also *Eighth Circuit's Order May Imperil FCC Enforcement, Triggers Call to Revive Rules*, Telco Competition Report (July 31, 1997) (despite Eighth Circuit's initial order, "the UNE platform is [not] dead") (statement of Mark Rosenblum, AT&T Vice President-law and public policy).

intended to advance that agenda. In the *Third Reconsideration Order*,[8] promulgated in the same docket as the regulations at issue here, the FCC required incumbent carriers to provide new entrants with a purported network element dubbed "shared transport." Although petitions for review challenging the *Third Reconsideration Order* remain pending before the Eighth Circuit, that order illustrates the extent to which the FCC abused the (temporary) survival of Rule 315(b) in an effort to require incumbent carriers to provide the UNE platform.

The *Third Reconsideration Order* (¶ 34 (J.A. 244-245)) defines shared transport as a purported network element consisting of *every* interoffice transmission facility in the incumbent's network — each of which had previously been defined in the *First Report and Order* as a network element in its own right.[9] The regulation relieved new entrants of any obligation to design their own alternative networks, or even to identify or designate which *particular* individual interoffice facilities would carry their customer's traffic. *Id.* ¶ 43 ("shared transport" need not be "identified as a limited or pre-identified portion of the network") (J.A. 246-247). The FCC acknowledged that shared transport could function only in combination with switching network elements also ac-

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[8] *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996* (CC Docket No. 96-98), Third Order on Reconsideration and Further Notice of Proposed Rulemaking, FCC 97-295 (rel. Aug. 18, 1997) ("*Third Reconsideration Order*") (J.A. 1359-1402), petitions for review pending, *Southwestern Bell Tel. Co.* v. *FCC*, Nos. 97-3389 *et al.* (8th Cir.).

[9] See *First Report and Order*, ¶ 442 ("it is technically feasible for incumbent LECs to unbundle * * * interoffice facilities as individual network elements") (J.A. 97); *id.* ¶ 441 ("by unbundling various dedicated and shared interoffice facilities, a new entrant can purchase all interoffice facilities on an unbundled basis *as part of a competing network*, or it can combine its own interoffice facilities with those of the incumbent") (emphasis added) (J.A. 97).

quired from the incumbent, but, expressly relying upon Rule 315(b), required incumbents to provide shared transport as part of a preassembled combination with switching. *Id.* ¶¶ 44, 47 (J.A. 247-249). Accord, *In the Matter of Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In Michigan*, CC Docket No. 97-137, FCC 97-298, ¶¶ 327-28, 336 (rel. Aug. 19, 1997). Thus, according to the FCC, shared transport gives new entrants undifferentiated use of the entire preassembled and integrated combination of each and every interoffice transport facility, tandem switch, and local switch in the incumbent's network. Or, as AT&T recently conceded, shared transport is "the use of [the incumbent carrier's] public switched network to carry traffic from point to point."[10]

There can be no question that the FCC promulgated the *Third Reconsideration Order* to give CLECs the right to acquire the UNE platform at the cost-based rates reserved for unbundled network elements. As then-FCC Chairman Reed Hundt made clear, the shared transport requirement "highlights the importance [the FCC] place[s] on incumbents making available to new entrants their network elements on a combined basis — a combination sometimes referred to as the UNE platform." *Third Reconsideration Order*, Separate Statement of Chairman Reed Hundt (J.A. 250).[11]

6. The Eighth Circuit's Order On Rehearing. Several incumbent LECs filed petitions for rehearing with the Eighth Circuit. The petitions informed the court of appeals

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[10] AT&T Communication of Michigan's Brief in Support of its Motion to Dismiss Under Rule 12(b)(6) or, in the Alternative, for Summary Judgment at 1 n.1, *Michigan Bell Tel. Co.* v. *Strand*, Case No. 5:98-CV-20 (W.D. Mich.) (filed April 20, 1998).

[11] Accord, Evaluation of the United States Department of Justice, CC Docket No. 97-137 (FCC), at 34 (filed June 25, 1997) ("shared transport * * * [is] needed to support entry through the 'network platform'").

of the events described above, in particular that the FCC, together with CLECs such as AT&T, had relied on the survival of Rule 315(b), together with the "all elements" rule, to require incumbent LECs to provide the UNE platform at the cost-based rates reserved by Congress for unbundled network elements. This regulatory action, the incumbent LECs charged, nullified key provisions of the 1996 Act and was at odds with the court's initial opinion.

The rehearing petitions asked the court of appeals to invalidate Rule 315(b). Alternatively, the petitions urged the Eighth Circuit to reconsider its earlier affirmance of the "all elements" rule. If Rule 315(b) stood, the petitions maintained, the premises underlying the court's prior affirmance of the "all elements" rule (see pp. 14-15, *supra*) would disappear. And if the FCC and AT&T were correct in asserting that Rule 315(b) authorized CLECs to acquire the UNE platform, CLECs would simply use the incumbent's entire preexisting network, rather than design and combine alternative, competing networks of their own. This, in turn, would destroy the distinction between the unbundled network element and resale entry options fashioned by Congress.

The Eighth Circuit granted the petitions for rehearing. Amending its initial opinion, the court of appeals vacated Rule 315(b) as "contrary to § 251(c)(3)," given that "the rule would permit the new entrant access to the incumbent['s] network elements on a bundled rather than an unbundled basis." Pet. App. 71a. The court reaffirmed its prior ruling that the plain language of Section 251(c)(3) "requires an incumbent LEC to provide access to the elements of its network only on an unbundled (as opposed to a combined) basis." *Id.* In so doing, the court directly considered and invalidated the UNE platform, holding that section 251(c) "does not permit a new entrant to purchase the incumbent LEC's assembled platform(s) of combined network elements (or any lesser existing combination of two or more elements)." *Id.* The court explained that "[t]o permit such an

acquisition of already combined elements at cost based rates for unbundled access would obliterate the careful distinction Congress has drawn in subsections 251(c)(3) and (4)" between access to unbundled network elements and the purchase of an incumbent's retail services for resale. *Id.*

SUMMARY OF ARGUMENT

In striking down Rule 315(b), the court of appeals held that section 251(c)(3) of the 1996 Act "does not permit a new entrant to purchase the incumbent LEC's assembled platform(s) of combined network elements * * *." Pet. App. 71a. Yet petitioners' defense of Rule 315(b) barely mentions the UNE platform, let alone their persistent campaign to require incumbent LECs to provide the platform at the cost-based rates reserved by Congress for unbundled network elements.

Although petitioners understandably are reluctant to address the point, the battle over Rule 315(b) and the "all elements" rule was and remains, in principal part, a battle over the UNE platform. Petitioners want this Court to reverse the Eighth Circuit's vacatur of Rule 315(b), and affirm the Eighth Circuit's approval of the "all elements" rule, because they believe that those rulings would allow CLECs to acquire the UNE platform. Indeed, the Eighth Circuit invalidated Rule 315(b) only upon learning that petitioners — most notably, the FCC, AT&T and MCI — had employed Rule 315(b), together with the "all elements" rule, in an effort to require incumbent carriers to provide the UNE platform under the guise of a combination of unbundled network elements. The Court could not render an informed and complete judgment without appreciating these crucial and undeniable facts.

The UNE platform would be a dead letter if this Court affirmed the Eighth Circuit's invalidation of Rule 315(b), or if it reversed the Eighth Circuit's decision to uphold the "all elements" rule. However, even if the Court were to conclude

that Rule 315(b) and the "all elements" rule were valid in some instances, it should hold that the rules would violate the 1996 Act insofar as they required incumbent LECs to provide the UNE platform at the cost-based rates reserved for unbundled network elements. This is so for two principal reasons.

First, the UNE platform obliterates the distinction between the unbundled network element and resale entry options established by Congress in sections 251(c)(3) and (c)(4), and thus undermines the structure of section 251(c). The UNE platform is identical to resale in several critical respects. Both allow new entrants to compete without designing and establishing an alternative network; both give new entrants identical access to the same configuration of network facilities used by the incumbent to provide retail service to its customers; and both relieve new entrants of the need even to identify which particular facilities will carry their customers' traffic. The only difference is price: by affixing the "UNE platform" label, as opposed to the "resale" label, to the undifferentiated use of the incumbent's preassembled network, the new entrant receives the benefit of the lower cost-based rates reserved by Congress for unbundled network elements. The effect of the UNE platform, then, is to nullify the resale provisions of the Act.

Second, the UNE platform is inconsistent with the plain language of section 251(c)(3). If a CLEC were to acquire the UNE platform, it would not obtain "access" to "network elements" "on an unbundled basis at any technically feasible point." 47 U.S.C. § 251(c)(3). Obtaining "access" to network elements "at a technically feasible point" unquestionably requires a new entrant to obtain some sort of *physical* access to the incumbent's network facilities. Moreover, the UNE platform is not a combination of *unbundled* network elements, even under petitioners' unduly restrictive definition of "unbundled," because a CLEC does not have the option

of acquiring one essential component of the UNE platform without taking another essential component.

ARGUMENT

I. The UNE Platform Undermines The Structure Of Section 251(c) By Subverting The Statutory Distinction Between Access To Unbundled Network Elements And Resale.

As described above (see pp. 6-11, *supra*), the 1996 Act establishes three distinct methods by which carriers may enter the local telecommunications market. *First*, new entrants may build an alternative local network from scratch, and interconnect that network with the incumbent's network. 47 U.S.C. § 251(c)(2). *Second*, an entrant may design and establish an alternative network with unbundled network elements acquired from the incumbent carrier. *Id.* § 251(c)(3). Consistent with the network-building nature of this entry option, Congress provided that the rate for network elements must be "based on the cost" to the incumbent "of providing the * * * network element." *Id.* § 252(d)(1). *Third*, a new entrant may use the incumbent carrier's entire preassembled network by acquiring the incumbent's actual retail services at a wholesale discount and reselling those services to customers. *Id.* § 251(c)(4). Because these entrants simply resell the incumbent's services, they need not design an alternative network to serve their customers. In light of the distinction between the resale and network element entry options, Congress based the wholesale discount for resale services not on cost to the incumbent of providing the service, but on the incumbent's retail rates, minus certain avoided costs. *Id.* § 252(d)(3). As the court of appeals recognized, the cost-based rates for network elements are lower than the wholesale rates for resale services. Pet. App. 54a-57a.

The UNE platform would make nonsense out of this statutory scheme. The UNE platform is the undifferentiated

use of the *same* entire preassembled network used by the incumbent carrier to provide retail services — the *same* retail services available for resale under section 251(c)(4). See pp. 16-20, *supra*. A CLEC acquiring the UNE platform does not have to engage in the tasks that distinguish the network element entry option from the resale entry option: designing and establishing an alternative network; calculating the volume of unbundled interoffice transmission facilities necessary to handle its anticipated traffic volume; identifying which particular network elements would carry its customers' traffic; assuming the risk that it will miscalculate traffic volumes and not recoup its investment in network elements; or combining the elements into an alternative network. The only difference between the UNE platform and resale is price: by substituting the phrase "UNE platform" for "resale," CLECs such as AT&T and MCI hope to obtain the same retail services at the lower cost-based rates reserved for network elements, rather than at the wholesale discount mandated by Congress for resale services.

At the time it enacted the 1996 Act, Congress plainly understood that each incumbent carrier already had designed and constructed a fully functioning, preassembled, integrated network to provide service to its local customers. See 47 U.S.C. §§ 251(c)(4), 271(c)(2)(B)(xiv). Congress required incumbents to make available *those* finished retail services to new entrants for resale under section 251(c)(4), and mandated a wholesale discount for that product under section 252(d)(3). If new entrants could acquire that very same product under the guise of a preassembled combination of purportedly unbundled network elements under section 251(c)(3), at the lower cost-based rates established by section 252(d)(1), Congress's inclusion of the resale provision in the 1996 Act would be meaningless. Reading the 1996 Act in that manner would run contrary to "the cardinal principle of statutory construction" that courts must "give effect, if possible, to every clause and word of a statute * * * rather

than to emasculate an entire section." *Bennett* v. *Spear*, 117 S. Ct. 1154, 1166 (1997) (internal quotation marks omitted); see also *Bailey* v. *United States*, 516 U.S. 137, 145-46 (1995); *Smith* v. *Robinson*, 468 U.S. 992, 1011 (1984).

The UNE platform undermines the structure of section 251(c), and nullifies the 1996 Act's resale provisions, in at least three respects.

1. The first conflict between the UNE platform and the terms of the 1996 Act concerns the nature of the platform as a telecommunications product. That product is the incumbent carrier's preexisting, bundled network used to provide retail service to the incumbent's customers — *the identical product available for resale under section 251(c)(4)*. At the same time, the UNE platform is absolutely inconsistent with the network element entry vehicle established in section 251(c)(3). New entrants providing service with unbundled network elements do not simply re-use the incumbent's preassembled network; rather, Congress expected them to establish their own alternative networks to serve their customers. See 47 U.S.C. § 251(c)(3) (incumbent carrier "shall provide such unbundled network elements in a manner that allows *requesting carriers* to combine such elements in order to provide [a] telecommunications service") (emphasis added); S. Rep. No. 104-23, at 19-20 (1995) ("unbundled access to the [incumbent] local exchange carrier's telecommunications facilities" necessary to ensure "the interoperability of *both carriers' networks*") (emphasis added). As Congress recognized, CLECs using network elements "offer[] * * * a competitive alternative" to the incumbent's network in a manner that resellers do not. H.R. Rep. No. 104-204, at 77 (1995).

Establishing an alternative network requires, at a minimum, that the new entrant identify and designate the particular network facilities — *i.e.*, unbundled network elements, facilities constructed anew or acquired from elsewhere by the entrant — that will carry its customers' traffic. Yet the

essential nature of, and principal justification for, the UNE platform is that it *relieves* entrants of these very obligations — obligations that serve to distinguish network element entry under section 251(c)(3) from resale entry under section 251(c)(4). To make the UNE platform available under section 251(c)(3) would eviscerate this congressionally mandated distinction. See *Colautti* v. *Franklin*, 439 U.S. 379, 392 (1979) (adhering to the "elementary canon of construction that a statute should be interpreted so as not to render one part inoperative").

MCI maintains that the UNE platform is distinct from resale because a new entrant acquiring the UNE platform, unlike a reseller, must "create" and "bill for" "the network it builds out of the leased elements." MCI Br. 23. That argument is frivolous. The UNE platform does not require the new entrant to "create" or "build[]" anything, because it gives entrants access to the incumbent carrier's entire preassembled, bundled network. See pp. 16-20, *supra*. Indeed, MCI elsewhere has acknowledged that the UNE platform consists of "facilities [that] are all interconnected components of the existing Ameritech network and are used to provide exchange access service to end-user customers."[12] With respect to the need to "bill for" services, a new entrant must bill its customers regardless of whether it provides service through the network element entry option or the resale entry option. Contrary to MCI's contention, then, the network configuration used when a new entrant requests the "UNE platform" is indistinguishable from the network configuration used when the entrant requests a "resale service."

2. The UNE platform also undermines the 1996 Act's provisions governing price. By requiring incumbent carriers

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[12] Memorandum of MCI Telecommunications Corporation and MCI Access Transmission Services, Inc. Contra Ameritech's Third Application for Rehearing, Case No. 96-922-TP-UNC (Pub. Util. Comm'n of Ohio), at 6 (filed May 4, 1998).

to sell their entire preassembled, integrated network under the guise of the UNE platform, the FCC fostered arbitrage strategies that eliminate the statutory distinction between unbundled network elements and resale. With the UNE platform, a new entrant acquires use of the incumbent's preassembled network at the lower cost-based prices reserved by section 252(d)(1) for unbundled network elements, rather than at the statutory wholesale discount established in section 252(d)(3) for resale services. Moreover, as envisioned by petitioners, CLECs may pay for the UNE platform primarily on an after-the-fact usage-sensitive basis, just as a reseller pays for resale services.[13] Thus, the court of appeals was entirely correct in concluding that the UNE platform would "obliterate" the distinction between the network element and resale entry options prescribed by Congress. Pet. App. 71a.

The CLECs themselves have touted the UNE platform's pricing anomalies as its principal virtue. As noted above, AT&T President Zeglis noted that, in one State, the section 252(d)(3) wholesale discount applicable to section 251(c)(4) resale services is 25.9%. By contrast, the UNE platform version of the same services — which Mr. Zeglis assumed would be available under section 251(c)(3) at the cost-based rates established by section 252(d)(1) — could be acquired at an effective discount of 52%. Thus, according to AT&T, an incumbent carrier must make available the preassembled, integrated network through which it provides retail services *either* (a) under the label "resale," at a 26% discount, *or* (b) under the label "UNE platform," at an effective 52% discount. See pp. 17-18, *supra*.

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[13] See AT&T/MCI Joint Application for Rehearing and/or Clarification, Case No. 96-922-TP-UNE (Pub. Util. Comm'n of Ohio), at 8-9 (filed July 21, 1997) (urging PUCO to "order Ameritech to provide interoffice transport * * * on a usage sensitive basis"). The FCC announced that it will "establish usage-sensitive rates for recovery of shared transport costs" in any interconnection arbitrations it conducts under section 252(e)(5) of the 1996 Act. *Third Reconsideration Order*, ¶ 30 (J.A. 243-244).

Neither AT&T nor its allies have ventured to explain why Congress would have enacted an elaborate statutory scheme governing distinct network element and resale entry options, only to give new entrants the "choice" between a 26% discount and a 52% discount for the very same product. Petitioners show no respect for Congress's judgment in advocating such a construction of the 1996 Act. And this Court should "not be disposed to give the statute a meaning that produces such strange consequences." *Deal* v. *United States*, 508 U.S. 129, 134 (1993).

MCI's solution to this dilemma is simply to deny that the UNE platform enjoys an inherent "economic advantage" over resale. MCI Br. 23-24. MCI's point appears to be that a new entrant would *not* receive a lower price for the incumbent's retail service when it utters "UNE platform" rather than "resale service." But this argument flatly contradicts what the CLECs have acknowledged in other forums. As noted previously, AT&T has made no bones about the fact that the UNE platform gives new entrants a far deeper discount for the incumbent's retail services than the wholesale discount mandated by Congress in section 252(d)(3). Indeed, MCI and AT&T have attempted to justify their withdrawal from the local residential market on the theory that the statutory discount for resale services is somehow insufficient, and that it is feasible to compete only if the incumbent's resold services are available under the label of the "UNE platform" at the lower cost-based rates reserved for network elements under section 252(d)(1).[14]

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[14] AT&T Communications of Illinois, Inc.'s Response to Motion for Stay of Illinois Bell Telephone Company, Docket No. 96-0486/0569 (Ill. Comm. Comm'n), at 10 (filed March 18, 1998) ("Experience has shown that CLECs cannot enter the market via resale of [the incumbent LEC's] local service on a financially viable basis."); Transcript, Remarks at the National Press Club (Jan. 22, 1998) (claiming that "[c]urrent resale discounts make it impossible for any competitor to ever make money selling local in any state in America") (statement of Timothy F. Price, MCI President).

Despite MCI's claims to the contrary, then, the "economic advantage" that the UNE platform affords over resale is the only reason why CLECs such as AT&T and MCI want the UNE platform so badly. The bottom line is that these carriers are dissatisfied with the wholesale discount established in section 252(d)(3) for new entrants that simply wish to resell the incumbent's retail services. Of course, if AT&T and MCI believe that the wholesale discount established by Congress for resold services is too meager, they should seek redress from Congress.[15] See *MCI* v. *AT&T*, 512 U.S. 218, 234 (1994). Instead, these carriers petition the Court to allow them to have their cake and eat it too: they want to obtain the incumbent's resold services under the guise of the UNE platform, thereby obviating the need to establish their own alternative networks, at the lower cost-based rates applicable to unbundled network elements. This the 1996 Act does not allow.

3. Finally, the UNE platform would allow the large long distance carriers to evade the 1996 Act's joint marketing restrictions. Section 271(e)(1) provides that large long distance carriers such as AT&T and MCI may not "jointly

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[15] MCI's and AT&T's unjustified complaints about the 1996 Act's wholesale discount for resale services have been rejected by the current Chairman of the FCC. See *Kennard Says Competition in Residential Telephony is Top Priority on 1998 Agenda*, TeleCompetition Report (Feb. 12, 1998) ("When asked about the recent claims by AT&T Corp. and MCI * * * that reselling residential local service is not viable, [FCC Chairman] Kennard said he didn't 'fully understand why not. * * * USN [Communications, Inc.] is providing local competition exclusively through resale. There are companies out there doing it.'"); Krause, *Computers & Technology Kennard's Call Is Implementing Telecom Reform*, Investor's Business Daily (Feb. 18, 1998) ("'Yes, I'm aware that the large (long-distance carriers) have backed away from a resale strategy. But some smaller [new entrants] haven't backed away from resale, and it seems to be viable for some new entrants.'") (statement of Chairman Kennard). In fact, Ameritech has provided new entrants with over 500,000 resold lines, approximately 55% of which are residential.

market" their long distance services with local services acquired from Bell operating companies under the 1996 Act's resale provisions. 47 U.S.C. § 271(e)(1) (prohibition expires three years after enactment of 1996 Act or in States where Bell company is authorized to provide long distance services). Congress enacted this provision "to provide parity between the Bell operating companies and other telecommunications carriers in their ability to offer 'one stop shopping' for telecommunications services." S. Rep. 104-23, at 43 (1995). This joint marketing restriction applies *only* to carriers that resell the incumbent's local services; large long distance companies that offer local service via the network element entry option are *not* covered. *First Report and Order*, ¶ 335 (J.A. 61-62).

The UNE platform would permit the large long distance carriers to nullify section 271(e)(1). The platform allows CLECs to resell the incumbent carrier's retail services under the guise of a purported combination of unbundled network elements. Thus, if AT&T were to affix the "resale" label to its resale of a Bell company's retail services, the joint marketing restriction would apply. However, according to petitioners, AT&T could evade that restriction simply by affixing the "UNE platform" label to the identical resale of a Bell company's retail services. The UNE platform, then, would nullify not only section 251(c)(4), but also section 271(e)(1), and is inconsistent with the 1996 Act for that reason as well. See *Rake* v. *Wade*, 508 U.S. 464, 471 (1993) ("We generally avoid construing one provision in a statute so as to suspend or supersede another provision.").

In sum, petitioners' campaign to require incumbent carriers to provide the UNE platform — a drive dependent upon Rule 315(b) and the "all elements" rule — is a blatant attempt to subvert the 1996 Act's clear distinction between unbundled network elements and resale.

II. The UNE Platform Does Not Provide A New Entrant With "Access To Network Elements On An Unbundled Basis At Any Technically Feasible Point."

Section 251(c)(3) requires incumbent carriers to "provide * * * nondiscriminatory access to network elements on an unbundled basis at any technically feasible point." 47 U.S.C. § 251(c)(3). While the UNE platform may be a preassembled combination of the incumbent carrier's *facilities*, it plainly is *not* a combination of *unbundled network elements* within the meaning of section 251(c)(3). *First*, because new entrants acquire the UNE platform on an "as is" basis, they do not obtain "access" to network elements at a "technically feasible point." *Second*, because a new entrant *must* take essential components of the UNE platform together as an integrated whole, and does not have the option of taking those components separately, the platform is not a combination of *unbundled* network elements *even* under petitioners' unduly restrictive definition of "unbundled."

A. The UNE Platform Does Not Give A New Entrant "Access" At A "Technically Feasible Point" To Network Elements.

Section 251(c)(3) requires incumbent carriers to provide "nondiscriminatory access to network elements on an unbundled basis *at any technically feasible point*." 47 U.S.C. § 251(c)(3) (emphasis added). The term "at any technically feasible point" — which MCI (MCI Br. 14) and the FCC (FCC Br. 43) omit from their respective recitations of section 251(c)(3) — undeniably has a physical dimension. The noun "point" refers to a physical place in the physical world. The adjective phrase "technically feasible" makes sense only in the context of obtaining actual *physical* access to a network element.[16]

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[16] The FCC's *First Report and Order* adopted this understanding of the statutory text: "We conclude that the term 'technically feasible' refers solely

The UNE platform does not give a new entrant physical access to network facilities at *any* point, let alone at a "technically feasible point." As described previously (see pp. 16-20 & 25-28, *supra*), the UNE platform allows CLECs to use the precise preassembled combination of network facilities that comprises the incumbent's entire local network. Thus, in acquiring the UNE platform, a new entrant obtains use of the incumbent's network as a bundled, amalgamated whole. There is no need for the entrant to design an alternative network, designate or request any particular facilities to carry its customers' telecommunications traffic, or combine leased network facilities with one another. Indeed, to CLECs like AT&T, the principal benefit of acquiring the UNE platform on an "as is" basis (see pp. 16-18, *supra*) lies in the fact that the UNE platform does not require a new entrant to obtain physical access to *any* specific facilities in the incumbent's network.

That feature of the UNE platform, however, is precisely what renders it invalid under section 251(c)(3). Because the UNE platform does not give a new entrant "access * * * at any technically feasible point" to network elements, the platform is "flatly inconsistent" with the terms of the 1996 Act. *Maislin Indus.* v. *Primary Steel, Inc.*, 497 U.S. 116, 131 (1990).

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to technical or operational concerns, rather than economic, space, or site considerations. We further conclude that the obligations imposed by section[] * * * 251(c)(3) include modifications to incumbent [carrier] facilities to the extent necessary to accommodate * * * access to network elements." *First Report and Order*, ¶ 198 (J.A. 34). This passage plainly demonstrates the FCC's understanding that new entrants will obtain physical access to unbundled network elements. That is the only context in which it would make sense to speak of the "technical and operational concerns," or of the "modifications to incumbent [carrier] facilities," involved in granting access to network elements. See also *id.* ¶¶ 202-204 (J.A. 34-37).

B. The Components Of The UNE Platform Are Not "Unbundled" Network Elements, Even Under The Unduly Restrictive Definition Of "Unbundled" Advocated By Petitioners.

There is an independent reason why the UNE platform is not a combination of unbundled network elements within the meaning of section 251(c)(3). The statute requires incumbent carriers to provide "access" to network elements "on an unbundled basis." 47 U.S.C. § 251(c)(3). The UNE platform, however, is not a combination of "unbundled" network elements under *any* definition of "unbundled." If, as the court of appeals correctly held, the term "unbundled" in section 251(c)(3) means physically separated, the UNE platform obviously could not be a combination of "unbundled" facilities. And even if, as petitioners incorrectly maintain, two physically connected network elements may be "unbundled" when a new entrant has the ability to acquire one of the elements but not the other, the UNE platform — which allows a new entrant to share the incumbent's network facilities in their current configuration — *still* is not a combination of "unbundled" network elements. For example, as the FCC has acknowledged, a new entrant does not have the option of taking the shared interoffice transmission component of the UNE platform without *also* taking the local switching component of the platform.

1. The Bell Atlantic, U S WEST and GTE Briefs cogently explain why the Eighth Circuit correctly concluded that incumbent carriers cannot be required to provide assembled network element combinations. Section 251(c)(3) requires that the new entrant itself physically combine network elements leased from the incumbent. Thus, as the court of appeals ruled, the term "unbundled," understood in the context of section 251(c)(3) as a whole, means physically separated as well as separately priced. The FCC, at least originally, shared this understanding: "the terms 'access' to network elements 'on an unbundled basis' mean that incum-

bent [carriers] must provide the facility or functionality of a particular element to requesting carriers, separate from the facility or functionality of other elements, for a separate fee." *First Report and Order*, ¶ 268 (J.A. 43). It necessarily follows that the FCC and CLECs such as AT&T and MCI are wrong to characterize the UNE platform — *i.e.*, the incumbent's preassembled, integrated network — as a combination of "unbundled" network elements under section 251(c)(3). See *Public Employees Retirement System of Ohio* v. *Betts*, 492 U.S. 158, 171 (1989) ("no deference is due to agency interpretations at odds with the plain language of the statute itself").

2. Petitioners argue vigorously that to be "unbundled," a network element need not be physically separated from adjacent network elements. As AT&T puts it, "[t]o provide something on an unbundled basis is * * * simply to state a different price for it and *to give users the option of declining to purchase it as part of a package.*" AT&T Br. 38-39 (emphasis added). See also MCI Br. 19 (the "normal meaning" of "unbundled" is "'*separately available* at a separate price'") (emphasis added); FCC Br. 44 ("the term 'unbundle' * * * denote[s] giving someone a *choice* of elements at separate prices") (emphasis added). That is, petitioners contend that two physically connected network elements may be "unbundled" within the meaning of section 251(c)(3) if a new entrant has the ability, if it so desires, to acquire one of the elements but not the other. See AT&T Br. 39 (to provide network components on an "unbundled" basis, incumbent carrier must "give customers the option of declining to obtain the unbundled component in combination with the [incumbent's] other * * * facilities").

Petitioners' strained interpretation of the statutory term "unbundled" is incorrect for the reasons set forth in the Bell Atlantic, U S WEST and GTE Briefs. However, even assuming *arguendo* that petitioners were correct, the UNE platform *still* could not be characterized as a combination of "unbun-

dled" network elements under section 251(c)(3). The reason is plain.

The UNE platform is the existing preassembled combination of equipment and facilities that the incumbent LEC uses to provide retail telecommunications service to its customers. As petitioners have acknowledged (see p. 20 & n.11, *supra*), a CLEC cannot acquire the UNE platform without leasing the incumbent carrier's entire interoffice transmission network. And whether the incumbent's entire interoffice transport network is viewed as a single network element or an integrated combination of separate network elements, the FCC has correctly recognized that a CLEC sharing use of that transport network "must also take local switching" from the incumbent. *Third Reconsideration Order*, ¶ 47 (J.A. 249). Moreover, it is undisputed that interoffice transmission and local switching are separate network elements. See 47 U.S.C. §§ 271(c)(2)(B)(v) ("[l]ocal transport" is transport "from the trunk side of a * * * switch unbundled from switching"), 271(c)(2)(B)(vi) ("[l]ocal switching" is switching "unbundled from transport").

The bottom line is that CLECs acquiring the UNE platform do not have the option of obtaining the interoffice transmission component of the platform without also taking the local switching component of the platform. Thus, even accepting petitioners' erroneous contention that the term "unbundled" in section 251(c)(3) means only that a new entrant has the *option* of obtaining a network element without also taking adjacent network elements, the UNE platform still cannot be considered a combination of *unbundled* network elements. It necessarily follows that incumbent LECs may not be compelled to provide the UNE platform under section 251(c)(3) at the cost-based rates reserved by Congress for unbundled network elements. See *Brown* v. *Gardner*, 513 U.S. 115, 122 (1994) (Court will not defer to agency interpretation of statute that "flies against the plain language of the statutory text").

There is an additional reason why the UNE platform is not a combination of *unbundled* network elements within the plain meaning of section 251(c)(3). That provision obligates incumbent carriers to provide unbundled network elements only if it is "technically feasible" to do so. 47 U.S.C. § 251(c)(3). But the FCC has conceded that an incumbent carrier providing shared local transport facilities separately from local switching would court disaster: "an incumbent LEC that separates shared transport facilities that are already connected to a switch would likely disrupt service to its own customers served by the switch." *Third Reconsideration Order*, ¶ 44 (J.A. 248). Ameritech agrees: if a CLEC purchasing the UNE platform exercised its "option" to receive separately the switching and transport facilities that the incumbent carrier currently combines and uses, the local telephone network would crash. It therefore is technically infeasible to give CLECs the option to acquire the components of the UNE platform separately from one another. See *First Report and Order*, ¶ 203 ("[n]egative network reliability effects are necessarily contrary to a finding of technical feasibility") (J.A. 36). Thus, the text of section 251(c)(3) squarely precludes imposing upon incumbent LECs an obligation to provide the UNE platform.

III. The Policy Justifications Advanced By Petitioners In Favor Of The UNE Platform Are Both Irrelevant And Invalid.

In defending Rule 315(b) before this Court, petitioners barely address the UNE platform. This is no surprise. Although Rule 315(b) is central to petitioners' efforts to obtain the UNE platform, actually addressing the platform would have compelled petitioners to explain how it could possibly be consistent with the distinction drawn by Congress between the unbundled network element and resale entry options.

MCI makes a feeble effort to justify the UNE platform. It does so by attacking what it calls the Eighth Circuit's

"policy rationale" for holding that new entrants may not obtain the UNE platform under section 251(c)(3). MCI Br. 22-26. MCI's characterization of the court of appeals' decision is incorrect. As demonstrated in the Bell Atlantic, U S WEST and GTE Briefs, the Eighth Circuit rested its decision entirely upon the text of section 251(c)(3) and the structure of section 251(c) as a whole, not on its view of what constitutes sound public policy. See Pet. App. 71a. There can be no question that the court of appeals fully appreciated its responsibilities under *Chevron*. *Id.* at 8a ("We must defer to administrative agency interpretations only if they are consistent with the plain meaning of a statute or are reasonable constructions of ambiguous statutes * * * [O]ur review does not encompass any determination regarding the wisdom or prudence of the policies Congress set forth in the Act * * *") (citing *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 842-45 (1984)). Accord, *MCI* v. *AT&T*, *supra*, 512 U.S. at 229.

Rather, it is MCI that seeks refuge in policy arguments to validate the UNE platform. Those arguments, of course, are irrelevant, given that the UNE platform is prohibited by the statutory text and structure of section 251(c). See *Central Bank* v. *First Interstate Bank*, 511 U.S. 164, 188 (1994) ("[p]olicy considerations cannot override * * * the text and structure of the Act"); *LeFlore* v. *Marvel Entertainment Group*, 493 U.S. 120, 126 (1989) ("[o]ur task is to apply the text, not to improve upon it").

Even if they were somehow relevant, MCI's policy arguments are meritless. In essence, MCI maintains that the Eighth Circuit's invalidation of the UNE platform "handicap[s]" the network element entry strategy and "compel[s] market participants to compete through inefficient means." MCI Br. 26. The only strategy hindered by the court of appeals, however, is that of the largest long distance carriers to acquire the incumbent carriers' resale services on the cheap. This is a view shared not only by incumbent

carriers like Ameritech, but also by new entrants that have actually invested in new network facilities and combined those facilities with unbundled network elements. Those new entrants, in fact, have praised the Eighth Circuit's decision as a boon for carriers seeking to compete for customers via the unbundled network element entry option.

For example, the CEO of Brooks Fiber, a facilities-based entrant operating in Ameritech's region, declared that new local entrants "'owe[] a debt of gratitude to the Eighth Circuit. * * * The fact that there will be no free ride' for interexchange [*i.e.*, long distance] carriers seeking a cheap method of local market entry is a 'plus for our industry.'"[17] Time Warner, another facilities-based entrant, warned that making the UNE platform available to CLECs would "discourag[e] investment in alternative networks which, over the long-term, will be the most significant competition to [incumbent carriers]."[18] In sum, the UNE platform is not essential to, but in fact is destructive of, facilities-based competition through the network element entry option. The

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[17] *ALTS Members Tout 'Year of the CLEC'*, Telco Competition Rep. (Nov. 20, 1997) (quoting James Allen).

[18] Comments of the Ohio Cable Telecommunications Ass'n and Time Warner Communications of Ohio, L.P., Case No. 96-922-TP-UNC (Pub. Util. Comm'n of Ohio), at 4, 6 (filed Aug. 25, 1997). Accord, *RHCs as wholesalers: As competitors become customers, RHCs are staffing up to serve them*, Telephony (Jan. 5, 1998) ("'Facilities-based [new entrants] have put a lot of money into the ground,' says Cindy Schonhaut, ICG's senior vice president for government and external affairs. 'If someone can buy [the incumbent's] network at substantially lower rates, that's not going to * * * help us recoup our investment.'"); Time Warner Communications Mem. In Support of Petitions for Rehearing at 8 (8th Cir. filed Oct. 1, 1997) ("If the advocates of [the UNE platform] prevail, then only the illusion of local competition will have been created * * * resulting in a reallocation of revenues and earnings between and among the incumbent [carriers] and the major interexchange carriers who have chosen to enter the local market by reselling * * * platforms of network elements which have been combined into complete services by the [incumbent carriers].").

platform would give AT&T and MCI a grossly unfair competitive advantage not only over incumbent carriers, but also over smaller new entrants that have chosen to invest in new network facilities and design alternative networks with the help of unbundled network elements.

In the end, there is no need for the Court to choose sides in the policy debate over the UNE platform. Congress has resolved that dispute through the text and structure of the 1996 Act, which preclude a CLEC from acquiring an incumbent's entire preassembled network configuration while avoiding the statutory provisions applicable to resale. It follows that the Eighth Circuit correctly held that section 251(c)(3) "does not permit a new entrant to purchase the incumbent LEC's assembled platform(s) of combined network elements" as a cut-rate substitute for resale. Pet. App. 71a. This Court should confirm that section 251(c)(3) does not permit CLECs to acquire the UNE platform at the cost-based rates reserved for unbundled network elements.

CONCLUSION

The judgment of the court of appeals should be affirmed insofar as it vacates Rule 315(b), and reversed insofar as it upholds the "all elements" rule. If this Court determines that Rule 315(b) and the "all elements" rule are valid on their face, the Court should hold that the rules are invalid to the extent they require incumbent LECs to provide the UNE platform at the cost-based rates reserved for unbundled network elements.

Respectfully submitted.

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Nos. 97-826, 97-829, 97-830, 97-831, 97-1075, 97-1087, 97-1099 and 97-1141

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

AT&T CORP., *et al.*, *Petitioners*,

v.

IOWA UTILITIES BOARD, *et al.*, *Respondents*.

GTE MIDWEST INCORPORATED, *Cross-Petitioner*,

v.

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA, *Cross-Respondents*.

AND RELATED CASES

On Writs of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR RESPONDENTS THE GTE ENTITIES AND CROSS-PETITIONER GTE MIDWEST INCORPORATED

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May 18, 1998

**The GTE Entities are listed on the inside cover.*

BEST AVAILABLE COPY

The following GTE Entities are respondents:

GTE Service Corporation
GTE Alaska Incorporated
GTE Arkansas Incorporated
GTE California Incorporated
GTE Florida Incorporated
GTE Midwest Incorporated
GTE South Incorporated
GTE Southwest Incorporated
GTE North Incorporated
GTE Northwest Incorporated
GTE Hawaiian Telephone Company Incorporated
GTE West Coast Incorporated
Contel of Minnesota, Inc.
Contel of the South, Inc.

QUESTIONS PRESENTED

1. Did the Court of Appeals correctly decide (i) that the plain terms of the Telecommunications Act of 1996 leave pricing determinations under the local competition provisions of the Act to state public utility commissions, rather than to the FCC; and (ii) that as to both pricing and other intrastate matters addressed by the Act, Section 2(b) of the Communications Act of 1934, 47 U.S.C. § 152(b), limits the FCC's authority to areas where the agency was assigned a role in straightforward and unambiguous terms by Congress?

2. Did the Court of Appeals err in affirming the FCC's determination that the term "network elements" is not limited to equipment in an incumbent's call routing network (and features of such equipment), but rather includes virtually all important aspects of the incumbent telephone company's business, including separate software systems used for business functions (such as billing) and distinct services that are separately available for purchase at wholesale rates?

3. Did the Court of Appeals err in accepting the FCC's determination that in evaluating whether access to a particular network element was "necessary" or whether a failure to provide access to such an element would "impair" an entrant's ability to provide service, *see* 47 U.S.C. § 251(d)(2), the ready availability of alternative facilities outside the incumbent's network should be deemed irrelevant?

4. Did the Court of Appeals err in affirming the FCC's determination that entrants may purchase from an incumbent telephone company *all* of the network elements

QUESTIONS PRESENTED
(continued)

needed to provide service without using any facilities of their own?

5. Did the Court of Appeals correctly interpret 47 U.S.C. § 251(c)(3), which requires incumbent telephone companies to provide network elements to requesting carriers "in a manner that allows requesting carriers to combine such elements," as requiring requesting carriers, rather than incumbents, to undertake the burden of combining elements in order to provide telephone service?

6. Was the Court of Appeals correct in vacating the FCC's rule implementing 47 U.S.C. § 252(I), which provides that an incumbent telephone company must "make available any interconnection, service, or network element provided under an agreement . . . to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement," where the FCC's rule would have allowed requesting carriers to pick and choose individual terms from other agreements without accepting all of the trade-offs that had produced those terms?

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, the GTE Entities advise the Court that each of the GTE Entities listed inside the front cover of this brief is a subsidiary of GTE Corporation. In addition, GTE Corporation has the following subsidiaries or affiliates that have outstanding securities in the hands of the public:

Acentech
AG Communication Systems Corporation
Alabama 1-Franklin RSA Partnership
Anglo-Canadian Telephone Company
BBN Corporation
BC TELECOM, Inc.
Belgacom Directory Services, S.A. (BDS)
Cable-Axion Digitel Inc.
Cable-Axion Quebec Inc.
California RSA No. 4 Limited Partnership
Caribbean Reservation Center, C. por A.
CEIET Continental Telefone S.A.
Chesapeake Directory Sales Company
Communicaciones Telefonicas, C. por A.
Compania Anonima Nacional Telefonos
de Venezuela (CANTV)
Conagro Telecommunications, S.A.
Continental Telecommunications Company (Nigeria)
Continental Telephone of Saudi Arabia, Ltd.
CTI Compania de Telefonos del Interior S.A.
CTI Holdings, S.A.
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Dantel
Danville Cellular Telephone Company Limited Partnership
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Digital Courier International Inc.
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RULE 29.6 STATEMENT

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Equicom Systems Management, Inc.
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Gadsden Celltelco Partnership
GTE California Incorporated
GTE CyberTrust Japan Incorporated
GTE Directories (B) SDN.BHD.
GTE Directories Corporation Ltd.
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GTE Hawaiian Telephone Company Incorporated
GTE Industries Incorporated
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GTE Mobilnet of Indiana RSA #3 Limited Partnership
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GTE Telecom Saudi Arabia Ltd.
GTE Yellow Pages Publishing Hungary Kft
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Illinois RSA 1 Limited Partnership
Indiana RSA #1 Limited Partnership
Iowa RSA No. 4 Limited Partnership
Iowa RSA No. 5 Limited Partnership
ISM Information Systems Management (B.C.) Corporation
Jacksonville Cellular Partnership
Kentucky RSA No. 1 Partnership
Knoxville Cellular Telephone Company
La Compagnie de Telephone Anglo-Canadienne/
Anglo-Canadian Telephone Company
Laycon Telecommunications, S.A.
LightStream Incorporated
Mobility Personacom Canada Ltd.
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(continued)

Rapport Interactive Services Inc.
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Sherkate Sahami Khass Telephone Sazi Iran
Signa Gateway Corporation
Southern Indiana RSA Limited Partnership
Stentor Resource Centre Inc.
Stentor Services Inc.
Telectronics Financing Corporation
Texas RSA 10B3 Limited Partnership
The Micronesian Telecommunications Corporation
Tuscaloosa Cellular Partnership
VenWorld Telecom, C.A.
Virginia Cellular Limited Partnership
Virginia Cellular Retail Limited Partnership
Virginia RSA 5 Limited Partnership
Virginia RSA 5 Retail Limited Partnership
Wilmington Cellular Partnership
Zona France Las Americas

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INTRODUCTION

In the Telecommunications Act of 1996 ("Act" or "1996 Act"), Congress established federal standards governing the introduction of competition into markets for local telephone service. The 104th Congress fashioned a specialized mechanism for implementing these standards: private negotiations backed up by arbitrations conducted by state public utility commissions. The Act thus leaves control over implementing the new era of competition in *intra*state markets precisely where control over these markets has always been — in the hands of the States.

The Act also strikes a careful balance. On the one hand, Congress wanted to promote rapid entry by competitors even before they could build ubiquitous local telephone facilities of their own. The Act thus requires an incumbent local telephone company to provide interconnection, wholesale services, and elements of its network to competing entrants. On the other hand, Congress placed equal importance on establishing rules that would (i) encourage new entrants to build facilities; (ii) preserve the traditional goal of ensuring that basic service is universally available at low, affordable rates ("universal service"); and (iii) compensate incumbents fully for the forced use of their networks and services by competitors.

The Federal Communications Commission (FCC), however, attempted to undo Congress's most important decisions. *First*, the FCC sought to usurp authority to set the critical *prices* for wholesale services, interconnection, and network elements, which the Act expressly assigns to the States. *Second*, the FCC radically expanded an incumbent's duty to provide its competitors with access to its network elements in order to promote the FCC's view that it needed to "jump start" entry by new firms. The FCC's rules would have destroyed the Act's careful balance between promoting rapid entry and preserving universal service, compensating incumbents, and fostering true facilities-based competition.

The Eighth Circuit struck down the FCC's most blatant attempts to rewrite the Act and substitute its policy choices for those made by Congress. As we demonstrate below, the Court of Appeals was correct to invalidate the worst of the FCC's usurpations — including its attempt to grab jurisdiction away from the States — but in fact it should have invalidated significantly more of the FCC's Order.

STATEMENT OF THE CASE

A. The Regulatory Background Before 1996.

Regulation of telecommunications has long been divided into separate spheres of responsibility for the States and the federal government. Section 2(b) of the Communications Act of 1934 provides the central command limiting federal authority over intrastate communications. Except for certain enumerated sections of the Act, "nothing in this Act shall be construed to apply or to give the [Federal Communications] Commission jurisdiction with respect to . . . charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service." 47 U.S.C. § 152(b). Regulating intrastate service — including local service — has thus been the exclusive province of state public utility commissions for decades.

Regulators long operated under the assumption that local telephone service is a natural monopoly. State laws thus granted an exclusive franchise in each local service area and provided for regulating the incumbent local exchange carrier (or incumbent "LEC") as a public utility.

The system of exclusive franchises was critical for ensuring that telephone service was universally available at affordable rates to all residents, including those in remote and other expensive-to-serve areas. To promote this objective of "universal service," States set low (often below-cost) rates for basic residential service (particularly in more rural areas) and subsidized those rates with higher, above-cost charges for

business service and for services such as special calling features.[1] It was only by restricting entry into the local market that States could ensure that above-cost rates in some segments of the market would not encourage competitors to enter and strip away the high-margin customers that were funding low residential rates. The exclusive franchise system thus allowed the States to operate a subsidy system by requiring the incumbent carrier to serve as the conduit, or the tax collector, for the subsidy flows, collecting high rates for some services in order to subsidize lower rates for others.

B. The Telecommunications Act of 1996.

In more recent years, advances in technology began to erode the assumption that local service could be provided most efficiently by a single carrier. In the mid-1990s, therefore, many States began efforts to introduce competition into local markets and undertook the difficult task of allowing competitive entry while still preserving the traditional regulatory goal of universal, affordable service.[2]

In the Telecommunications Act of 1996, Congress determined to follow the lead of these States, and concluded that all telecommunications markets should be opened to competition. With respect to markets for local service, Congress rejected the idea that it was efficient for only one

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[1] The FCC has outlined the typical system of implicit cross-subsidies. *See, e.g.*, In the Matter of Federal-State Joint Board on Universal Service, CC Docket No. 96-45, ¶ 11 (May 8, 1997) (hereinafter "Universal Service Order") ("Most states have established local rate levels such that businesses pay more on a per-line basis for basic local service than do residential customers, although the costs of providing business and residential lines are generally the same. In addition, rates charged for vertical services such as touch tone, conference calling and speed dialing, subsidize basic local service rates.").

[2] *See, e.g.*, Cal. Pub. Util. Code § 709 (1994); *see also Iowa Utils. Bd. v. FCC*, 109 F.3d 418, 427 n.7 (8th Cir. 1996).

firm to operate a local network and instead outlined a "pro-competitive, de-regulatory" framework for introducing full, facilities-based competition into all segments of the telecommunications industry. H.R. Conf. Rep. No. 104-458 at 113 (1996) (hereinafter "Conf. Rep."). Congress proceeded explicitly on the assumption that "meaningful facilities-based competition is possible," *id.* at 148, and thus set out to craft a statutory plan that would "accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services . . . by opening all telecommunications markets to competition," *id.* at 113.

To foster the ultimate goal of facilities-based competition, Congress had to strike a careful balance between a series of competing considerations. Congress recognized, for example, "that it is unlikely that competitors will have a fully redundant network in place when they initially offer local service." Conf. Rep. at 148. To spur rapid entry, therefore, Congress allowed competitors to make some use of the existing network facilities of incumbent LECs. But granting access to incumbents' facilities raised countervailing concerns.

First, Congress had to ensure that access to existing equipment was not granted *so* expansively and made *so* attractive that it would stifle incentives for entrants to deploy their own rival facilities. That would sacrifice the long-term objective of the Act (facilities-based competition) in favor of the superficial, short-term achievement of merely multiplying the number of firms in the market using the same network.

Second, Congress had to ensure that incumbents would be fully compensated for the forced use of their property. The bedrock constitutional command embodied in the Takings Clause, U.S. Const. Amend. V, requires that incumbents who are forced to turn over their property to competitors be compensated fully for *all* of their costs and be afforded an opportunity to earn a fair rate of return.

Third, Congress recognized that there was an inherent conflict between competition and the current system of implicit subsidies used to maintain low residential rates. Once markets were opened, cross-subsidies in incumbents' rates would give new entrants an artificial ability to undercut incumbents and to strip away high-value customers. Indeed, by cherry-picking such customers, entrants would divert the very revenue streams that had subsidized below-cost service and would put pressure on the subsidy system to collapse. In confronting this problem, Congress had to protect two goals. First, Congress wanted to preserve universal service. Abandoning universal service altogether and letting the market set rates, after all, would mean *increases* in rates for most Americans. Congress therefore mandated the creation of explicit subsidy funds that would be sustainable in a competitive market. Second, Congress also had to ensure that during the interim period before such new funds were established, States would have sufficient flexibility to ensure that entrants could not cherry-pick the highest-value consumers in the market without making a fair contribution to universal service.

As outlined below, the Act reconciles these competing considerations through a series of restrictions ensuring that each facet of the plan for competition fulfills a limited role and does not upset the structure of the whole.

1. Opening the Local Exchange.

To promote the basic objective of spurring competition, Congress explicitly preempted all state barriers to entry in local service. *See* § 253(a). Congress also recognized that spurring rapid entry would require aiding competitors who would not be able instantly to deploy ubiquitous local networks of their own. Congress therefore imposed a series of duties on incumbents requiring them to allow entrants to use their existing networks.

First, Congress required each incumbent to allow entrants to "interconnect" with its network. *See* § 251(c)(2). This duty

made it possible for an entrant to compete by deploying only a limited network of its own since it eliminated the need to create a free-standing, ubiquitous network that connected all consumers in an area. Interconnection allows an entrant, in effect, to buy ubiquitous access to all consumers on the incumbent's network. Through interconnection, an entrant with only a small network of its own can ensure that customers on its network can speak to everyone else.

Second, Congress acted on its recognition that entrants may need to obtain "*[s]ome* facilities and capabilities (*e.g.*, central office switching)" from incumbents, Conf. Rep. at 148 (emphasis added), by requiring incumbents to make pieces or "elements" of their networks available on an "unbundled basis" in "a manner that allows requesting carriers to combine such elements in order to provide . . . telecommunications service." § 251(c)(3). This provided a method for entrants with *some* facilities of their own to purchase selected pieces of equipment from an incumbent (for example, the "loop" or wire connecting the customer to the switch) so that the entrants could begin competing without having to build out the full facilities needed to serve even a small number of customers.

Third, Congress directed incumbents to make finished telecommunications services available to entrants at wholesale rates. *See* § 251(c)(4). That allowed entrants to provide a limited form of competition by acting as middlemen reselling an incumbent's own service, and more importantly would allow entrants to build up a customer base of significant scale that would then enable them to invest in facilities of their own.[3]

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[3] *Cf.* Remarks of FCC Chairman Reed Hundt, "Antitrust and Interconnection: Old Wine in New Bottles (Telecommunications Act of 1996)," 1996 WL 646783 (November 8, 1996) (explaining that resale played exactly this role as a "competitive stepping stone to facilities-based competition" in long distance markets).

While it granted entrants forced access to incumbents' property, Congress also carefully *limited* these obligations to protect competing objectives served by the Act. In particular, to ensure that access to the existing network would not erode entrants' incentives to deploy competing facilities, Congress carefully circumscribed the duty to provide network elements.

First, Congress defined "network element" as "a facility or equipment used in the provision of a telecommunications service," including the "features, functions, and capabilities that are provided by means of such facility or equipment." 47 U.S.C. § 153(29). Network elements are thus definitionally limited to *physical* parts of the call-routing network — and features provided by those parts.

Second, Congress made it clear that even if a facility qualified as a "network element," a new entrant could not obtain that facility absent some demonstration of need. Congress thus required an evaluation of whether access to a proprietary element was "necessary" for a competitor, and for non-proprietary elements required an evaluation of whether a failure to provide access "would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer." § 251(d)(2).

Through these first two restrictions, Congress limited access to elements to what — as AT&T rightly recognizes — would conventionally be termed "essential facilities" of the local exchange — the facilities that had long been thought to be so difficult to duplicate that they justified treating incumbent LECs as natural monopolies. *See* AT&T Br. 2. These restrictions played a critical role in ensuring that allowing access to existing networks would not undermine the primary goal of "meaningful facilities-based competition,"

Conf. Rep. at 148, by eliminating incentives for entrants to build facilities of their own.[4]

Third, the Act restricted network elements to provide a limited entry path between simple "interconnection," which would be useful only for those who had end-to-end local exchange facilities of their own, and "resale," which would be used by those who had no facilities and who wanted to be middlemen reselling an incumbent's service. By mandating "access" to discrete pieces of the network "at any technically feasible point," § 251(c)(3), Congress provided entrants who had some facilities a method for entering immediately by filling out their networks with leased equipment — but it did not eliminate the need to have *any* facilities whatsoever.

Fourth, Congress directed that incumbents were required to provide these parts of their networks only as separate, discrete pieces — that is, "on an unbundled basis" and "in a manner that allows *requesting carriers* to combine such elements" to provide service. § 251(c)(3) (emphasis added). The statutory rubric of providing "access" to "elements" did *not* require them to turn over their *entire networks* ready for an entrant to use to resell fully preassembled telephone service.

In addition to those limitations on access to network elements, Congress also designed the pricing standards for both network elements and wholesale services to serve the concurrent objectives of retaining incentives for entrants to deploy their own facilities, allowing immediate entry by those who lacked complete networks of their own, compensating incumbents, and preserving universal service.

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[4] *Cf., e.g.*, W. Blumenthal, *Three Vexing Issues Under the Essential Facilities Doctrine: ATM Networks as Illustration*, 58 Antitrust L.J. 855, 860 (1989) ("In light of the potentially perverse competitive incentives created by the opportunity for compulsory access, a plaintiff should not be granted access in an essential facilities case unless the alternatives to the facility are extraordinarily difficult for anyone to put in place.").

Congress required wholesale prices for finished service made available for resale to be based on retail rates reduced only by the "costs that will be avoided by the local exchange carrier" through offering the service at wholesale rather than at retail. § 252(d)(3). That standard ensures that incumbents will be compensated for all their costs (which are necessarily reflected in retail rates set by state regulators) and that entrants who can provide service more cheaply than the incumbent will have an incentive to do so. It also ensures that wholesale rates will incorporate whatever cross-subsidy structure regulators have embedded in retail rates. *Cf.* H.R. Rep. No. 104-204, pt. 1, at 72 (1995) ("The [resale] rate should reflect whether, and to what extent, the local dialtone service is subsidized by other services . . . ."). It thus prevents entrants from purchasing wholesale services without contributing to universal service and ensures that entrants will not be given prices that allow them automatically to undercut the incumbent's rates (which include contributions to universal service).

For interconnection and unbundled network elements, Congress specified that rates must be "based on the cost . . . of providing the interconnection or network element" and "may include a reasonable profit." § 252(d)(1). Properly construed,[5] that standard ensures that incumbents will receive full compensation based on all the actual costs of providing their existing facilities. At the same time, it preserves incentives for entrants to construct their own facilities if they would be more efficient (*i.e.*, lower-cost) than the incumbent's.

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[5] As outlined below, the FCC misinterpreted the standard in § 252(d)(1) to preclude the States from considering either the costs of universal service subsidies or the actual costs of past investments in the network ("historical costs"). *See infra* pp. 15-16. Although the Eighth Circuit vacated that rule on jurisdictional grounds, state commissions have applied a similar interpretation.

2. Reform of Universal Service Subsidies.

Congress also recognized that competition required a comprehensive reform of universal service subsidies. Implicit subsidies embedded in retail rates are not sustainable in a competitive environment. Indeed, if left in place, they would unfairly hobble incumbents in the competitive race. Entrants unfettered by a state-imposed rate structure would have a guaranteed opportunity to offer lower rates than an incumbent. Thus, they could target and strip away precisely the high-margin customers who currently support low residential rates, diverting to themselves the revenues that now fund universal service. That result could not be permitted, since requiring incumbents to continue providing below-cost rates to residential subscribers in that scenario would impermissibly convert the incumbent from a conduit for subsidies to a deep pocket funding the subsidy itself.[6]

Wary of these dangers, Congress demanded reforms in universal service to ensure both that universal service was not sacrificed and that entrants would not be given an unfair advantage by being exempted from universal service burdens. Congress thus commanded in § 254 that the current system of implicit subsidies embedded in rates should be replaced by "explicit" subsidies sustainable in a competitive market. § 254(e).

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[6] The FCC itself has explained that the "system [of implicit subsidies] is not sustainable in its current form in a competitive environment. Implicit subsidies were sustainable in the monopoly environment because some consumers (such as urban business customers) could be charged rates for local exchange and exchange access service that significantly exceeded the cost of providing service, and the rates paid by those customers would implicitly subsidize service provided by the same carrier to others. . . . In a competitive market, a carrier that attempts to charge rates significantly above cost to a class of customers will lose many of those customers to a competitor." Universal Service Order ¶ 17.

Section 254 also makes clear that the States play a critical role in coordinating the transition to a new subsidy structure with the advent of competition. In particular, Congress wanted to ensure that in the interim period before new explicit subsidy systems were fully ready, entrants would not simply be given a free ride by being exempted from any universal service burden whatsoever. Thus, Congress obligated the States in unequivocal terms to ensure that "*[e]very* telecommunications carrier that provides intrastate telecommunications services *shall contribute, on an equitable and nondiscriminatory basis*, in a manner determined by the State to the preservation and advancement of universal service." § 254(f) (emphasis added). No entrant, in other words, could be absolved of a fair share of the burden of universal service. By giving them the flexibility to incorporate universal service costs into the prices for wholesale services and network elements, the Act's pricing standards provided the States a critical ability to coordinate their progress in universal service reform with advancing competition.

3. Decentralized Implementation of the Act.

In opening local markets to competition, Congress was extensively applying federal law to purely *intra*state communications — and particularly to matters of competition in intrastate communications — for the first time. Congress thus faced a significant choice. It could follow the extension of substantive federal law with a corresponding extension in the power of the FCC, or it could rely on a more localized mechanism to implement the Act.

In this deregulatory legislation, the 104th Congress was hardly enamored with the prospect of granting more power to federal bureaucracies, especially in an area traditionally subject to state control. Thus, it should come as no surprise that to implement the Act — part of the stated goal of which was to "reduce regulation," Pub. L. No. 104-104 (preamble) — Congress did not simply turn over the reins to regulators at the

FCC. Instead, Congress pursued a decentralized plan for establishing the Act's "de-regulatory" framework.

First and foremost, Congress did not turn to any government agency at all to administer the Act, but rather relied on *private negotiations* to establish agreements implementing the duties imposed on incumbents. Congress thus imposed a duty on both incumbents and new entrants to negotiate in good faith. *See* § 251(c)(1). Moreover, to provide an incentive for negotiations, the Act freed negotiated agreements from many of the substantive standards of § 251. *See* § 252(a).

Next, Congress provided that if private negotiations proved unfruitful, either party could petition a *state public utility commission* to conduct a binding arbitration on open issues. § 252(b)(1). States thus could use the expertise they had developed through decades as the sole regulators of local service to apply the Act, through individualized arbitration proceedings, to the specific circumstances of particular carriers in different parts of the country while protecting universal service.

In particular, Congress made clear in § 252(d) that *States* would determine the *prices* that would apply to interconnection, unbundled elements, and resold service. That section provides that "a State commission" will make the "[d]etermination" of the rates for interconnection and network elements and spells out the specific standard state commissions are to apply. § 252(d)(1). Similarly, it commands that a "State commission shall determine wholesale rates." § 252(d)(3).

Congress also assigned the FCC a number of significant tasks in implementing the local competition provisions of the Act. If a State decides not to undertake its role under § 252, the statute provides that the FCC "shall assume the responsibility of the State commission . . . with respect to the proceeding or matter." § 252(e)(5). In addition, Congress

assigned the FCC several specific responsibilities, including "exclusive jurisdiction" over "telecommunications numbering." § 251(e)(1). Similarly, Congress envisioned the FCC's having some role in determining which network elements should be made available, *see* § 251(d)(2), and in defining requirements for "number portability," § 251(b)(2).

Significantly, Congress declined to amend § 2(b) of the Communications Act to exempt the new provisions of the 1996 Act from § 2(b)'s strict limitation on the FCC's power over intrastate matters. Indeed, while such an amendment had been part of both the House and Senate bills, *see* S. 652, 104th Cong., 1st Sess. § 101(c)(2) (1995); H.R. 1555, 104th Cong., 1st Sess. § 101(e)(1) (1995), the Conference Committee removed such a provision from the final legislation.

To speed competition, Congress set deadlines for both the States and the FCC. Congress directed the FCC to "establish regulations" for implementing the tasks assigned to it in § 251 "[w]ithin 6 months after the date of enactment," § 251(d)(1), and directed the States to conclude arbitrations "not later than 9 months after the date on which the local exchange carrier received the request [for negotiations]." § 252(b)(4).

Lastly, consistent with its decentralized approach to administering the Act, Congress provided for exclusive review of state commission arbitration decisions in the various federal district courts. *See* § 252(e)(4), (e)(6). Congress gave the FCC no authority to review the States' determinations.

C. The FCC's First Report and Order.

After passage of the Act in February 1996, private negotiations started promptly and, under timetables set in the Act, state commissions soon began arbitrating agreements. As the Court of Appeals later explained in entering a stay of the FCC's pricing rules, "[t]he Act's system of private negotiation backed by state-run arbitration was operating without the input from the FCC" to speed the transition to competition and had

"initially proved to be successful." *Iowa Utilities Board v. FCC*, 109 F.3d 418, 427-28 (8th Cir. 1996).

On August 8, 1996, however, the FCC issued its 700-page First Report and Order,[7] which threatened to derail that process entirely. While the 1996 Act had set out a self-described "de-regulatory" framework for introducing competition and had carefully limited the expansion of federal regulatory power by assigning a vital role to the States, the FCC's ponderous Order attempted to regulate every facet of the transition to competition and dramatically extended the FCC's authority.

To start, the FCC attempted to countermand Congress's view that private negotiations were a reliable first-line mechanism for implementing the Act. Indeed, the FCC continues to insist that given "disparit[ies] in bargaining power," negotiations could not work unless the FCC declared a "national regulatory baseline" of outcomes to "reduce transaction costs," FCC Br. 10, — *i.e.*, unless the FCC dictated outcomes in advance.

1. The FCC's Proxy Prices and Pricing Rules.

In its First Report and Order, the FCC ignored Congress's fundamental choice to assign the states the authority to implement the Act's pricing standards under §252. The FCC thus declared that *it* had authority to adopt "national pricing rules" and proceeded to relegate the States to the role of mechanically applying detailed methods dictated by the FCC. J.A. 17-18 (¶¶ 104-05). Indeed, while the FCC now portrays its pricing rules as a project in cooperation with the States in which the FCC defined a general "methodology" and the States retained authority to implement that method by setting specific rates, *see* FCC Br. 10, 26-27, the Order went far beyond mere

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[7] In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, 11 F.C.C.R. 15499 (Aug. 8, 1996).

methodologies. The FCC set specific prices — so-called "proxy prices" — that States were *required* to apply unless they justified any departure with a detailed cost study prepared to the FCC's specifications. J.A. 132 (¶ 619).

Not surprisingly, the FCC does not even *mention* its indefensible proxy prices in this Court. In 1996, however, they were a grave threat to the negotiation and arbitration process set out in the Act. By guaranteeing entrants a known price if they held out for arbitrations, the proxies threatened to pull the plug on meaningful negotiations and arbitrations altogether. As the Eighth Circuit explained in entering its stay, "the negotiations preferred by the Congress [were] already breaking down due to the competitors' desire to hold out for the FCC's proxy rates." 109 F.3d at 425.

In addition to setting specific proxy prices, the FCC also spelled out extensive rules that it required the States to follow in implementing the Act's pricing standards. For example, the FCC determined that the cost-based pricing standard for network elements required the States to adhere to the FCC's own newly minted "Total Element Long Run Incremental Cost" or "TELRIC" pricing method. Under that method, network element prices were to be set based only on the forward-looking cost of operating a hypothetical network constructed solely with the most efficient technology available. J.A. 140, 141-42 (¶¶ 685, 690).

The FCC's TELRIC pricing rule would have exposed the States to potentially enormous liabilities, would have undermined universal service, and would have thwarted the goal of facilities-based competition. First, by requiring States to ignore an incumbent LEC's actual investment in its network, the FCC's TELRIC rule would open the States up to potentially massive liability for the taking of LEC property, since the States could not ensure that a LEC would have the opportunity to earn a fair rate of return on state-approved and state-required investments.

Second, the FCC's TELRIC rule would prohibit States from including in the price of network elements the substantial costs of subsidizing universal service. By forcing the States to exclude these subsidy costs from element prices (even before completing universal service reform), the TELRIC rule exacerbated the potential for cherry-picking: new entrants using an incumbent's network elements (with no obligation to serve high-cost residential customers) could selectively capture the high-revenue customers who subsidize universal service and pocket for themselves the revenues that currently fund universal service.

Third, the FCC's TELRIC rule would doom any hope of promoting true facilities-based competition. By making the incumbent's network available at the cost of a hypothetical, least-cost, ideally efficient network, the FCC ensured that no entrant could ever hope to construct cheaper, more efficient facilities of its own, and thus that it would have no incentive even to attempt to do so. The FCC's TELRIC rule aptly reflects the Commission's barely disguised belief that facilities-based competition is not a realistic objective — a guiding assumption to which the FCC clings in its brief in this Court. *See* FCC Br. 5 ("[N]o prospective entrant could hope to compete with the incumbent LECs . . . by replicating the existing local network infrastructure").

The First Report and Order, indeed, was tacitly based on the assumptions that Congress was wrong about the prospect for facilities-based competition in the local exchange, that local service remained a natural monopoly, and that the only way to spur a form of "competition" in local service was effectively to nationalize existing local networks and to sell them off piecemeal so that various competitors could use the same facilities simultaneously to offer the same service under different brand names. Rather than fostering real facilities-based competition, therefore, the FCC set about to generate a form of pseudo-competition by hypothesizing the prices that the process of

competition *might* achieve and declaring by fiat that the existing network should be sold at those prices. In that way, the FCC abandoned the objective of allowing competition to develop so that *competition* itself could gradually drive prices down and sought instead to impose the *end results* of competition through an edict of central planning that would merely promote the proliferation of resellers using the same network — and regulators parceling out rights to use that network.[8]

Finally, the FCC's exhaustively detailed pricing rules eliminated any role for the States other than crunching numbers to implement the FCC's formula. Reducing the States to the function of implementing the FCC's *diktat* was entirely in keeping with the FCC's view of the division of responsibilities in the Act. As the then-Chairman of the FCC put it, in the FCC's view, the 1996 Act threw the State's ability "to make their own decisions on things like local loop unbundling, pricing — that kind of thing" into "the trash can of history."[9] Indeed, to extend its control even further, despite the explicit terms of the Act granting federal district courts exclusive jurisdiction to review state arbitration decisions, the FCC purported to claim that *it* would have authority to review arbitrations under the complaint procedure provided in § 208 of the Communications Act. J.A. 465-69 (¶¶ 121-28).

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[8] *Cf.* Hon. Stephen G. Breyer, *Antitrust, Deregulation, and the Newly Liberated Marketplace*, 75 Calif. L. Rev. 1005, 1018 (1987) (explaining the "special policy risk of deregulation" that regulators may attempt to protect "competitors instead of protecting competition").

[9] Interview with Reed Hundt, *in* Telecommunications Report, Supplement at 10 (July 9, 1996).

2. The FCC's Radical Expansion of the Duty To Provide Unbundled Network Elements.

In addition to seizing control for itself over the Act's pricing terms, the FCC also swung a wrecking ball through each of four critical limitations Congress incorporated into incumbents' duty to provide access to network elements.

First, while Congress had carefully limited the definition of a "network element" to a "facility or equipment used in the provision of a telecommunications service" (or the "features, functions, and capabilities" provided by a facility), § 153(29), the FCC radically expanded the term to include virtually every aspect of an incumbent's business. For example, the FCC concluded that an incumbent must make available to its competitors (i) its operators, (ii) its directory assistance personnel, and (iii) its internal operations support software systems. J.A. 116-17, 129-30 (¶¶ 516, 554). By doing so, the FCC obliterated Congress's effort to restrict elements to what could be considered the "essential facilities" of the incumbent's network.

Second, Congress restricted access even to items that met the definition of "network element" by directing the FCC to consider whether access to proprietary elements was "necessary" and whether failure to provide non-proprietary elements would "impair" an entrant's ability to provide service. § 251(d)(2). The FCC's Order followed a two-step approach to eliminate these limitations. The agency first reinterpreted § 251(c)(3)'s direction concerning *where* incumbents should provide "access" to elements ("at any technically feasible point") into a broad presumption governing *what* parts of the network should be unbundled. It ruled that every element that could technically be unbundled *must* be unbundled. J.A. 49

(¶ 278).[10] Next, when it turned to the restrictions of § 251(d)(2), the FCC sought to protect its erroneous presumption requiring blanket unbundling by reading § 251(d)(2) in a way that would not "significantly diminish the obligation imposed by section 251(c)(3)." *Id.* at 53-54 (¶ 286).

To serve that end, the FCC effectively read the limitations imposed by § 251(d)(2) out of the Act by determining that it would conduct an evaluation of whether access to an element was "necessary," or whether failure to provide the element would "impair" an entrant's ability to provide service, by looking solely to the availability of alternative facilities *within the incumbent LEC's own network*. J.A. 51-52, 54-55 (¶¶ 283, 287). The availability of comparable facilities from other sources (for example, a tandem switch or trunking facilities from a long distance carrier) was irrelevant in the FCC's view. As a result, under the FCC's standard, access to a network element is virtually always required — an incumbent's network rarely contains needlessly duplicative facilities. And since no element would ever be available elsewhere at the price of a hypothetical, most-efficient network (the price mandated by the FCC), buying an element from another source would always "impair" a carrier's ability to provide service.

Third, having expanded the duty to provide "elements" to every conceivable aspect of an incumbent's business, the FCC took the further step of allowing a new entrant to purchase *all* of the network elements needed to provide completed service without providing *any* facilities or personnel of its own. Instead, the new entrant could simply order from the incumbent (at hypothetically most-efficient, cost-based prices) the *entire network* needed to provide completed telephone service, *plus* all of the incumbent's ancillary business functions (such as

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[10] The Court of Appeals struck down this presumption as contrary to the terms of the Act, *see* Pet. App. 46a-47a, and the FCC has not even attempted to seek review of that decision.

operator and directory services) and use all of these so-called "unbundled" elements to provide telephone service. J.A. 59, 63-65 (¶¶ 331, 338-41).

Fourth, the FCC ruled that even though the Act required incumbents only to provide elements in "a manner that allows requesting carriers to combine" them, § 251(c)(3), incumbents would instead be required to provide elements preassembled as they already existed in the network, *see* 47 C.F.R. § 51.315(a), and would even be required to combine them in any new fashion requested by an entrant. *Id.* §§ 51.315(c)-(f).[11]

This quadruple-whammy expansion of the unbundling duty destroyed the careful balance struck by Congress in the Act. By broadening "elements" to include every aspect of an incumbent's business, removing any limit on when they must be provided, and ruling that all elements must be provided already assembled into a functioning platform, the FCC turned network elements into another route for effectively obtaining finished service ready for resale. As a result, an entrant could ignore the statutory terms governing resale and instead could declare that it wanted to use the fiction of ordering *all* of the elements necessary to provide service *preassembled* — and supported by operators, directory assistance services, and operational support systems, to boot. Moreover, an entrant could use this fiction of sham unbundling to evade the wholesale rate under the Act and receive instead a rate that is the sum of the hypothetical, cost-based prices set by the FCC.

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[11] The agency actually attempted an even more extravagant extension of the unbundling duty by declaring that entrants would be able to demand that an incumbent upgrade its facilities to provide them with elements that are "superior in quality to that which the incumbent LEC provides to itself." 47 C.F.R. § 51.311. The FCC thus sought to give entrants the right to control for their own benefit the incumbent's network planning and the deployment of new technology in the network. The Eighth Circuit vacated this rule, *see* Pet. App. 50a-52a, and the FCC has not even attempted to seek review of that decision.

The FCC describes its expansions of unbundling as giving entrants a "choice" about entering the market. On the one hand, the entrant can purchase local service at the Act's wholesale prices — *in which case the entrant would contribute fairly to universal service and compensate the incumbent for the actual costs of its network.* Alternatively, under the fiction of buying "unbundled" elements that are preassembled, the entrant can declare that it wants *all* of the elements needed to provide completed service already combined together into a finished platform — *in which case the entrant would contribute nothing to universal service and compensate the incumbent only for the costs of a hypothetical, ideally-efficient network.*

Far from creating a meaningful "choice" of alternative entry strategies, this end-run around the wholesale rate opened an irresistible avenue for arbitrage that would have upset the careful balances Congress imposed in the statutory pricing standard. It would allow entrants — while merely reselling service provided entirely over an incumbent's network — not only to avoid contributing to universal service, but also to pocket for themselves the revenues from business and urban customers that currently maintain low residential rates. The FCC's rules, in short, would have sacrificed the critical goals of preserving universal service, fully compensating an incumbent for the use of its property, and promoting facilities-based competition, all for the short-term goal of promoting immediate entry by a number of firms and stripping away market share from incumbents.

Not surprisingly, when the Order was released, new entrants could not conceal their glee at this guaranteed opportunity for windfall profits. AT&T's president touted to investment analysts that the network element platform provided new entrants with "another way to resell" incumbent services, but at what he calculated to be a "52 percent" discount from retail rates — more than *two to three times* the discounts set according to the statutory standards for wholesale services.

See Transcript, "AT&T Investment Community Meeting" (March 3, 1997), J.A. 255, 258.

3. The FCC's Pick-and-Choose Rule.

Finally, the FCC distorted the obligation Congress imposed in § 252(i) of the Act. That section requires an incumbent to "make available any interconnection, service, or network element" that it provides under an agreement with one party "to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement." The FCC expanded that unremarkable requirement into an extraordinary option for entrants to pick and choose any individual term from earlier agreements *without* having to accept all the trade-offs and conditions built into the agreement that made those terms possible. J.A. 1044-45, 1048 (¶¶ 1310, 1321).

D. Review in the Eighth Circuit.

Several States, joined by GTE and other incumbent LECs, sought a stay of the FCC's pricing rules and the pick-and-choose rule — the elements of the Order that most immediately threatened to derail the process of negotiations and arbitrations envisioned by Congress. After briefing and oral argument, the Eighth Circuit stayed these provisions.[12]

On the merits, the Eighth Circuit determined that the FCC lacked jurisdiction to issue rules implementing the pricing terms of the local competition provisions of the Act. Centering its analysis on the text of the Act, the court explained that § 252(c)(2) plainly commands state commissions, not the FCC, to establish rates in arbitrations and that § 252(d) again directs

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[12] The FCC, AT&T, and MCI unsuccessfully asked Circuit Justice Thomas to vacate the stay. 117 S. Ct. 378; 117 S. Ct. 379 (1996). The FCC then reapplied to Justice Ginsburg, and AT&T and MCI reapplied to Justice Stevens. After being referred to the Court, these applications were also denied. 117 S. Ct. 429 (1996).

the States to set rates and defines the specific standards they are to apply. Given the absence of any reference to the FCC in the sections of the Act that explicitly addressed pricing, the court concluded that "the Act plainly grants the state commissions, not the FCC, the authority to determine the rates involved in the implementation of the local competition provisions of the Act." Pet. App. 14a.

Alternatively, the court explained that *even if* the text of § 252 were not clear, any ambiguity was resolved by the plain command of § 2(b) of the Communications Act. Under settled law, the restriction of § 2(b) barring the FCC from authority over intrastate matters can be overcome only by a straightforward and unambiguous command from Congress. *See* Pet. App. 15a-19a (citing *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355 (1986)). But far from providing any unambiguous grant of authority to the FCC, the 1996 Act unequivocally assigned pricing authority to the States.[13]

Given the command of § 2(b), the court also ruled that the FCC could claim authority to implement other intrastate matters addressed in the Act only where Congress had explicitly given the FCC a role. *See* Pet. App. 12a n.10, 37a.

As to the unbundling rules, the court upheld some of the FCC's decisions and struck down others. The court deferred both to the FCC's view of what constitutes a "network element," Pet. App. 41a-45a, and to the agency's view as to when access to a network element is "necessary" or would "impair" an entrant's ability to provide service, *id.* 47a-48a. The court also agreed with the FCC that the Act did not preclude an entrant from relying *solely* on network elements obtained from an incumbent to provide service. *Id.* 53a-58a.

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[13] Because it struck down the pricing rules on jurisdictional grounds, the court did not address the substantive challenges that GTE and others had brought against the FCC's pricing rules. *See* Pet. App. 23a-24a.

At the same time, however, the court made plain that the Act did not convert network elements into a second avenue for providing the same thing as finished service ready for resale. *Id.* 54a-55a. The court struck down the FCC's rules requiring incumbents to combine elements for new entrants. *See* 47 C.F.R. § 51.315 (c)-(f). In addressing those rules, the court explained that § 251(c)(3) of the Act "unambiguously indicates that requesting carriers will combine the unbundled elements themselves" and "does not require the incumbent LECs to do *all* of the work." *Id.* 53a (emphasis in original). The court further made clear that its "decision requiring the requesting carriers to combine the elements themselves" was critical for preserving the distinction between network elements and wholesale service. *Id.* 56a-57a.

In its initial opinion, however, the court without comment left in place one rule, 47 C.F.R. § 51.315(b), that required incumbent LECs to provide entrants with elements already pre-assembled into a functioning package if the elements were connected in the LEC's own network. In a petition for rehearing, GTE and other parties pointed out that the failure to vacate this rule would undermine the distinction between network elements and wholesale service that the court had recognized as fundamental to the structure of the Act. If an entrant could purchase the network already pre-assembled, it would simply be obtaining finished service for resale, but at a lower price that undermined the system of universal service. The Eighth Circuit agreed and, vacating § 51.315(b), explained that "[t]o permit such an acquisition of already combined elements at cost based rates for unbundled access would obliterate the careful distinctions Congress has drawn in subsections 251(c)(3) and (4) between access to unbundled network elements on the one hand and the purchase at wholesale rates of an incumbent's telecommunications retail services for resale on the other." Pet. App. 71a.

Lastly, the Eighth Circuit struck down the FCC's pick-and-choose rule. Concluding that the terms of § 252(i) in isolation did not flatly foreclose the FCC's interpretation, Pet. App. 25a & n.22, the court proceeded to "'look to the structure and language of the statute as a whole' to determine if the FCC's interpretation of this ambiguous provision is a reasonable one." Pet. App. 25a (quoting *National R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 417 (1992)). Under this second prong of *Chevron* analysis, the court held that the pick-and-choose rule would undermine the negotiation process Congress had established, and thus that the FCC's expansive gloss was not a reasonable construction of the Act. *Id.* 25a-27a.

E. The Dialing Parity Decision.

In a decision consolidated for review, the Eighth Circuit applied the same analysis under § 2(b) outlined in its main decision to hold that the FCC's dialing parity rules for *intrastate* calls were beyond the FCC's jurisdiction. *See* Pet. App. 79a-89a.

SUMMARY OF ARGUMENT

1. Congress expressly assigned authority over the pricing terms of the Act's local competition provisions to state public utility commissions. Section 252(c)(2) commands that "State commission[s] shall . . . establish any rates," and § 252(d) provides the standards that States must apply. Neither the FCC's efforts to construct an expansive rulemaking role for itself under the non-pricing terms of § 251, nor its efforts to dragoon into service general grants of rulemaking authority plucked from the 1934 Act can alter the explicit terms of the 1996 Act specifically addressing pricing — all of which direct the States, and only the States, to apply the Act's pricing standards.

Even if § 252 of the Act were not so clear, the Eighth Circuit correctly held that § 2(b) of the Communications Act

confirms the FCC's lack of authority over pricing. Section 2(b) unequivocally commands that ambiguity in the Act cannot be construed to give the FCC jurisdiction with respect to intrastate matters. That directive not only provides a statute-specific rule of construction that defeats any claim for *Chevron* deference to the FCC's grasp for authority over pricing; it also imposes a substantive limit on the FCC's power that can be overcome only by a "straightforward" grant of authority in the Act. No such grant of authority exists here.

2. The FCC's four major expansions of the unbundling duty violate the Act both in their individual terms and in their cumulative effect. First, the FCC stretched the term "network element" to encompass every aspect of a LEC's business, whether or not it formed a part of the call-routing "network." Second, while Congress sought to encourage deployment of competing facilities by requiring an evaluation of need before network elements would be made available, *see* § 251(d)(2), the FCC read this limitation out of the Act. Third, the FCC converted the duty to provide individual pieces of the network into a duty to provide *every* piece, so that an entrant would need no facilities of its own. Finally, the FCC completed its transformation of unbundling by turning an obligation to provide discrete, separate pieces of the network into a duty to turn over the entire network, preassembled into a functioning platform ready to provide service.

This quadruple expansion not only obliterated important distinctions in the Act by making network elements what AT&T has termed "another way to resell," but even worse, it made this second route to resell available at a different price. The FCC provided entrants the irresistible option of relying entirely on the incumbent's network to resell the incumbent's own service, but at a price vastly lower than the wholesale rate set by Congress — a price, indeed, that freed entrants of any of the burdens of universal service. The FCC thus opened an avenue for rampant arbitrage that provided an end-run around

the wholesale rate set by Congress and Congress's repeated commands designed to ensure that competition would not undermine universal service.

The Eighth Circuit rightly recognized that the FCC's approach would "obliterate the careful distinctions Congress has drawn" between network elements and wholesale service, Pet. App. 71a, and properly vacated the FCC's rule requiring incumbents to provide preassembled combinations of elements. But the court also should have struck down the FCC's further three expansions of the unbundling duty.

3. The Eighth Circuit rightly recognized that the FCC's pick-and-choose rule was fundamentally incompatible with Congress's plan for relying on binding negotiations to implement the terms governing local competition. The pick-and-choose rule would have scuttled that plan and made effective negotiations and the creation of binding agreements impossible.

ARGUMENT

I. CONGRESS RESERVED AUTHORITY OVER THE ACT'S PRICING AND OTHER INTRASTATE MATTERS TO THE STATES.

Despite the bold proclamation of the FCC's then-chairman that state control over local competition had been consigned to "the trash can of history," the terms of the 1996 Act reveal an entirely different plan. As the Court of Appeals made clear, proper analysis of the role Congress assigned the FCC in the local competition provisions requires addressing the statute in two steps.

First, even without regard to § 2(b), the Act by its terms unequivocally assigns authority over the pricing provisions of the Act to the States — *not* to the FCC.

Second, reading the Act under § 2(b)'s rule of construction not only confirms that the FCC has no authority over the

pricing terms in the local competition provisions; it also shows that the lower court was correct in limiting the FCC's role in other intrastate matters to subjects where Congress explicitly gave the FCC a role.[14]

A. Congress Expressly Reserved Authority Over the Act's Pricing Provisions to the States.

1. The Plain Terms of the Act Assign Pricing Authority to the States.

Section 252(c)(2) unequivocally provides that in arbitrations "State commission[s] shall . . . establish any rates for interconnection, services, or network elements." Similarly, section 252(d) — the section expressly entitled "Pricing Standards" — makes it clear that "[d]eterminations . . . of the just and reasonable rate[s]" for arbitrated agreements must be made by a "State commission." Section 252(d), moreover, goes on to provide the specific standards that *state commissions* are to apply in determining rates. These provisions make it abundantly clear that the States, not the FCC, are to implement the pricing terms of the Act.

A clear dichotomy in § 252(c) confirms the States' exclusive role in pricing. Section 252(c)(1) generally directs the state commissions in concluding "open issues" in arbitrations to ensure that terms they impose meet *both* "the requirements of section 251" *and* "regulations prescribed by the [FCC] pursuant to section 251." In contrast, the next paragraph specifically addresses *pricing* as a separate matter

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[14] AT&T attempts to slip through the back door some new challenges to the Eighth Circuit's rulings, arguing that the rulings were based on the court's jurisdictional holdings. AT&T Br. 32-34. The Court should not consider these issues, as they were not properly raised in the petitions for *certiorari*. On those issues, the Eighth Circuit did not rule, as AT&T suggests, based on the scope of the FCC's interpretive authority. Instead, the court held that the FCC's actions violated the substantive provisions of the Act. *See* Pet. App. 47a, 52a-53a.

and — omitting any reference to FCC rules — commands solely that States shall "establish rates . . . according to subsection (d)" — *i.e.*, according to § 252(d). As the Court of Appeals explained in staying the FCC's pricing rules, the contrast between subsections (c)(1) and (c)(2) demonstrates that "where Congress intended for the state commissions to follow FCC rules in arbitrations, it expressly said so." 109 F.3d at 424. As to pricing, Congress decidedly did not say so.

The FCC's contrary claim that § 252(c) somehow *supports* its authority over pricing is nonsensical. *See* FCC Br. 27. Under the FCC's tortured reading, § 252(c)(1) covers *all* issues, including rates, and requires States to follow the FCC's rules. Subsection (c)(2) then addresses pricing distinctly, but because pricing was already included in (c)(1), it *adds* a requirement that States also apply the standards of § 252(d). The FCC's interpretation gives no effect to Congress's decision to separate its directions concerning "establish[ing] rates" into a separate subsection. There would have been no need for such a division if Congress had intended all the same directions from § 251(c)(1) to apply to rates. The FCC's reading thus contravenes the settled principle that "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (citations omitted).

The plain division drawn in § 252(c), moreover, is echoed more broadly in the structure of the Act. Section 252(d) breaks out "Pricing Standards" into a separate, self-contained section that explicitly describes the standards that "State commission[s]" must apply in determining rates and conspicuously omits any role for the FCC.

This special treatment for pricing was no accident. Neither the House nor the Senate bill contained an analog to section 252, but rather in a single section defined the duties imposed

on incumbent LECs and the role that States were to fulfill in arbitrations. In the Senate bill, that section included a broad command for States to ensure that terms imposed in arbitrations "are consistent with the [FCC's] rules." S. 652, 104th Cong., 1st Sess. § 101(a) (creating § 251(d)(5)(D)) (1995). Concerned that such language might be construed to require States to conform to the FCC's commands on all matters, including pricing, States objected to the draft legislation.[15] In response, that language was deleted, a new § 252 outlining the States' role in arbitrations was created, and, in particular, a new § 252(c) established a bifurcated command concerning the standards States were to apply. On matters of pricing, the States were directed to apply solely the standards of § 252(d). The new § 252(d), in turn, outlined the principles for States to use in setting rates.[16] The legislative history thus

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[15] *See, e.g.*, Initial Comments of National Association of Regulatory Utility Commissioners, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-88, at 10 (May 16, 1996) (describing States' efforts to influence the Act before the Conference Committee); Comments of the Florida Public Service Commission at 8.

[16] The FCC's supporters would like to dismiss this dramatic restructuring as a non-substantive change. *See, e.g.*, MCI Br. 32-33 & n.23. Indeed, MCI claims that the FCC must retain any role in pricing arguably implied in the House and Senate bills simply because no change was discussed in the Conference Report. *Id.* That approach to the legislative history is insupportable. The plain implications of the reworking of the text cannot be overridden by reference to drafts of the statute. Moreover, MCI's claim that the lack of discussion in the Conference Report can deprive the changed text of any meaning is doubly flawed. It amounts to the view, firmly rejected by this Court, "not only that plain statutory language cannot be credited unless specifically explained in legislative history, but also that the apparent import of legislative history [*i.e.*, the change in text] cannot be credited unless specifically explained in legislative history." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 386 n.2 (1992). In any event, MCI's claim that any substantive change *must* be discussed in the report is flatly undermined

(continued...)

plainly confirms what the text of the Act makes clear: Congress expressly singled out pricing and reserved it to state control.

2. The FCC Cannot Point to Any Terms in the 1996 Act Assigning It Authority Over Pricing.

In the face of § 252's express assignment of pricing authority to the States, the FCC cannot point to any language that plausibly supports its claim to a role in pricing. Indeed, the FCC meticulously avoids § 252 — the section that explicitly addresses pricing — and diverts attention instead to § 251.

Specifically, the FCC claims that § 251(d)(1) gives it plenary rulemaking authority to implement "this section" and that this power extends to pricing. *See* FCC Br. 18. *See also* MCI Br. 27. That argument is flawed in several respects. In the first place, as the Eighth Circuit recognized, § 251(d)(1) is not a grant of rulemaking authority. Rather, it places a limitation on the FCC by directing the agency to complete "[w]ithin 6 months after the date of enactment" any rulemaking in areas where it has power under § 251.

Second, even if § 251(d)(1) could imply authority for the FCC to implement the terms of *that section*, as the court pointed out, "[n]owhere in section 251 is the FCC authorized specifically to issue rules governing the rates" for local competition. Pet. App. 12a. The pricing standards of the Act appear in § 252, not § 251.

To fill that hole, the FCC seizes upon the fact that in defining the duties imposed on incumbents, § 251(c) mentions

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[16] (...continued)
by the preamble to the report itself, which makes clear that in addition to omitting discussion of "clerical corrections" and "minor drafting" changes, the report also does not discuss "conforming changes *made necessary by agreements reached by the conferees*." Conf. Rep. at 113 (emphasis added).

"just" and "reasonable" "rates, terms, and conditions" for interconnection and network elements and "wholesale rates" for services. *See* § 251(c)(2)(D), (c)(3), (c)(4)(A). According to the FCC, § 251(d)(1) gives it authority to "implement" § 251(c)'s references to rates. FCC Br. 18. The FCC thus proceeds with its eyes shut tightly to the plain terms of the statute, pretending that § 251(c) sets out the "substantive rate provisions" of the Act. *Id.* at 28. That is fanciful. Section 252 expressly defines the "Pricing Standards" of the Act, and the plain terms of both § 251 and § 252 make clear that Congress directed the States to implement those standards.

Indeed, even § 251(c)'s passing reference to "just" and "reasonable" rates itself directs that this duty should be implemented "*in accordance with*" the "requirements" of "*section 252*." § 251(c)(3) (emphasis added). Section 252(c)(2) in turn directs the States to set rates following only the standards of § 252(d). Section 252(d), in fact, is the *only* section in the Act in which Congress defined the standards of "just and reasonable" rates and "wholesale" rates mentioned in § 251(c). Moreover, if there were any doubt that § 252(d) is the controlling provision on authority over pricing, § 252(d) states plainly that the States have the role of defining "just and reasonable rates" "*for purposes of*" the duty imposed in § 251(c). § 252(d)(1) (emphasis added). *See also* § 252(d)(3) ("*For the purposes of section 251(c)(4)*, a State commission shall determine wholesale rates . . . .") (emphasis added).

The FCC's claim that the relationship runs the other way, *see* FCC Br. 28 n.10, and that § 251(c)'s reference to § 252 somehow gives the FCC plenary authority to promulgate rules implementing § 252 — a section that conspicuously makes no mention of the FCC — ignores the terms of the Act. Congress directed that "*for purposes of*" any reference to rates in § 251, *state commissions* would determine rates under the standards defined in § 252. *See* § 252(d)(1), (3) (emphasis added). Congress could hardly have used any clearer language to

establish that to the extent rates were mentioned in § 251, the task of implementing the Act's *rate* requirements was to be carved out and implemented solely through the explicit commands given to the States in § 252.[17]

3. The FCC's Second-Line Statutory Arguments Provide No Better Support for Its Claim to Pricing Authority.

Unable to construct a coherent argument for its claimed pricing authority based on the express commands of the 1996 Act, the FCC and its supporters comb through both the Communications Act of 1934 and additional provisions of the 1996 Act hoping to find snippets to bolster the FCC's claims. To start, the FCC seizes upon a grab-bag of general provisions from the 1934 Act that grant the agency rulemaking power and tries to press them into service for its pricing authority under the 1996 Act. Specifically, the FCC calls upon §§ 201(b), 303(r) and 154(i), but none is up to the task.

Despite the FCC's protests, the Eighth Circuit rightly held that § 201(b) is limited to *interstate* communication. *See* Pet. App. 12a. Section 201(a) addresses solely "interstate or foreign communication by wire or radio," and the first sentence of § 201(b) limits that section to "*such* communication service." (emphasis added). AT&T's assertion that the subsequent "sentences" of the section are somehow not limited to interstate communication is preposterous. *See* AT&T Br. 23-24. The next clauses (they are not separate sentences at all) are merely provisos limiting the duty applied to "such

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[17] The FCC's tortured construction, moreover, does not even apply to pricing for wholesale service. The FCC's textual link — the reference in § 251(c) to rates "in accordance with . . . section 252" — does not exist in § 251(c)(4). Rather, the only cross-reference is § 252(d)(3)'s command that "[f]or the purposes of section 251(c)(4), a State commission shall determine wholesale rates." This hole in the FCC's theory confirms that the FCC has the relationship between the sections backwards.

communication service" in the first sentence. They imply no departure from the basic subject matter of interstate communication. In any event, even if the last sentence of the section were somehow wholly unconstrained by the context preceding it, the FCC cannot pluck such a generalized term out of the 1934 Act and purport to trump the 1996 Act's express grant of exclusive authority over pricing to the States. As this Court has repeatedly affirmed, "it is a commonplace of statutory construction that the specific governs the general." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384-85 (1992) (citation omitted).

For the same reason, the general rulemaking provisions of § 303(r) (which appears only in a list of FCC responsibilities relating to *radio* communications) and § 154(i) (which is simply the general grant of power to the FCC to execute "its functions" assigned elsewhere under the Act) cannot support the FCC's claims. Indeed, these provisions are particularly poor candidates for trumping § 252's explicit directions assigning pricing to the States since each is expressly limited to grant power only to the extent consistent with other provisions of the chapter.[18]

The FCC next runs through a list of provisions in the 1996 Act that it claims can bolster its assertion of pricing authority. In each case, the argument is the same. According to the FCC, these sections obliquely acknowledge a role for the FCC in implementing intrastate matters but do not *expressly* grant the FCC rulemaking power. In the FCC's view, therefore, one or another of the provisions in its grab-bag should be stretched to

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[18] *See* 47 U.S.C. § 303(r) ("*Except as otherwise provided in this chapter*, the [FCC] . . . shall . . . make such rules and regulations . . . not inconsistent with law, as may be necessary to carry out the provisions of this chapter . . . .") (emphasis added); *id.* § 154(i) ("The [FCC] may perform any and all acts, make such rules and regulations, and issue such orders, *not inconsistent with this chapter*, as may be necessary in the execution of its functions.") (emphasis added).

supply it with a broad authority to implement *all* local competition provisions of the Act, including the pricing terms, in order to avoid the "interpretive anomalies" that might result if some sections *acknowledged* a rulemaking role for the FCC without some other section *expressly granting* that role. FCC Br. 21. But an oblique reference to a role for the FCC on one topic cannot justify expanding general or ambiguous phrasing in *another section* so as to trump the explicit assignment of pricing authority to the States in § 252. Moreover, as outlined below, none of the provisions the FCC cites even implies the broad-ranging role the FCC would like.

The FCC first relies on § 251(d)(2), which outlines the standards that the FCC must apply in determining what network elements should be unbundled. While the section does expressly indicate a role for the FCC in implementing the unbundling obligation under the Act, that hardly indicates any broader role for the agency, particularly any role in pricing. To the contrary, the section strikingly demonstrates that where Congress intended the FCC to play a rulemaking role, Congress recognized that role explicitly in the text and prescribed standards for the FCC to apply.

Next, the FCC would rely on § 251(d)(3). *See* FCC Br. 22-23. That section, however, in no way assumes a broad rulemaking role for the FCC. To the contrary, as its title — "Preservation of State Access Regulations" — suggests, it assumes power in the *States* to define access requirements and explicitly *limits* the FCC, directing that the FCC "shall not" preclude the enforcement of any state access rules that are "consistent with the requirements of this section" and that do not "substantially prevent" implementation of the "requirements of this section" and "purposes of this part." § 251(d)(3). The FCC's attempt to suggest that the reference to "purposes of this part" implies a broad-ranging role for it in defining extra-textual "purposes" of the Act simply distorts the text. The clear import of the section is to require the FCC to

hew closely to the terms of the statute in order to prevent the agency from intruding on States' rules more than required to implement Congress's commands. Moreover, once again, it is particularly fanciful for the FCC to argue that a limitation on its power over one subject — access rules — can be transformed through negative implication into a sweeping grant of authority over a different subject — pricing.

Reaching to increasingly remote sections of the Act, the FCC next points to § 253(d), which gives the FCC a circumscribed authority "after notice and an opportunity for public comment" to preempt state laws that are the most egregious obstacle to the Act, namely those that flatly "*prohibit* or have the effect of *prohibiting*" any entity from providing a telecommunications service. § 253(d) (emphasis added). Contrary to the FCC's implausible assertions, that limited ability is not a blank check for the FCC to promulgate rules promoting its self-aggrandizing regulatory agenda. Rather, the section expressly allows the FCC to act only retrospectively after a "State or local government has permitted or imposed" a legal requirement prohibiting entry.

The FCC's appeal to § 160, which the Eighth Circuit ruled was not even properly raised below, *see* Pet. App. 13a n.11, is equally unavailing. That section was part of a separate title addressing "Regulatory Reform." It allows the FCC to forbear from enforcing any provision of the entire Communications Act and requires the agency before doing so to consider whether "charges, practices, classifications, or regulations" will be "just and reasonable," § 160(a)(1). It also restricts the FCC's ability to "forbear from applying the requirements of section 251(c)." § 160(d). From this, the FCC again jumps to the conclusion that any time it is mentioned in the same sentence as the word "rates" or "charges," Congress must have given it plenary authority specifically to implement § 252(d), and that it must have authority over § 251(c) as well.

Such inferences are wholly unwarranted. Since § 160 applies to the entire Communications Act, it had to refer to "charges" to ensure that the new regulatory forbearance measure would apply to all the charges for interstate service that the FCC has long controlled. Moreover, even in the 1996 Act, the FCC has an *express* role in implementing *some* unbundling provisions of § 251(c), *see* § 251(d)(2), and an explicit role in applying both the Act's pricing terms and § 251(c) when a State refuses to conduct arbitrations. *See* § 252(e)(5). The terms of § 160 thus mesh comfortably with the terms of both the 1996 Act and the 1934 Act without any need to invent an *über*-rulemaking authority for the FCC.

Lastly, the FCC strains to pluck pricing authority out of its entirely unrelated role in certifying Bell Operating Company (BOC) compliance with the competitive checklist that regulates BOCs' admission into the long distance market. *See* FCC Br. 29-31. The checklist requires a BOC to offer interconnection and network elements in accordance with the requirements of § 251(c) and § 252(d)(1), *see* § 271(c)(2)(B), and directs the FCC to approve an application only if "it finds that . . . [the BOC] has fully implemented the competitive checklist." § 271(d)(3)(A)(i). The FCC's theory that it cannot possibly determine compliance with § 252(d) unless it has independent authority to define the standards of that section is fanciful. Section 271 does not give the FCC any independent role in pricing; it does nothing more than require the FCC to ensure that a BOC has complied with what § 252(d)(1) calls for — namely, the "[d]eterminations *by a State commission* of the just and reasonable rate" for interconnection and elements. § 252(d)(1) (emphasis added). The FCC's effort to turn the statute around ignores once again the maxim that the specific governs the general. A mere cross-reference to § 252(d)(1) cannot *negate* the explicit command in § 252(d) for the States to establish rates and *reassign* authority to the FCC.

The FCC's effort to twist § 271 into authority over pricing is particularly audacious, moreover, since Congress recognized that control over the BOCs' gateway into the long distance market would give the FCC a potential choke-hold on the companies and explicitly directed the FCC not to stray from the text of the Act. Congress thus commanded that the FCC "may not, by rule or otherwise, limit or extend the terms used in the competitive checklist." § 271(d)(4). The FCC's attempt to parlay the mere cross-reference to § 252(d)(1) into complete rulemaking authority over pricing would accomplish precisely the sort of expansion of power that Congress forbade.

4. The FCC's Policy Arguments Ignore Congress's Plan for Implementing the Act and Cannot Override the Text of the Statute.

Having failed to provide any textual basis for its authority over pricing, the FCC and its supporters predictably resort to a host of policy arguments. The FCC tries to reconcile its assertion of power with the terms of the Act by arguing that it has not usurped the States' pricing role *entirely*. Rather, the FCC claims, it has devised a system of "concurrent and complementary pricing roles" under which the FCC prescribes pricing methodologies and the States set actual rates. FCC Br. 26; *see also* MCI Br. 30-31. This effort to justify the FCC's approach is also fatally flawed.

In the first place, the First Report and Order did not limit the FCC to this newly-packaged cooperative role at all. Rather, it set specific proxy prices that States were required to apply. J.A. 132 (¶ 619). Not surprisingly, even the FCC does not defend its improper attempt to set specific rates in this Court.

Moreover, the FCC's current embrace of a "cooperative" role is nothing more than patronizing rhetoric. The FCC pays lip-service to the idea of reserving to the States the "important task of tailoring [the Act's] standards to accommodate region- or carrier-specific variables," FCC Br. 39, and allowing States

to "exercise their considerable discretion," *id.* at 26, because the text and structure of the statute amply reveal Congress's intent to enlist the expertise of States in administering the Act and in particular to rely on their judgment in making "[d]eterminations . . . of the just and reasonable rate." § 252(d)(1). But after the FCC has exhaustively defined and artificially restricted the costs state commissions are allowed to consider, it leaves the States no role other than plugging numbers into a uniform FCC formula.

Finally, the dual control over pricing that the FCC espouses has no basis in the text of the Act. As outlined above, the Act's pricing terms are directed to the States and only to the States — they suggest *no* role for the FCC at any level of generality. Indeed, § 252(d) explicitly defines the "Pricing Standards" that are to be used to set rates and directs the *state commissions* to implement them. Seeking a textual hook for its argument, MCI suggests that the command to the States to "establish" rates somehow limits the States' role and distinguishes their function from the broader one of "prescribing pricing methodology." MCI Br. 30. But that purported distinction is baseless. Far from suggesting a narrow role for the States, Congress made it perfectly clear that it expected them to exercise considerable discretion by directing them to make "*[d]eterminations*" of "just and reasonable rate[s]." § 252(d)(1) (emphasis added).

The FCC's strained attempt to support its theory of dual pricing roles is particularly unconvincing since the terms of the 1996 Act bear no resemblance to other statutes clearly granting the FCC the role it longs for here. For example, in the Cable Act of 1992 — which the FCC itself showcased below as an example of the sort of role it has in mind — Congress explicitly directed that "[t]he Commission shall, by regulation, ensure that [cable] rates . . . are reasonable," 47 U.S.C. § 543(b)(1), and enumerated specific "factors" the FCC was to consider, § 543(b)(2). Congress also left no uncertainty about

the States' subsidiary role in applying the FCC's determinations as it directed that "the rates for the provision of basic cable service shall be subject to regulation by a franchising authority . . . in accordance with the regulations prescribed by the Commission." § 543(a)(2)(A). Even a cursory comparison to the Cable Act amply demonstrates that Congress knew how to create a system of dual authority over pricing and that it simply did not take that approach in the 1996 Act.[19]

Next, the FCC and its supporters fall back on a parade of horribles they claim will result from the decision below. Their dire warnings boil down to the repeated assertion that the Eighth Circuit has supposedly created an "incoherent jurisdictional scheme," MCI Br. 35, in which States will be applying "radically disparate methodologies" to pricing, FCC Br. 30, and in which there will be endless rounds of litigation before the courts ever arrive at what the FCC's rules already provide: a single, uniform, nationwide interpretation of the finest details of the pricing methods to be used under the Act.

What the FCC and its supporters attempt to caricature as a descent into chaos, however, is nothing more than a system that allows the States much-needed localized discretion in applying the federal standards supplied by the Act — an outcome the 104th Congress saw as one of the *advantages* of federalism. The FCC's strident claims that States will be wildly varying on basic methodological issues is belied by the

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[19] AT&T's claim that this Court found such a plan for dual control over rates under the Medicaid Act despite supposedly clearer language assigning responsibility to the States is simply false. *See* AT&T Br. 26 (citing *Wilder v. Virginia Hospital Ass'n*, 496 U.S. 498 (1990)). *Wilder* involved no question of the agency's authority, but addressed only the availability of a § 1983 action. The statute, moreover, made the agency's oversight authority clear as it required States to "mak[e] assurances *satisfactory to the Secretary [of HHS]*" that the rates they used were "reasonable and adequate." *Id.* at 503 (quoting statute) (emphasis added).

terms of the Act itself. Section 252(d) provides sufficient guidance to ensure that States will operate under the same fundamental principles. And while it is true that application of the Act's standards may vary in the details from State to State, it is entirely appropriate for different States to take into account their particular regulatory histories and current circumstances by considering different categories of costs in setting rates.

Two obvious circumstances that would vary from State to State and that States would have to accommodate in setting rates involve the ever-important issues of protecting universal service and compensating incumbents for their historical investments. By assigning the States control over pricing, Congress ensured that the same entity that controlled both the level of intrastate universal service subsidy costs and the mandated investments incumbents must make in their networks would also have authority to set prices for use of the incumbent's property that would fairly distribute those costs.

B. Section 2(b) Independently Confirms That the FCC Has No Jurisdiction Over Pricing, and Also Restricts the FCC's Authority Over Other Intrastate Matters Addressed by the 1996 Act.

As outlined above, the Court of Appeals squarely held that "the Act plainly grants the state commissions, not the FCC, the authority to determine the rates involved in the implementation of the local competition provisions of the Act." Pet. App. 14a. It went on, moreover, to buttress that holding by ruling that even if the Act were ambiguous in assigning pricing to the States, "[a]ny ambiguity regarding the FCC's vacuum of authority over local telecommunications pricing under the Act is resolved by operation of section 2(b)" *against* the FCC. *Id.* at 15a.

Because the Court of Appeals was correct that the Act explicitly assigns pricing authority to the States, whether or not § 2(b) applies does not matter for the question of authority over

pricing. Nevertheless, the court's § 2(b) analysis is correct, and provides an *independent* ground for invalidating the FCC's assertion of jurisdiction over pricing. Section 2(b), moreover, provides the critical command limiting the FCC's authority over other, non-price intrastate matters addressed in the Act.

1. Section 2(b) Is a Statute-Specific Counter-*Chevron* Rule of Construction.

Section 2(b) of the Communications Act of 1934 unambiguously commands that "nothing in this Chapter shall be construed to apply *or to give the Commission jurisdiction with respect to* . . . charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service." 47 U.S.C. § 152(b) (emphasis added). As this Court has explained, the section constitutes a "congressional denial of power to the FCC." *Louisiana Public Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). Indeed, the court has emphasized that the "sweeping" wording of the section "[b]y its terms" "fences off from FCC reach or regulation intrastate matters — indeed, including matters 'in connection with' intrastate service." *Id.* at 370.

In addition, § 2(b) "provides its own rule of statutory construction," *id.* at 377 n.5, under which any ambiguity concerning the application of the statute or the extension of FCC jurisdiction over intrastate matters must be resolved *against* extension of federal authority. Section 2(b) thus provides a statute-specific, counter-*Chevron* rule that precludes the FCC from claiming deference for attempts to extend its rules to intrastate matters. *Cf. Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984).

This rule of construction, moreover, plainly applies to the local competition provisions of the 1996 Act. Indeed, Congress pointedly *declined* to amend § 2(b) to exempt the local competition provisions from its reach. While both the House and Senate bills included such an amendment,

see S. 652, 104th Cong., 1st Sess. § 101(c)(2) (1995); H.R. 1555, 104th Cong., 1st Sess. § 101(e)(1) (1995), Congress *removed* such a provision from the final legislation.[20]

2. The Court of Appeals Correctly Held That Section 2(b) Would Resolve Any Ambiguity in the Act Against the FCC's Assertion of Jurisdiction Over Pricing Matters.

As the Court of Appeals correctly concluded, even if the Act were ambiguous in assigning pricing jurisdiction to the States — which it is not — § 2(b) would resolve that ambiguity against the FCC's assertion of jurisdiction.

As the Court of Appeals found, "the prices that incumbent local exchange carriers may charge their new competitors for interconnection, unbundled access, and resale ... as well as the rates for the transport and termination of telecommunication traffic qualify as 'charges . . . for or in connection with intrastate communications service.'" Pet. App. 15a. Accordingly, the rule of construction embodied in § 2(b) applies, which means that the FCC has no jurisdiction over prices unless the Act "unambiguous[ly]" and "straightforward[ly]" gives it such jurisdiction. *Louisiana*, 476 U.S. at 377. Even if one were to disagree with the Court of Appeals' primary holding that the Act "plainly" assigns pricing jurisdiction to the States, Pet. App. at 14a, the Act cannot be fairly characterized as doing the opposite — namely, "unambiguous[ly]" and "straightforward[ly]" assigning pricing jurisdiction to the FCC. Accordingly, under the rule of

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[20] The FCC attempts to bury this damning fact in a footnote and to dismiss the elimination of the amendment as a "non-substantive" change because it was not expressly discussed in the Conference Report. But that tactic ignores the express statement in the Report that it does not discuss "conforming changes made necessary by agreements reached by the conferees." Conf. Rep. at 113. *See also supra* n. 16.

construction in § 2(b), any ambiguity is resolved *against* the FCC's assertion of jurisdiction.

The FCC and its supporters offer four insubstantial arguments to avoid this straightforward application of § 2(b).

First, the FCC dredges up the same list of supposed "interpretive anomalies" addressed above, *see supra* pp. 34-35, to argue that the Act must be read to grant it broad powers over *intra*state matters relating to both pricing and nonpricing issues. As explained earlier, none of the provisions to which the FCC points implies any broad rulemaking power for the FCC whatsoever. But more importantly, the FCC's entire approach to establishing its supposedly "straightforward" grant of jurisdiction is precisely what § 2(b) *prohibits*. The FCC's entire argument is an effort to pick out sections of the Act that the FCC thinks *obliquely* suggest some rulemaking role for it and to leverage these sections into a basis for "construe[ing]" *other* ambiguous or general provisions of the Act into a sweeping grant of rulemaking authority over *all* intrastate matters. That roundabout approach to the text is exactly what does *not* provide a "straightforward" and "unambiguous" command sufficient to "override" § 2(b). *Louisiana*, 476 U.S. at 377.

Indeed, where Congress has intended to supersede § 2(b) by expressly assigning the FCC intrastate authority, it has generally done so in exceedingly clear terms. In the 1996 Act itself, for example, Congress directed that the FCC should "take all actions necessary" to "prescribe regulations that establish a per call compensation plan . . . for each and every completed *intrastate and interstate call using [a] payphone*." § 276(b)(1)(A) (emphasis added). Similarly, in § 225, Congress directed the FCC to "ensure that *interstate and intrastate* telecommunications relay services are available . . . to hearing-impaired and speech-impaired individuals." § 225(b)(1) (emphasis added). Congress thus demonstrated repeatedly that it could provide exactly the sort of

unambiguous command that would override § 2(b); yet the FCC can nowhere point to remotely comparable language giving it any role in pricing for the local competition provisions.

Second, the FCC and other petitioners attempt to circumvent § 2(b) by arguing that the 1996 Act straightforwardly *applies* to intrastate matters, and that this alone should suffice to give the FCC rulemaking power. That approach runs afoul of the plain terms of the section, which expressly imposes a *dual* limitation — phrased in the disjunctive — commanding that "nothing in this Chapter shall be construed *to apply or to give the [FCC] jurisdiction with respect to*" intrastate matters. 47 U.S.C. § 152(b) (emphasis added). According to the FCC, however, the disjunctive phrasing should simply be ignored.

On this score, the FCC's primary argument amounts to the assertion that federal telecommunications law cannot conceivably apply to any matter outside the FCC's rulemaking authority. The FCC argues this proposition: as long as the Communications Act applied only to interstate matters, the FCC's jurisdiction was coextensive with the Act; therefore, now that the Act also applies to intrastate matters, the FCC's authority should automatically be extended to the full scope of the statute, because to do otherwise would be to give effect to the disjunctive phrasing of § 2(b) for the first time. *See* FCC Br. 34; *id.* at 21. Merely to state that position is to refute it.

Third, replaying an argument already rejected by this Court in *Louisiana*, the FCC appeals to a form of pseudo-legislative history to narrow § 2(b). The FCC claims that § 2(b) was passed in response to the intrastate authority that the Interstate Commerce Commission had been permitted to exercise in the *Shreveport Rate Case, Houston, E. & W.T.R. Co. v. United States*, 234 U.S. 342 (1914). That case involved ICC regulation of intrastate matters to which federal law did not directly apply — what the FCC now calls "ancillary"

jurisdiction. As a result, the FCC claims, whatever the terms of § 2(b), the provision should be limited to overruling *Shreveport* on its facts and to prohibiting similar exercises of "ancillary" jurisdiction. *See, e.g.*, FCC Br. 34-35; MCI Br. 45-47.

Even apart from the flaws this approach has as an attempt to elevate ambiguous legislative history over the terms of the statute, the FCC's maneuver is hobbled by a more fundamental error: this Court has already rejected this same argument. In *Louisiana*, the FCC claimed that because *Shreveport* had involved power to set intrastate rates, § 2(b) should only limit the FCC's power over that precise subject. The Court emphatically rejected this "narrow reading." *Louisiana*, 476 U.S. at 371. The Court explained that the provision was not limited to responding to the facts of the *Shreveport* case, but rather dealt more broadly with "[t]he question of an appropriate division between federal and state regulatory power." *Id.* at 372. The Court thus concluded that the "breadth of the language" in the section should be given full effect. *Id.* at 373. The FCC's effort to use *Shreveport* to cabin the terms of § 2(b) is thus a tactic that has already been soundly rejected.

The FCC's *final* attempt to slip out from under § 2(b) is a belated assertion of the so-called "impossibility" exception. FCC Br. 36. As described by the Court of Appeals, "this quite narrow exception," recognized in some court of appeals decisions, "provides that the FCC may preempt state regulation of intrastate telecommunications matters only when (1) it is impossible to separate the interstate and intrastate components of the FCC regulation and (2) the state regulation would negate the FCC's lawful authority over interstate communications." Pet. App. 16a. The FCC claims that this exception grants it pricing authority because local telephone facilities carry *both* intrastate and interstate calls.

The agency's belated resort to this theory is fruitless for a number of reasons.

First, the FCC never relied on this basis for jurisdiction in the First Report and Order. J.A. 448-56, 461-65 (¶¶ 83-103, 111-20). (outlining the FCC's grounds for authority). It is a bedrock principle of administrative law that a reviewing court "must judge the propriety of [administrative] action solely by the grounds invoked by the agency," *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947), including the agency's articulated rationale for bringing its action within its statutory authority, *see American Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 539-540 (1981). The *post hoc* impossibility claims of the FCC's appellate counsel thus cannot be substituted for the agency's own basis for acting.

Indeed, the policies behind *Chenery* apply with particular force here. Had the agency ever attempted to spell out its impossibility analysis, it would have been patently obvious that the theory could not remotely apply to a large portion of the FCC's claims for power. For example, setting wholesale prices for local service by definition involves matters that are solely *intrastate* in nature. Indeed, before the Eighth Circuit the FCC conceded that this service was "solely intrastate." Brief for the FCC and the United States at 30. The impossibility exception thus cannot remotely justify the wholesale pricing authority the FCC claimed. The FCC, moreover, has never claimed that jurisdiction to set wholesale prices under § 252(d)(3) should rest with a different entity from authority to set prices for interconnection and network elements under § 252(d)(1). As a result, the incontestable failure of the FCC's "impossibility" theory as to wholesale pricing necessarily undermines the FCC's claims over the remaining pricing authority as well.

But even if the FCC could get beyond both *Chenery* and the patent inapplicability of the impossibility exception to much of the authority the FCC wants to claim, that exception would still not justify FCC power over *any* pricing matter. Impossibility analysis protects the efficacy of the FCC's rulemaking authority only where the FCC has clear authority

over some interstate matter to start with. But the FCC itself acknowledges that the Act assigns authority over pricing as one indivisible unit (covering, for example, element pricing whether the elements are used for *inter*state or *intra*state calls), *see* FCC Br. 36-37, and the best the FCC can plausibly argue to get its foot in the door is that the Act has not been entirely clear in *foreclosing* any FCC role. From that starting point the FCC cannot call on "impossibility" to bootstrap a purported *ambiguity* about pricing into *complete control* for itself over the very same subject — unless the exception is an entirely circular device for expanding FCC power. To the contrary, impossibility analysis requires a clear FCC role in some *inter*state matter as an essential predicate for extending the FCC's reach into *intra*state matters. It cannot convert a purported lack of clarity into an absolute assignment of all pricing authority to the FCC.

3. The Court of Appeals Was Also Correct That Section 2(b) Restricts the FCC's Jurisdiction Over Other, Non-Pricing Matters Involving Intrastate Telecommunications.

Having relied on § 2(b) to provide "belt-and-suspenders" support for its ruling on jurisdiction over pricing, the Eighth Circuit was entirely correct to apply the plain terms of § 2(b) to restrict the FCC's authority over other, non-pricing intrastate matters addressed by the 1996 Act as well. As the court explained, Congress used express and unambiguous terms to assign the FCC a role in several intrastate matters under the Act. Absent such an express grant of authority, the FCC could point to no basis for ignoring the command of § 2(b). As a result, the court correctly held that the FCC's intrastate authority under § 251 was "confined to the six areas where

Congress expressly called for the FCC's participation." Pet. App. 37a.[21]

II. THE EIGHTH CIRCUIT PROPERLY VACATED ONE OF THE FCC'S FOUR RULES RADICALLY EXPANDING THE UNBUNDLING DUTY, BUT FAILED TO ENFORCE THE REMAINING RESTRICTIONS IMPOSED BY CONGRESS.

As explained above, Congress balanced a series of competing concerns as it opened local markets to competition. While seeking to encourage immediate entry by granting access to incumbents' facilities, at the same time Congress sought to protect incentives for facilities-based competition, ensure that incumbents would be fully compensated for the use of their property, and preserve support for universal service. The FCC wholly upset the balance reconciling these objectives by driving a freight train through each of four critical limitations Congress placed on incumbents' duty to provide access to elements of the network.

First, it redefined "network element[s]" to include *all* significant aspects of an incumbent's business, not just pieces of its call delivery system (and the features thereof). *Second*, it effectively read out of the Act the standards requiring the agency to evaluate whether access to network elements was "necessary" or whether denial of access would "impair" the ability of competitors to provide service. *Third*, it transformed the Act's requirement that an incumbent sell its competitor individual *pieces* of its network into an obligation to sell the entire network. *Finally*, the FCC attempted to force incumbents to provide a package of "unbundled" network

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[21] By identifying these areas of FCC power under § 251, the court did not purport to catalogue *all* grants of intrastate authority to the FCC in the Act. The question whether the FCC could identify sufficiently explicit language elsewhere in the Act to grant intrastate authority is not presented here.

elements already combined together into completed telephone service with all advanced features and functions.

The Eighth Circuit rightly vacated the last of these four extra-statutory efforts to redefine the unbundling duty. Each of the first three expansions of the duty is also flatly contrary to the Act. In upholding those FCC rules on unbundling, the Eighth Circuit erred.

A. The Combined Effect of the FCC's Four Unlawful Decisions on Unbundling Highlights the Conflict Between the FCC's Rules and the Act.

As outlined in detail below, the FCC violated the plain terms of the Act with each of its four expansions of the unbundling duty. But the stark disparities that exist between the FCC's individual rules and the terms of the Act do not tell the whole story here. It is the cumulative effect of the FCC's decisions that graphically shows how the FCC has expanded access to unbundled elements beyond all confines and turned it into an irresistible opportunity for entrants to engage in arbitrage at the expense of universal service.

The Eighth Circuit properly recognized the need to evaluate the FCC's rules against the plan of the Act as a whole. Thus, in vacating the FCC's attempt to require incumbents to provide network elements already combined together, the court explained that, viewed in the context provided by the broader structure of the Act, the FCC's rule would improperly "obliterate the careful distinctions Congress has drawn" between network elements and resale. Pet. App. 71a.

Indeed, the court's ruling prevented the FCC's multiple expansions of the unbundling duty from completely undoing the Act. As outlined above, the FCC's authorization of "sham unbundling" — allowing an entrant to order finished service through the fiction of purchasing *all* the elements of the network already preassembled into a functioning platform — would have given entrants an irresistible choice. Either they

could purchase service for resale at a price that contributes to universal service and fully compensates the incumbent (*i.e.*, the wholesale price under § 252(d)(3)), or they could purchase it *for a fraction of that price* through a rate that evades any contribution to universal service and fails to compensate the incumbent.

That is some choice! It would allow new entrants to pay a fraction of the price of wholesale service through the expedient of invoking sham unbundling and ordering the network element "platform." Perhaps most outrageous of all, this government-sponsored system of regulatory arbitrage would have allowed entrants not merely to avoid contributing to universal service, but — while doing nothing but reselling service provided entirely over an incumbent's network — to pocket for themselves the revenues from business and urban customers that currently maintain low residential rates. In that way, sham unbundling would effectively convert what had been a subsidy for consumers into a subsidy attracting arbitrageurs.

Not surprisingly, the FCC and its allies recognize that a candid examination of the effects of these rules provides the greatest threat to sham unbundling. Thus, they hope to divert attention from the complete picture in two ways.

First, they decry any effort to examine the statutory structure as an extra-textual foray into "policy." *See, e.g.*, FCC Br. 47; MCI Br. 21-22. The FCC no doubt would prefer to restrict this Court to viewing in isolation each of the discrete terms the agency purported to interpret. In that way, the FCC could attempt to squeeze some ambiguity out of the text and rush to claim deference for its construction. *See* FCC Br. 48; MCI Br. 14-15.

But this "divide and conquer" approach to statutory interpretation is impermissible. The FCC cannot jump to *Chevron* to shore up its rules while hiding the overall impact of

its regulatory scheme. To the contrary, before there can be any question of deferring to an agency, a court must endeavor to determine the intent of Congress by examining both "the particular statutory language at issue *as well as the language and design of the statute as a whole*." *Sullivan v. Everhart*, 494 U.S. 83, 89 (1990) (emphasis added); *United States Sav. Ass'n v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988). As the Court has warned, individual provisions are "often clarified by the remainder of the statutory scheme," in particular where "only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *Timbers of Inwood*, 484 U.S. at 371. *Chevron* cannot be applied, so to speak, on an "unbundled basis."

Nor can the FCC bolster its attacks on the Eighth Circuit's construction of the Act with its vitriolic rhetoric. What the FCC and its supporters vilify as anticompetitive increases in costs that the Eighth Circuit imposed due to its "policy" views, *see, e.g.*, MCI Br. 22, AT&T Br. 46, involve nothing more than enforcing the balanced restraints Congress imposed on access to elements.

MCI attempts a second, more focused effort to impose blinders on any analysis of the Act by insisting that the impact of the FCC's sham unbundling on universal service must be ignored. Universal service, MCI claims, is an entirely separate concern addressed elsewhere in the Act. Thus, pointing to the mandate for new "explicit" subsidies, *see* § 254, MCI claims that Congress refused to link such reforms in any way to competitors' ability to enter the market. MCI would brand any effort to show that the FCC's rules would exempt entrants from the burdens of existing implicit subsidies as a misguided effort to "preserve" the subsidies Congress wanted replaced. MCI Br. 25. But MCI well knows that GTE and other incumbents have no desire to preserve implicit subsidies. Rather, they would prefer a rapid transfer to the explicit funding systems that will ensure that all carriers bear an equal burden. But what

Congress explicitly forbade is a system in which incumbents continue to bear *all* the burdens of paying for universal service while entrants are freed from *any* universal service obligations and can undercut incumbents' rates simply by reselling use of the incumbent's own network. That result patently conflicts with Congress's repeated efforts to preserve universal service funding — including the unequivocal command that "[e]very telecommunications carrier . . . *shall contribute, on an equitable and nondiscriminatory basis*" to universal service. § 254(f). *See also* § 253(b) (preserving States' authority to impose "competitively neutral" means for advancing universal service). Despite MCI's hopes, that unqualified command does not permit competitors to enter the market for *any period* without contributing to universal service.

MCI desperately claims that Congress required *no* coordination between introducing competition and spreading universal service burdens equitably to entrants for one reason — MCI cannot deny that sham unbundling will have precisely the effect of promoting arbitrage and freeing entrants from any obligation to contribute to universal service. MCI thus strains to reconcile the statutory plan with the windfall promised by the FCC by ignoring Congress's commands requiring *all* carriers to bear the load of universal service.

These attempts to divert attention from the cumulative effects of the FCC's actions should fail. As detailed below, the conflicts between each of the FCC's rules and the terms of the Act provide ample reason for vacating the agency's actions. But the overall impact of the FCC's rules on unraveling the plan crafted by Congress also provides an important part of the picture demonstrating that the agency's actions cannot be reconciled with the language and structure of the Act.

B. The Court of Appeals Erred in Upholding Three of the FCC's Improper Expansions of the Duty To Provide Unbundled Network Elements.

While it prevented the worst harm that would result from the FCC's expansions of the duty to unbundle by vacating the rule requiring incumbents to provide elements preassembled, the Court of Appeals erred in upholding three of the FCC's major decisions broadening the unbundling duty.

1. The FCC Improperly Expanded the Definition of Network Elements.

The FCC erred first and foremost by ignoring the express limits in the definition of "network elements" and expanding the term beyond all rational bounds. Congress restricted the term so that entrants could obtain parts of the incumbent's call-routing network. The plain and ordinary meaning of the term "network element" itself, after all, denotes a "piece" of the "network" — that is, the system of lines and switches that makes up the local exchange. The statutory definition confirms that commonsense understanding as it restricts a network element to a "facility or equipment," § 153(29) — that is, a physical piece of the network. While the definition also encompasses "features, functions, and capabilities" of these network parts, it includes only features or functions that are "provided *by means of such facility or equipment*." *Id.* (emphasis added). Congress thus established network elements as items that are unalterably rooted in discrete physical parts of the local exchange.

The Act also restricts "network elements" by requiring that an element be "used in the provision of a telecommunications service." *Id.* "Telecommunications," in turn, is defined as the "transmission, between or among points specified by the user, of information of the user's choosing." § 153(46). Network elements, therefore, are the pieces of "equipment" that make up the incumbent's "network" for call delivery — the system used

to transmit calls from one point to another. Not surprisingly, this definition effectively makes network elements correspond to the so-called "bottleneck" facilities of the local exchange that are necessary for any carrier to use to get calls to and from every customer in a local exchange area. It is precisely that type of capital-intensive infrastructure owned by the incumbent that entrants might find difficult to duplicate in the near term when first starting their own local telephone businesses.

Both the FCC and the Eighth Circuit, however, removed any constraints limiting what might count as a network element and converted the term into an avenue for entrants effectively to rent any part of an incumbent's business. Following the FCC, the court emphasized that elements were facilities used in providing "telecommunications *service*," and that telecommunications service is the "'offering of telecommunications . . . to the public.'" Pet. App. 42a (emphasis added) (quoting § 153(46)). In the court's view, "offering" service to the public encompassed many functions beyond routing calls, and thus "network elements" were not limited to parts of the actual call-routing network at all. *Id.*

But that expansive gloss cuts the term loose from any plausible connection to the text. Indeed, it removes any constraint at all on what can be a network element. Everything that a LEC does and everything that it uses in its business is, in some sense, part of the "overall commercial offering" of service to the public. Pet. App. 43a. By making anything used in the offering of service the only touchstone for deciding what is an element, the court endorsed an FCC construction that guarantees absurd results. Under the FCC's reading, an incumbent's entire billing department and all the software and "equipment" it uses would be an "element" subject to being rented out to entrants on an "unbundled basis."

The terms of the definition, moreover, make it plain that the reference to the "provision of telecommunications service" — the phrase on which the FCC so heavily relies — was not

designed to decouple "network elements" from the familiar and concrete concept of the call-routing network. The definition refers to facilities (including their features) "used in the transmission, routing, or other provision of a telecommunications service." § 153(29). That listing shows that, far from straining to sweep in every function performed by a LEC to operate a profitable business, Congress was referring to basic steps in call delivery. The specific functions Congress described — "transmission" and "routing" — both refer to physical delivery of calls. The concluding term in the list referring to "other provision" of service does not suddenly expand the sentence to encompass every aspect of running a local exchange business. To the contrary, under the principle of *ejusdem generis*, such a general term concluding a list is limited by the more specific terms that precede it. *See, e.g.*, *Breininger v. Sheet Metal Workers*, 493 U.S. 67, 91-92 (1989). The FCC's contrary reading is utterly at odds with the text.[22]

By automatically treating as "network elements" everything that a LEC uses in any aspect of its business, the FCC absolved itself of the responsibility of ever applying the terms actually set by Congress. Before requiring unbundling, the FCC never even considered whether a given item at issue was actually a "facility or equipment" that was a part of the network (or a "featur[e], functio[n], or capabilit[y]" of such a facility). This approach makes "network elements" infinitely expandable, and the Eighth Circuit applied this reading to uphold two FCC errors.

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[22] The FCC itself, moreover, has interpreted the same terms in another section of the Act to mean precisely what we suggest. Under § 214(e), a carrier's eligibility for a new federal support mechanism hinges, in part, upon whether the carrier is "using its own facilities" to "offer" certain telecommunications "services." § 214(e)(1)(A). The FCC has squarely ruled that under that section the term "facilities" is limited to "physical components of the telecommunications network that are used in the transmission or routing" of calls. Universal Service Order ¶ 151.

(a) The FCC Erred By Treating Discrete Services as Network Elements.

First, the FCC concluded not only that "network elements" could include any equipment used in any aspect of the LEC's business, but also that an entire branch of the business might be treated as an "element." The agency thus decided that operator and directory assistance services would be treated as network elements — producing the absurdity that live operators are deemed "elements" of the network subject to unbundling.[23] J.A. 125-29 (¶¶ 534-40). Such an outcome cannot be squared with the terms of the statute. Operators providing directory assistance or other service to customers cannot be forced into the statutory categories of a "facility" or "equipment" or even "features, functions, or capabilities provided by means of such facility or equipment." § 153(29). To the contrary, they are *people* fulfilling a role in running one aspect of the LEC's business.

Operators, moreover, are used to provide a distinct *service*, and the Act provides a separate means for entrants to obtain services from an incumbent under the resale provisions of § 251(c)(4). The Eighth Circuit's bald conclusion that § 251(c)(4) does not provide the "exclusive means" for entrants to obtain services for resale, Pet. App. 45a, but that services should *also* be available as "network elements," ignores both the text and legislative history. Where a statute addresses discrete, defined terms such as finished "services" and "network elements" in separate provisions, the inclusion of one term in a given provision necessarily implies exclusion of the

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[23] Indeed, as if to pursue its own *reductio ad absurdum*, the FCC suggested that, where technically feasible, when an entrant such as AT&T "leases" a GTE operator on an "unbundled basis," that operator should be "rebranded" — *i.e.*, the operator should selectively identify himself or herself as an AT&T operator when answering a call from an AT&T customer. J.A. 127-28 (¶ 537).

other. *See, e.g., O'Melveny & Myers v. FDIC*, 512 U.S. 79, 86 (1994) ("*Inclusio unius, exclusio alterius.*").

Here the evolution of the Act strongly confirms that reading since Congress consciously eliminated any reference to "services" in the definition of network elements. Both the House and Senate bills had referred to unbundled access to "services" — indeed, the Senate bill did not even contain a separate provision on resale of services. *See* S. 652, 104th Cong., 1st Sess. § 251(b)(1) (1995); H.R. 1555, 104th Cong., 1st Sess. § 242(a)(2) (1995). In the Act, however, any mention of services was eliminated from both the definition of network elements and the section outlining the unbundling duty, *see* § 251(c)(3). Instead, "services" were addressed solely in the separate resale provision, § 251(c)(4). The FCC's expansion of elements to include operator and directory assistance services is thus wholly at odds with the Act.

(b) The FCC Improperly Expanded the Definition of Elements To Include OSS.

Second, the FCC determined that background software systems used by an incumbent to run its business, known as operation support systems (OSS), would qualify as elements. OSS perform a number of functions. The vast majority are software systems designed to maximize the efficiency of the LEC's operations, and in particular its customer service operations. Thus, such software manages billing functions, automatically routes service requests entered by a customer service operator to the appropriate personnel, allows scheduling of repair visits, and provides access to customer information relevant to the process of ordering services or repairs.

None of these systems is part of the call-routing network. By limitlessly expanding the definition of network elements, however, the FCC eliminated any need even to *consider* whether a particular software system actually has anything to

do with the "network" itself. Instead, it treated all OSS as "elements" of the "network" subject to unbundling without any further inquiry.

But OSS are not "facilities" or "equipment" used in the routing or transmission of a telephone call. Nor are they "features, functions, [or] capabilities that are provided by means of such facility or equipment." § 153(29). The FCC, moreover, made no effort to claim that OSS played a part in routing a call. Rather, the agency asserted that access to OSS was necessary to ensure that entrants could accomplish "pre-ordering, ordering . . . and billing," J.A. 118 (¶ 518), as well as "service functions [such] as scheduling customer appointments," *id.* at 118-19 (¶ 519), in "substantially the same time and manner that an incumbent can for itself," *id.* at 118 (¶ 518). The agency thus sought to ensure, through access to software, that entrants would be able to run the business aspects of their ventures just as efficiently as incumbents. The duty Congress imposed to provide "elements" of a telecommunications "network," however, had nothing to do with making such business skills of an incumbent available for its competitors.

(c) Expanding "Network Elements" to All Important Parts of a LEC's Business Defeats the Objectives of the Act.

The FCC's expansion of the definition of "network elements" is not only inconsistent with the terms of the Act, it is also wholly at odds with the statute's purposes. The Act is meant to promote competition by allowing new entrants to use the essential facilities of an incumbent — those aspects of the LEC's infrastructure that cannot reasonably be duplicated in the near term. But it does not foster competition to allow a competitor to purchase *all* significant parts of a LEC's business (especially at rates based on the costs of a hypothetical, most-efficient provider). Rather, true competition is promoted (and the benefits of innovation and improved efficiency are obtained) when an entrant has an incentive to provide some

aspects of a local exchange business more efficiently than the incumbent.

The FCC, however, requires a LEC to turn over to its competitors precisely those aspects of its business in which competitors should be attempting to differentiate themselves. In a competitive marketplace where a basic set of essential facilities was provided to all comers by the incumbent, competition would occur precisely on such non-essential aspects of the business as operator services, directory assistance, and operation support systems. By treating such parts of the business as "essential facilities," the FCC ensures that there will be no competition on these aspects of the business and limits competition merely to marketing functions.

2. The FCC Improperly Diluted the Standards Limiting What Elements Must Be Unbundled.

The FCC compounded its errors by eviscerating the standards in § 251(d)(2) limiting the obligation to unbundle even items that come within the definition of "network elements." Congress insisted that there be an evaluation of *need* before entrants would be granted forced access to the facilities of an incumbent's existing network. Thus, Congress directed that "in determining what network elements should be made available," the FCC "*shall consider*, at a minimum," whether access to proprietary elements was "necessary" and whether the failure to provide access to a non-proprietary element would "impair" an entrant's ability to provide service. § 251(d)(2) (emphasis added).

The FCC followed a two-step approach to read those limitations out of the Act. To start, the agency misinterpreted § 251(c)(3)'s direction concerning *where* an incumbent had to provide access to elements ("at any technically feasible point") as a command defining *what* had to be unbundled. The agency thus created an extra-statutory presumption that any element

that could technically be unbundled must be unbundled. J.A. 49 (¶ 278). The Eighth Circuit rightly vacated that presumption as contrary to the text, Pet. App. 46a-47a, and the FCC has not even attempted to seek review of that ruling. The Eighth Circuit failed to appreciate, however, that the agency's erroneous presumption fundamentally clouded the rest of the FCC's approach to the statutory terms limiting unbundling.

Specifically, when the FCC turned to § 251(d)(2), it perceived a false tension between the restrictions in that section and the blanket presumption it had mistakenly created under § 251(c)(3). To resolve that tension, the FCC gave primacy to its misconstruction of § 251(c)(3) and sought to read § 251(d)(2) in a way that would not "significantly diminish the obligation imposed by section 251(c)(3)." J.A. 53-54 (¶ 286). As a result, the FCC watered down the standards of § 251(d)(2) into meaninglessness by concluding that any assessment of the "necessary" and "impair" standards should proceed solely by looking to the availability of alternative facilities *from within the incumbent's own network*. J.A. 51-52, 54-55 (¶¶ 283, 287). Thus, irrespective of cost or other considerations, the FCC rejected the suggestion that access to a proprietary element should not be considered "necessary" if a requesting carrier "can obtain the requested proprietary element from a source other than the incumbent." *Id.* at 51-52 (¶ 283). That approach to the text is insupportable. It defies the ordinary English meaning of the terms to pretend that an element from an incumbent's network is "necessary" (or that failure to provide it would "impair" one's ability to provide service) if it is readily available "from a source other than the incumbent."

In upholding this approach, the Eighth Circuit simply echoed the FCC's claim that if incumbents could "evade their unbundling duties whenever a network element could be obtained elsewhere," the use of elements for entry would be crippled because almost every element "could *theoretically* be duplicated *eventually*." Pet. App. 48a (emphasis added). But

that begs the question in two respects. First, the FCC did not preclude consideration only of *theoretical* facilities that did not exist and were not readily available. Rather, it categorically precluded all consideration of alternatives — even those that exist and are readily available (including deployed facilities such as the fiber optic cables used by cable television providers or the switches deployed by competitive access providers).

Second, the suggestion that looking to facilities outside the network would allow incumbents to "evade their unbundling duties" just assumes the answer to the question. Section 251(d)(2) *limits* the duty by restricting when elements must be provided. To suggest that incumbents "evade" their "dut[y]" if access is not required where there are readily available alternatives assumes that the obligation is to provide completely unfettered access to all parts of the network at all times. That is simply not the duty Congress established.

The FCC also sought to justify its approach by declaring that considering alternative facilities outside the network might require entrants to "duplicate unnecessarily" a part of the network. J.A. 51-52 ¶ 283). That purported rationale brazenly rejects the policies Congress sought to promote. "Unnecessary" "duplication" is simply the FCC's denigrating term for deploying competing facilities. But Congress required an evaluation of need before elements would be provided precisely to encourage the use of non-incumbent facilities and thereby to preserve the incentives for innovation and increased efficiency that come with facilities-based competition. The FCC derided that goal and proceeded to grant exactly the unlimited access Congress had forbidden.

3. The FCC Improperly Ruled that Entrants Could Provide Service Using *Solely* Network Elements.

The FCC continued its drive to expand the unbundling duty by determining that entrants could rely *solely* on network

elements to provide local service. In other words, without supplying any facilities of its own, an entrant could order the entire network from end to end as supposedly discrete, "unbundled" elements and rely on those facilities to offer service. J.A. 63-65 (¶¶ 338-41).

Section 251(c)(3) rules out the FCC's approach. The section requires incumbents to provide "access" to "elements" of the network at any "technically feasible point." It is directed at ensuring physical access to discrete pieces of the network at various points of possible connection so that entrants can use limited portions of the network — not at simply allowing an entrant to order the whole network, lock, stock and barrel. Turning that requirement for incumbents to split up the network and provide different pieces at various points into an obligation to provide everything an entrant might need to provide service, from start to finish, rewrites the Act.

The FCC's approach would also undermine the basic distinction Congress crafted between resale and network elements as modes of entry. In § 251(c)(4), Congress created a distinct method of entry that would allow competitors with no facilities to rely solely on the incumbent's network and to resell the incumbent's own service. Network elements, in contrast, provided a means for those with some facilities of their own to enter immediately by filling gaps in their networks with leased equipment. It reflected Congress's understanding that "*[s]ome* facilities and capabilities (*e.g.*, central office switching) will likely need to be obtained from the incumbent . . . as network elements." Conf. Rep. at 148. By instead converting network elements into a second route for obtaining from the incumbent everything needed to run a local exchange (including, under the FCC's erroneous definition, such added services as operators and directory assistance), the FCC undermined a critical protection built into the structure of the Act to promote the development of competing facilities.

The resale route Congress established was also carefully restricted to ensure that the quick and easy way to enter the market by completely piggy-backing on the incumbent would not lead to regulatory distortions. The FCC's conversion of access to selected network elements into a route for effectively renting everything needed to run a local exchange business improperly allows entrants to circumvent those protections.

For example, Congress set the wholesale pricing rule to ensure that entrants acting as middlemen will incorporate the *same* subsidy structure in their rates that an incumbent faces in its retail rates. Section 252(d)(3) thus requires wholesale rates "based on the retail rate" — a standard that "reflect[s] whether, and to what extent, the local dialtone service is subsidized by other services." H.R. Rep. No. 104-204, at 72 (1995). The FCC's conversion of access to parts into an obligation to provide the *entire* network, however, largely destroys that fundamental protection. The FCC would make it possible to rely solely on elements to provide service, thus converting network elements effectively into a second avenue for using the incumbent's network to resell the incumbent's service, but at a price different from the wholesale price.

Similarly, the FCC would allow entrants to circumvent restrictions Congress imposed on the use of resold service. Congress sought to ensure that large long distance companies would not be given an immediate advantage in seizing market share by being able to market their own long distance service jointly with local service resold from a Bell company — at least not until the Bell company would be able to compete effectively by providing long distance service in its own region. *See* 47 U.S.C. § 271(e)(1). That restriction was expressly designed "to provide parity between the Bell operating companies and other telecommunications carriers in their ability to offer 'one stop shopping' for telecommunications services." S. Rep. No. 104-23, at 43 (1995). The FCC, however, would allow entrants to evade that

limitation completely by relying solely on network elements effectively to resell an incumbent's service. J.A. 61-62 (¶ 335).

C. The Eighth Circuit Rightly Vacated the FCC's Rule Requiring Incumbents to Provide Elements Already Assembled into Platforms.

Finally, as if to guarantee that its rules would provide an absolute end-run around the protections Congress built into the Act's resale provisions, the FCC capped off its multi-step expansion of the unbundling duty by ruling that incumbents would be required to provide elements *already preassembled* into functioning platforms whenever the elements were already connected in the incumbent's own network. *See* 47 C.F.R. § 51.315(b). That rule completed the FCC's conversion of unbundled elements into a second route for obtaining finished service to resell, since it guarantees that an entrant would not have to do anything for itself to turn disparate elements into a fully functioning service. By allowing entrants to engage in the fiction of labeling a request for use of the entire network as a request for "access" to "unbundled" elements, the FCC created a new, wholly extra-statutory duty and turned ordering "unbundled" elements into a sham. By imposing a duty to provide discrete, separate *parts* of the network, Congress did not require incumbents to turn over a *fully preassembled*, functioning network. The FCC's approach is akin to turning a requirement that a company provide entrants spare auto parts "on an unbundled basis" into a duty instead to provide entire automobiles ready to drive off the lot.

Creating that sweeping obligation is flatly contrary to the Act in its own right, but it is an even more egregious violation when combined with the pricing standard applied to network elements. As explained above, the pricing terms for network elements have been construed by regulators to exclude any consideration of the costs of universal service. By labeling its request to use the entire network as a fictional purchase of fully pre-assembled "elements," an entrant can effectively obtain the

same ability to resell an incumbent's service that it would get under the Act's resale provisions, but at a price that eliminates any contribution to universal service. The entrant thereby receives an automatic ability to undercut an incumbent's retail rates. The entrant would be assured of a chance to strip away the customers that currently support universal service and simultaneously to pocket for itself the funds those customers provided to subsidize low rates for the average consumer. The FCC's scheme would thus scuttle all the protections Congress built into the Act to ensure that allowing entrants a chance to piggy-back on an incumbent's network would *not* undermine the goal of universal service.

As the Eighth Circuit rightly held, the FCC's rule disregards the terms of § 251(c)(3). To start, that section expressly requires incumbents to provide "access to network elements" at "any technically feasible point" within the network. With those terms, Congress plainly cast the duty it imposed in terms of physical "access" to *pieces* of the network at different physical locations where connection might be feasible. The language plainly denotes a duty to provide access to multiple different parts of the network, not an obligation to turn over the entire network as one integrated, functioning unit. The section goes on, moreover, to specify that elements are to be provided on an "unbundled basis," again reinforcing the conclusion that Congress was requiring incumbents to provide *parts* of their network separated out for individual purchase.

Finally, as the Eighth Circuit emphasized, the section concludes by specifying that incumbents are required to provide elements only "'in a manner that allows *requesting carriers to combine* such elements in order to provide such telecommunications service." Pet. App. 70a (quoting 47 U.S.C. § 251(c)(3) (emphasis added by court)). As the court explained, "[t]his sentence unambiguously indicates that requesting carriers will combine the unbundled elements themselves." *Id.* That in itself makes it crystal clear that

Congress did not require incumbents to shoulder the burden of "combining" elements. Moreover, the section makes clear that entrants will have to go through this process of "combin[ing]" elements "in order to provide" service. "Elements" are thus the building blocks that must be put together to create a service that can be marketed to customers — elements in themselves do not come ready-made as services ready for entrants to turn around and resell.

The FCC tries in vain to avoid the plain terms chosen by Congress to define the unbundling duty. First, to divert attention from the language emphasized by the court below — which states that "requesting carriers" will "combine" network elements — the FCC casts its attack as if the judgment rested solely on the meaning of the term "unbundled." *See* FCC Br. at 44; *see also* MCI Br. 18-19. The FCC and its supporters thus claim that providing "elements" on an "unbundled basis" means only providing separate *prices* for elements and cannot imply that elements are actually to be sold on a physically separated basis.

That approach, however, ignores the context provided by the rest of the section. Section 251(c)(3) describes providing physical "access" to discrete "elements" of the network and dividing up the network into distinct parts where it will be "technically feasible" to connect to each separate element. In that context, providing this physical access "on an unbundled basis" necessarily requires separating out the parts of the network into distinct pieces.

Indeed, the FCC's approach to the phrase "on an unbundled basis" is incoherent. The FCC and its allies claim that "unbundling" goods means providing separate prices. But even in the antitrust and related contexts that they emphasize, requiring unbundling of goods does not imply simply the empty formality of creating a price list. To the contrary, it means requiring a firm to provide goods on a separated basis. Thus, even accepting the FCC's frame of reference, by

requiring "unbundling" the Act merely mandates that an incumbent cannot force a new entrant to purchase the entire network bundled together into completed telephone service. Rather, the LEC must also sell *pieces* of its network separately, at separate prices. But granting entrants the right to buy *pieces* of the network *not bundled* together is not the same as granting them the right to buy all the pieces of the network *already bundled together* into completed service.

In the end, even the FCC cannot avoid the plain import of the words of the Act. It explains in its brief, for example, that the point of the unbundling is to allow entrants "to lease *individual network elements*," FCC Br. 5 (emphasis added) — in other words, not the *whole network* already preassembled. Similarly, in its orders the FCC has repeatedly referred to "unbundling" an element to describe "physically separating" it from the rest of the network.[24] Given the context in which the term is used, in fact, it would be virtually impossible to discuss implementation of § 251(c)(3) without giving the term that connotation.

The FCC and its allies also place tremendous weight on dictionary definitions that appear to support the FCC's emphasis on separate prices. But as noted above, attempting to limit "unbundling" to imply solely a pricing constraint is illogical. In any event, AT&T and MCI wholly overplay their hand in claiming that merely citing dictionaries that appear to support the FCC's interpretation "is itself conclusive of its reasonableness." AT&T Br. 39; MCI Br. 19. Even the case cited by AT&T makes clear that the existence of a dictionary definition does not insulate an agency rule from review; rather,

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[24] *See, e.g.*, Third Order on Reconsideration, In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, FCC 97-295, at 8 (Aug. 18, 1997) (stating that "transport is physically severable from switching" but that LECs "may not unbundle switching and transport facilities that are already combined").

the agency must still apply a definition that "mak[es] some sense under the statute." *National R.R. Passenger Corp. v. Boston & Me. Corp.*, 503 U.S. 407, 418 (1992). The Court, in fact, has rejected the view that "the courts must defer to the agency's choice among available dictionary definitions." *MCI v. AT&T*, 512 U.S. 218, 226 (1994). To the contrary, a choice among alternative dictionary definitions must be supported by "contextual indications" from the statute. *Id.* Here, the FCC's reading conflicts with the context of the Act. And in any event, even a dictionary cited by petitioners makes it plain that the term "unbundled" describes goods sold on a separate basis. *See* Random House Dictionary of the English Language 2055 (2d ed. 1987) ("(of related products or services) sold separately rather than as a package").

Nor can the FCC support its interpretation with its assertion that one network element — the signaling system — cannot be physically disconnected and provided separately to entrants. FCC Br. 45. The FCC's own Order undermines this claim. The FCC addressed explicitly the task of providing access to signaling, separate from the rest of the network, and ruled that "[c]arriers that provide their own switching facilities should be able to access the incumbent LEC's [signaling] network via a signaling link between their switch and the incumbent LEC's [signaling transfer point]" — a particular facility in the signaling network. J.A. 99-100 (¶ 483). Indeed, the FCC elaborated that "[t]his could be accomplished by the incumbent providing an unbundled signaling link from its [signaling transfer point] to the competitor's switch." Moreover, to the extent that the switching function cannot be separated from signaling associated with it, the FCC defined signaling to be part of the "switching" network element -- not a separate element at all. See 47 C.F.R. § 51.319(c)(1)(C)(2).

The FCC's purportedly "textual" arguments ring particularly hollow, moreover, since the FCC has not even attempted to resuscitate its vacated rules requiring incumbents

to combine elements in *new* ways upon an entrant's request. *See* 47 C.F.R. § 51.315(c)-(f). After conceding that § 251(c)(3) means that incumbents cannot be forced to do *additional* combining of elements, the FCC cannot point to any basis for requiring incumbents to provide *existing* combinations. The distinction between what *has been* combined and what *might be* combined brings the FCC's rule no closer to the text of the Act. The Act does not require incumbents to do combining for entrants, and the fact that an incumbent may have already added value to one set of elements by combining them for itself does not mean that entrants automatically get to free-ride on the incumbent's efforts. To the contrary, § 251(c)(3) sets a duty to turn over discrete pieces of the network, without the added benefit of combinations, and that is all it requires. The facile protest that incumbents will be "taking apart" their networks to provide those pieces cannot change the contours of that duty.

Next, the FCC and its supporters claim that in requiring incumbents to provide elements "in a manner that allows requesting carriers to combine" them, the Act imposes a "duty," and that "as a matter of grammar," a "duty" cannot be read to create a "right" for incumbents to insist on providing elements on a physically separated basis. FCC Br. 45. But this is nothing more than a semantic game. The terms of § 251(c)(3) necessarily *limit* the extent of the duty imposed by the Act. Because Congress has directed that incumbents are required to provide elements "in a manner that allows requesting carriers to combine" them, the necessary result is that incumbents remain free to insist that they will not provide elements in any other manner.

Lastly, the FCC appeals to § 251(c)(3)'s command for "nondiscriminatory access" to elements. FCC Br. 46. In the FCC's view, an entrant will have equal access to *all* an incumbent's elements only if it has the exact same ability as an incumbent to use the elements already connected together into

a functioning network. But using the nondiscrimination principle to unravel all the other limitations in the section would plainly prove too much. It is simply not discriminatory for an incumbent to fulfill its duty to provide elements "in a manner that allows the requesting carrier to combine" them by actually providing separate elements that entrants can combine — even if it means separating the individual elements. To use the analogy from above, a firm with a duty to provide spare auto parts does not "discriminate" against entrants by providing perfectly good parts instead of fully assembled cars.

Finally, the FCC and its allies again appeal to purported policy concerns as they complain that, in their view, the elimination of the network element "platform" has destroyed the utility of elements as a means of entry. That is nonsense. Nothing in the Eighth Circuit's decision undermines the efficiency of network elements as a means of entry. The Eighth Circuit merely put an end to the fiction of a pre-combined network element platform that would allow entrants to buy completed services for two to three times the discount required under the statutory pricing standard. Despite their complaints, there can be no serious doubt about what has slowed the advance of competition since the passage of the Act. As long as the option of sham unbundling was dangled before entrants, no rational firm would dare attempt either deploying its own facilities or reselling service under the Act's wholesale provisions. In short, the FCC's own implausible and yet irresistible offer of windfall profits through sham unbundling brought any plans for genuine entry — either facilities-based or through resale — effectively to a halt.

III. THE EIGHTH CIRCUIT PROPERLY VACATED THE "PICK-AND-CHOOSE" RULE AS AN UNREASONABLE CONSTRUCTION OF THE ACT.

Section 252(i) sets forth an unremarkable nondiscrimination principle designed to allow later entrants to obtain in negotiations the same terms for their agreements as carriers

who have gone before them, as long as they are willing to accept *all* the terms that formed the earlier bargain. The Act provides only that an incumbent "shall make available any interconnection, service, or network element provided under an agreement" to "any other requesting telecommunications carrier *upon the same terms and conditions as those provided in the agreement*." § 252(i) (emphasis added).

In framing the issue under this section, the FCC conveniently omits the terms limiting incumbents' duty to providing "the same terms and conditions" as in an earlier agreement. *See* FCC Br. (I). That is hardly surprising, since the FCC's rules read that limitation out of the statute.

In the FCC's view, § 252(i) entitled a carrier "to choose among individual provisions" in an earlier agreement, J.A. 1044-45 (¶ 1310), and obtain those terms without even entering the standard negotiation process under § 252(a). *Id.* at 1048 (¶ 1321). Indeed, the FCC ruled that a carrier with a supposedly "binding" agreement in place could selectively jettison individual terms in favor of more advantageous terms subsequently negotiated by others. *Id.* at 1046-47 (¶ 1316). The FCC also ensured that a carrier could "choose" the terms it desired without having to accept corresponding tradeoffs elsewhere in the agreement that may have made those terms possible. Rather, to limit itself to providing the "same terms and conditions" as in an earlier agreement, an incumbent would have to "prove" that the terms were "*legitimately related* to the purchase of the individual element being sought." *Id.* at 1046 (¶ 1315). The FCC flatly determined that an incumbent "*may not*" treat terms governing sale of one element or service as part of the terms that produced agreement on another element or service. *Id.* (emphasis added). The FCC thus categorically rejected the possibility that concessions on their face related to

one particular piece of an agreement could have been a crucial *quid pro quo* for better terms on another.[25]

By artificially compartmentalizing every issue, the FCC's rule ignores the reality of bargaining and would make the give-and-take of negotiations impossible. An incumbent could never make a concession on one issue in return for a concession on another matter, because its own concession would automatically become available to all carriers without the need for others to accept the trade-off that made the term possible.

The Eighth Circuit rightly recognized this inherent conflict between the FCC's approach and Congress's design for implementing the Act. Despite the clear tension between the FCC's rule and the Act's unqualified requirement that incumbents need only offer "the same terms and conditions," the Eighth Circuit concluded that "the language of subsection 252(i) *in isolation*," did not prohibit the FCC's approach. Pet. App. 25a (emphasis added). Pursuing standard *Chevron* analysis, therefore, the court proceeded to "'look to the structure and language of the statute as a whole' to determine if the FCC's interpretation of this ambiguous provision is a reasonable one." *Id.* (quoting *National R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 417 (1992)).[26] Despite the FCC's effort to label this approach pejoratively as a resort

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[25] The FCC's claim that it "protect[ed]" incumbents by requiring entrants using § 252(i) to adopt to the existing terms and conditions "*relating to the particular service or element*," FCC Br. 48 n.15 (emphasis added), is thus carefully worded to disguise the gaping hole in the supposed "protection" offered by the FCC's rule.

[26] While the court cast its analysis under the second step of *Chevron*, it would also have properly fit under the first. Examination of the structure and purposes of a statute is one of the "traditional tools of statutory construction," *Regions Hospital v. Shalala*, 118 S. Ct. 909, 915 (1998), to be employed before a statute is deemed ambiguous. *See also supra* p. 52.

to "policy," FCC Br. 49, consideration of the structure of the Act was a routine part of the process for determining whether an agency's action is "reasonable in light of the legislature's revealed design." *Nationsbank v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 257 (1995).

As the court explained, the "structure of the Act reveals Congress's preference for voluntarily negotiated interconnection agreements," Pet. App. 25a, and the FCC's rule would "thwart" that process, *id.* 26a. It would also conflict with the requirement that negotiated agreements be "binding," § 252(a)(1), because entrants could "unilaterally incorporate more advantageous provisions contained in subsequent agreements negotiated by other carriers." Pet. App. 26a. The Eighth Circuit thus correctly ruled that the FCC's approach to § 252(i) could not be reconciled with the Act.

As this Court has explained, "we should not impute to Congress a purpose to paralyze with one hand what it sought to promote with the other." *American Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 513 (1981) (citations omitted). The FCC's rule would have achieved precisely that illogical result by undermining the process that Congress made the centerpiece for implementing the local competition terms of the Act.

CONCLUSION

For the foregoing reasons, the Court should resolve this case as follows:

First, the Court should affirm the Court of Appeals' judgments concerning both (i) the FCC's lack of authority over the pricing terms of the Act and (ii) the FCC's lack of authority over non-pricing intrastate matters covered by the Act.

Second, the Court should reverse the Court of Appeals' judgments upholding the FCC's rules (i) expanding the definition of network elements to include OSS and services such as directory assistance and operator services; (ii) diluting the "necessary" and "impair" standards of § 251(d)(2); and

(iii) declaring that entrants could rely solely on network elements to provide service.

Third, the Court should affirm the Court of Appeals' judgment vacating the FCC's rule requiring incumbents to provide network elements pre-assembled into combinations.

Fourth, the Court should affirm the Court of Appeals' judgment vacating the FCC's pick-and-choose rule.

Respectfully submitted,

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STATUTORY ADDENDUM

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47 U.S.C. § 152 APPLICATION OF ACT

* * *

(b) Except as provided in sections 223 through 227, inclusive, and section 332, and subject to the provisions of section 301 and title VI, nothing in this Act shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier . . . .

* * *

47 U.S.C. § 153 DEFINITIONS

* * *

(29) NETWORK ELEMENT.- The term "network element" means a facility or equipment used in the provision of a telecommunications service. Such term also includes features, functions, and capabilities that are provided by means of such facility or equipment, including subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service.

* * *

(43) TELECOMMUNICATIONS.- The term "telecommunications" means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.

* * *

(46) TELECOMMUNICATIONS SERVICE.- The term "telecommunications service" means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.

* * *

47 U.S.C. § 251 INTERCONNECTION.

(a) GENERAL DUTY OF TELECOMMUNICATIONS CARRIERS. - Each telecommunications carrier has the duty -

(1) to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers; and

(2) not to install network features, functions, or capabilities that do not comply with the guidelines and standards established pursuant to section 255 or 256.

(b) OBLIGATIONS OF ALL LOCAL EXCHANGE CARRIERS. - Each local exchange carrier has the following duties:

(1) RESALE. - The duty not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications services.

(2) NUMBER PORTABILITY. - The duty to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission.

(3) DIALING PARITY. - The duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service, and the duty to permit all such providers to have nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listing, with no unreasonable dialing delays.

(4) ACCESS TO RIGHTS- OF- WAY. - The duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224.

(5) RECIPROCAL COMPENSATION. - The duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.

(c) ADDITIONAL OBLIGATIONS OF INCUMBENT LOCAL EXCHANGE CARRIERS. - In addition to the duties contained in subsection (b), each incumbent local exchange carrier has the following duties:

(1) DUTY TO NEGOTIATE. - The duty to negotiate in good faith in accordance with section 252 the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) and this subsection. The requesting telecommunications carrier also has the duty to negotiate in good faith the terms and conditions of such agreements.

(2) INTERCONNECTION. - The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network-

(A) for the transmission and routing of telephone exchange service and exchange access;

(B) at any technically feasible point within the carrier's network;

(C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and

(D) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252.

(3) UNBUNDLED ACCESS. - The duty to provide, to any requesting telecommunications carrier for the

provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.

(4) RESALE. - The duty -

(A) to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers; and

(B) not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service, except that a State commission may, consistent with regulations prescribed by the Commission under this section, prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such service to a different category of subscribers.

(5) NOTICE OF CHANGES. - The duty to provide reasonable public notice of changes in the information necessary for the transmission and routing of services using that local exchange carrier's facilities or networks, as well as of any other changes that would affect the interoperability of those facilities and networks.

(6) COLLOCATION. - The duty to provide, on rates, terms, and conditions that are just, reasonable,

and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier, except that the carrier may provide for virtual collocation if the local exchange carrier demonstrates to the State commission that physical collocation is not practical for technical reasons or because of space limitations.

(d) IMPLEMENTATION. -

(1) IN GENERAL. - Within 6 months after the date of enactment of the Telecommunications Act of 1996, the Commission shall complete all actions necessary to establish regulations to implement the requirements of this section.

(2) ACCESS STANDARDS. - In determining what network elements should be made available for purposes of subsection (c)(3), the Commission shall consider, at a minimum, whether -

(A) access to such network elements as are proprietary in nature is necessary; and

(B) the failure to provide access to such network elements would impair the ability of the telecommunications carriers seeking access to provide the services that it seeks to offer.

(3) PRESERVATION OF STATE ACCESS REGULATIONS. - In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that -

(A) establishes access and interconnection obligations of local exchange carriers;

(B) is consistent with the requirements of this section; and

(C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.

(e) NUMBERING ADMINISTRATION. -

(1) COMMISSION AUTHORITY AND JURISDICTION. - The Commission shall create or designate one or more impartial entities to administer telecommunications numbering and to make such numbers available on an equitable basis. The Commission shall have exclusive jurisdiction over those portions of the North American Numbering Plan that pertain to the United States. Nothing in this paragraph shall preclude the Commission from delegating to State commissions or other entities all or any portion of such jurisdiction.

(2) COSTS. - The cost of establishing telecommunications numbering administration arrangements and number portability shall be borne by all telecommunications carriers on a competitively neutral basis as determined by the Commission.

(f) EXEMPTIONS, SUSPENSIONS, AND MODIFICATIONS. -

(1) EXEMPTION FOR CERTAIN RURAL TELEPHONE COMPANIES. -

(A) EXEMPTION. - Subsection (c) of this section shall not apply to a rural telephone company until (i) such company has received a bona fide request for interconnection, services, or network elements, and (ii) the State commission determines (under subparagraph (B)) that such request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 (other than subsections (b)(7) and (c)(1)(D) thereof).

(B) STATE TERMINATION OF EXEMPTION AND IMPLEMENTATION SCHEDULE. - The party

making a bona fide request of a rural telephone company for interconnection, services, or network elements shall submit a notice of its request to the State commission. The State commission shall conduct an inquiry for the purpose of determining whether to terminate the exemption under subparagraph (A). Within 120 days after the State commission receives notice of the request, the State commission shall terminate the exemption if the request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 (other than subsections (b)(7) and (c)(1)(D) thereof). Upon termination of the exemption, a State commission shall establish an implementation schedule for compliance with the request that is consistent in time and manner with Commission regulations.

(C) LIMITATION ON EXEMPTION. - The exemption provided by this paragraph shall not apply with respect to a request under subsection (c) from a cable operator providing video programming, and seeking to provide any telecommunications service, in the area in which the rural telephone company provides video programming. The limitation contained in this subparagraph shall not apply to a rural telephone company that is providing video programming on the date of enactment of the Telecommunications Act of 1996.

(2) SUSPENSIONS AND MODIFICATIONS FOR RURAL CARRIERS. - A local exchange carrier with fewer than 2 percent of the Nation's subscriber lines installed in the aggregate nationwide may petition a State commission for a suspension or modification of the application of a requirement or requirements of

subsection (b) or (c) to telephone exchange service facilities specified in such petition. The State commission shall grant such petition to the extent that, and for such duration as, the State commission determines that such suspension or modification -

(A) is necessary -

(i) to avoid a significant adverse economic impact on users of telecommunications services generally;

(ii) to avoid imposing a requirement that is unduly economically burdensome; or

(iii) to avoid imposing a requirement that is technically infeasible; and

(B) is consistent with the public interest, convenience, and necessity.

The State commission shall act upon any petition filed under this paragraph within 100 days after receiving such petition. Pending such action, the State commission may suspend enforcement of the requirement or requirements to which the petition applies with respect to the petitioning carrier or carriers.

(g) CONTINUED ENFORCEMENT OF EXCHANGE ACCESS AND INTERCONNECTION REQUIREMENTS. - On and after the date of enactment of the Telecommunications Act of 1996, each local exchange carrier, to the extent that it provides wireline services, shall provide exchange access information access, and exchange services for such access to interexchange carriers and information service providers in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier on the date immediately preceding the date of enactment of the Telecommunications Act of 1996 under any court order, consent decree, or regulation, order, or policy of the Commission, until such restrictions and

obligations are explicitly superseded by regulations prescribed by the Commission after such date of enactment. During the period beginning on such date of enactment and until such restrictions and obligations are so superseded, such restrictions and obligations shall be enforceable in the same manner as regulations of the Commission.

(h) DEFINITION OF INCUMBENT LOCAL EXCHANGE CARRIER. -

(1) DEFINITION. - For purposes of this section, the term "incumbent local exchange carrier" means, with respect to an area, the local exchange carrier that -

(A) on the date of enactment of the Telecommunications Act of 1996, provided telephone exchange service in such area; and

(B)(i) on such date of enactment, was deemed to be a member of the exchange carrier association pursuant to section 69.601(b) of the Commission's regulations (47 C.F.R. 69.601(b)); or

(ii) is a person or entity that, on or after such date of enactment, became a successor or assign of a member described in clause (i).

(2) TREATMENT OF COMPARABLE CARRIERS AS INCUMBENTS. - The Commission may, by rule, provide for treatment of a local exchange carrier (or class or category thereof) as an incumbent local exchange carrier for purposes of this section if -

(A) such carrier occupies a position in the market for telephone exchange service within an area that is comparable to the position occupied by a carrier described in paragraph (1);

(B) such carrier has substantially replaced an incumbent local exchange carrier described in paragraph (1); and

(C) such treatment is consistent with the public interest, convenience, and necessity and the purposes of this section.

(i) SAVINGS PROVISION. - Nothing in this section shall be construed to limit or otherwise affect the Commission's authority under section 201.

47 U.S.C. § 252 PROCEDURES FOR NEGOTIATION, ARBITRATION, AND APPROVAL OF AGREEMENTS.

(a) AGREEMENTS ARRIVED AT THROUGH NEGOTIATION. -

(1) VOLUNTARY NEGOTIATIONS. - Upon receiving a request for interconnection, services, or network elements pursuant to section 251, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251. The agreement shall include a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement. The agreement, including any interconnection agreement negotiated before the date of enactment of the Telecommunications Act of 1996, shall be submitted to the State commission under subsection (e) of this section.

(2) MEDIATION. - Any party negotiating an agreement under this section may, at any point in the negotiation, ask a State commission to participate in the negotiation and to mediate any differences arising in the course of the negotiation.

(b) AGREEMENTS ARRIVED AT THROUGH COMPULSORY ARBITRATION. -

(1) ARBITRATION. - During the period from the 135th to the 160th day (inclusive) after the date on

which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues.

(2) DUTY OF PETITIONER. -

(A) A party that petitions a State commission under paragraph (1) shall, at the same time as it submits the petition, provide the State commission all relevant documentation concerning -

(i) the unresolved issues;

(ii) the position of each of the parties with respect to those issues; and

(iii) any other issue discussed and resolved by the parties.

(B) A party petitioning a State commission under paragraph (1) shall provide a copy of the petition and any documentation to the other party or parties not later than the day on which the State commission receives the petition.

(3) OPPORTUNITY TO RESPOND. - A non-petitioning party to a negotiation under this section may respond to the other party's petition and provide such additional information as it wishes within 25 days after the State commission receives the petition.

(4) ACTION BY STATE COMMISSION. -

(A) The State commission shall limit its consideration of any petition under paragraph (1) (and any response thereto) to the issues set forth in the petition and in the response, if any, filed under paragraph (3).

(B) The State commission may require the petitioning party and the responding party to provide such information as may be necessary for the State commission to reach a decision on the unresolved issues. If any party

refuses or fails unreasonably to respond on a timely basis to any reasonable request from the State commission, then the State commission may proceed on the basis of the best information available to it from whatever source derived.

(C) The State commission shall resolve each issue set forth in the petition and the response, if any, by imposing appropriate conditions as required to implement subsection (c) upon the parties to the agreement, and shall conclude the resolution of any unresolved issues not later than 9 months after the date on which the local exchange carrier received the request under this section.

(5) REFUSAL TO NEGOTIATE. - The refusal of any other party to the negotiation to participate further in the negotiations, to cooperate with the State commission in carrying out its function as an arbitrator, or to continue to negotiate in good faith in the presence, or with the assistance, of the State commission shall be considered a failure to negotiate in good faith.

(c) STANDARDS FOR ARBITRATION. - In resolving by arbitration under subsection (b) any open issues and imposing conditions upon the parties to the agreement, a State commission shall -

(1) ensure that such resolution and conditions meet the requirements of section 251, including the regulations prescribed by the Commission pursuant to section 251;

(2) establish any rates for interconnection, services, or network elements according to subsection (d); and

(3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

(d) PRICING STANDARDS. -

(1) INTERCONNECTION AND NETWORK ELEMENT CHARGES. - Determinations by a State commission of the just and reasonable rate for the interconnection of facilities and equipment for purposes of subsection (c)(2) of section 251, and the just and reasonable rate for network elements for purposes of subsection (c)(3) of such section -

(A) shall be -

(i) based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element (whichever is applicable), and

(ii) nondiscriminatory, and

(B) may include a reasonable profit.

(2) CHARGES FOR TRANSPORT AND TERMINATION OF TRAFFIC. -

(A) IN GENERAL. - For the purposes of compliance by an incumbent local exchange carrier with section 251(b)(5), a State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless -

(i) such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier; and

(ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the

additional costs of terminating such calls.

(B) RULES OF CONSTRUCTION. - This paragraph shall not be construed -

(i) to preclude arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as bill-and-keep arrangements); or

(ii) to authorize the Commission or any State commission to engage in any rate regulation proceeding to establish with particularity the additional costs of transporting or terminating calls, or to require carriers to maintain records with respect to the additional costs of such calls.

(3) WHOLESALE PRICES FOR TELECOMMUNICATIONS SERVICES. - For the purposes of section 251(c)(4), a State commission shall determine wholesale rates on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier.

(e) APPROVAL BY STATE COMMISSION. -

(1) APPROVAL REQUIRED. - Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. A State commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies.

(2) GROUNDS FOR REJECTION. - The State commission may only reject -

(A) an agreement (or any portion thereof) adopted by negotiation under subsection (a) if it finds that -

(i) the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or

(ii) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity; or

(B) an agreement (or any portion thereof) adopted by arbitration under subsection (b) if it finds that the agreement does not meet the requirements of section 251, including the regulations prescribed by the Commission pursuant to section 251, or the standards set forth in subsection (d) of this section.

(3) PRESERVATION OF AUTHORITY. - Notwithstanding paragraph (2), but subject to section 253, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

(4) SCHEDULE FOR DECISION. - If the State commission does not act to approve or reject the agreement within 90 days after submission by the parties of an agreement adopted by negotiation under subsection (a), or within 30 days after submission by the parties of an agreement adopted by arbitration under subsection (b), the agreement shall be deemed approved. No State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section.

(5) COMMISSION TO ACT IF STATE WILL NOT ACT. - If a State commission fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the Commission shall issue an order preempting the State commission's jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission.

(6) REVIEW OF STATE COMMISSION ACTIONS. - In a case in which a State fails to act as described in paragraph (5), the proceeding by the Commission under such paragraph and any judicial review of the Commission's actions shall be the exclusive remedies for a State commission's failure to act. In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 and this section.

(f) STATEMENTS OF GENERALLY AVAILABLE TERMS. -

(1) IN GENERAL. - A Bell operating company may prepare and file with a State commission a statement of the terms and conditions that such company generally offers within that State to comply with the requirements of section 251 and the regulations thereunder and the standards applicable under this section.

(2) STATE COMMISSION REVIEW. - A State commission may not approve such statement unless such statement complies with subsection (d) of this section and section 251 and the regulations thereunder. Except as provided in section 253, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State

law in its review of such statement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

(3) SCHEDULE FOR REVIEW. - The State commission to which a statement is submitted shall, not later than 60 days after the date of such submission -

(A) complete the review of such statement under paragraph (2) (including any reconsideration thereof), unless the submitting carrier agrees to an extension of the period for such review; or

(B) permit such statement to take effect.

(4) AUTHORITY TO CONTINUE REVIEW. - Paragraph (3) shall not preclude the State commission from continuing to review a statement that has been permitted to take effect under subparagraph (B) of such paragraph or from approving or disapproving such statement under paragraph (2).

(5) DUTY TO NEGOTIATE NOT AFFECTED. - The submission or approval of a statement under this subsection shall not relieve a Bell operating company of its duty to negotiate the terms and conditions of an agreement under section 251.

(g) CONSOLIDATION OF STATE PROCEEDINGS. - Where not inconsistent with the requirements of this Act, a State commission may, to the extent practical, consolidate proceedings under sections 214(e), 251(f), 253, and this section in order to reduce administrative burdens on telecommunications carriers, other parties to the proceedings, and the State commission in carrying out its responsibilities under this Act.

(h) FILING REQUIRED. - A State commission shall make a copy of each agreement approved under subsection (e) and each statement approved under subsection (f) available for public inspection and copying within 10 days after the agreement or statement is approved. The State commission

may charge a reasonable and nondiscriminatory fee to the parties to the agreement or the party filing the statement to cover the costs of approving and filing such agreement or statement.

(i) AVAILABILITY TO OTHER TELECOMMUNICATIONS CARRIERS. - A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

(j) DEFINITION OF INCUMBENT LOCAL EXCHANGE CARRIER. - For purposes of this section, the term "incumbent local exchange carrier" has the meaning provided in section 251(h).

47 U.S.C. § 253 REMOVAL OF BARRIERS TO ENTRY.

(a) IN GENERAL. - No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

(b) STATE REGULATORY AUTHORITY. - Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

(c) STATE AND LOCAL GOVERNMENT AUTHORITY. - Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory

basis, if the compensation required is publicly disclosed by such government.

(d) PREEMPTION. - If, after notice and an opportunity for public comment the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b), the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

(e) COMMERCIAL MOBILE SERVICE PROVIDERS. - Nothing in this section shall affect the application of section 332(c)(3) to commercial mobile service providers.

(f) RURAL MARKETS. - It shall not be a violation of this section for a State to require a telecommunications carrier that seeks to provide telephone exchange service or exchange access in a service area served by a rural telephone company to meet the requirements in section 214(e)(1) for designation as an eligible telecommunications carrier for that area before being permitted to provide such service. This subsection shall not apply-

(1) to a service area served by a rural telephone company that has obtained an exemption, suspension, or modification of section 251(c)(4) that effectively prevents a competitor from meeting the requirements of section 214(e)(1); and

(2) to a provider of commercial mobile services.

47 U.S.C. § 254 UNIVERSAL SERVICE.

(a) PROCEDURES TO REVIEW UNIVERSAL SERVICE REQUIREMENTS. -

(1) FEDERAL-STATE JOINT BOARD ON UNIVERSAL SERVICE. - Within one month after the date of enactment of the Telecommunications Act of 1996, the Commission shall institute and refer to a Federal-State Joint Board under section 410(c) a proceeding to

recommend changes to any of its regulations in order to implement sections 214(e) and this section, including the definition of the services that are supported by Federal universal support mechanisms and a specific timetable for completion of such recommendations. In addition to the members of the Joint Board required under section 410(c), one member of such Joint Board shall be a State-appointed utility consumer advocate nominated by a national organization of State utility consumer advocates. The Joint Board shall, after notice and opportunity for public comment, make its recommendations to the Commission 9 months after the date of enactment of the Telecommunications Act of 1996.

(2) COMMISSION ACTION. - The Commission shall initiate a single proceeding to implement the recommendations from the Joint Board required by paragraph (1) and shall complete such proceeding within 15 months after the date of enactment of the Telecommunications Act of 1996. The rules established by such proceeding shall include a definition of the services that are supported by Federal universal service support mechanisms and a specific timetable for implementation. Thereafter, the Commission shall complete any proceeding to implement subsequent recommendations from any Joint Board on universal service within one year after receiving such recommendations.

(b) UNIVERSAL SERVICE PRINCIPLES. - The Joint Board and the Commission shall base policies for the preservation and advancement of universal service on the following principles:

(1) QUALITY AND RATES. - Quality service should be available at just, reasonable, and affordable rates.

(2) ACCESS TO ADVANCED SERVICES. - Access to advanced telecommunications and information services should be provided in all regions of the Nation.

(3) ACCESS IN RURAL AND HIGH COST AREAS. - Consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information services, including interexchange services and advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas.

(4) EQUITABLE AND NONDISCRIMINATORY CONTRIBUTIONS. - All providers of telecommunications services should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service.

(5) SPECIFIC AND PREDICTABLE SUPPORT MECHANISMS. - There should be specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service.

(6) ACCESS TO ADVANCED TELECOMMUNICATIONS SERVICES FOR SCHOOLS, HEALTH CARE, AND LIBRARIES. - Elementary and secondary schools and classrooms, health care providers, and libraries should have access to advance telecommunications services as described in subsection (h).

(7) ADDITIONAL PRINCIPLES. - Such other principles as the Joint Board and the Commission determine are necessary and appropriate for the protection of the public interest, convenience, and necessity and are consistent with this Act.

(c) DEFINITION. -

(1) IN GENERAL. - Universal service is an evolving level of telecommunications services that the Commission shall establish periodically under this section, taking into account advances in telecommunications and information technologies and services. The Joint Board in recommending, and the Commission in establishing, the definition of the services that are supported by Federal universal service support mechanisms shall consider the extent to which such telecommunications services-

(A) are essential to education, public health, or public safety;

(B) have, through the operation of market choices by customers, been subscribed to by a substantial majority of residential customers;

(C) are being deployed in public telecommunications networks by telecommunications carriers; and

(D) are consistent with the public interest, convenience, and necessity.

(2) ALTERATIONS AND MODIFICATIONS. - The Joint Board may, from time to time, recommend to the Commission modifications in the definition of the services that are supported by Federal universal service support mechanisms.

(3) SPECIAL SERVICES. - In addition to the services included in the definition of universal service under paragraph (1), the Commission may designate additional services for such support mechanisms for schools, libraries, and health care providers for the purposes of subsection (h).

(d) TELECOMMUNICATIONS CARRIER CONTRIBUTION. - Every telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and

sufficient mechanisms established by the Commission to preserve and advance universal service. The Commission may exempt a carrier or class of carriers from this requirement if the carrier's telecommunications activities are limited to such an extent that the level of such carrier's contribution to the preservation and advancement of universal service would be de minimis. Any other provider of interstate telecommunications may be required to contribute to the preservation and advancement of universal service if the public interest so requires.

(e) UNIVERSAL SERVICE SUPPORT. - After the date on which Commission regulations implementing this section take effect, only an eligible telecommunications carrier designated under section 214(e) shall be eligible to receive specific Federal universal service support. A carrier that receives such support shall use that support only for the provision, maintenance, and upgrading of facilities and services for which the support is intended. Any such support should be explicit and sufficient to achieve the purposes of this section.

(f) STATE AUTHORITY. - A State may adopt regulations not inconsistent with the Commission's rules to preserve and advance universal service. Every telecommunications carrier that provides intrastate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, in a manner determined by the State to the preservation and advancement of universal service in that State. A State may adopt regulations to provide for additional definitions and standards to preserve and advance universal service within that State only to the extent that such regulations adopt additional specific, predictable, and sufficient mechanisms to support such definitions or standards that do not rely on or burden Federal universal support mechanisms.

(g) INTEREXCHANGE AND INTERSTATE SERVICES. - Within 6 months after the date of enactment of the Telecommunications Act of 1996, the Commission shall adopt rules to require that the rates charged by providers of

interexchange telecommunications services to subscribers in rural and high cost areas shall be no higher than the rates charged by each such provider to its subscribers in urban areas.

Such rules shall also require that a provider of interstate interexchange telecommunications services shall provide such services to its subscribers in each State at rates no higher than the rates charged to its subscribers in any other State.

(h) TELECOMMUNICATIONS SERVICES FOR CERTAIN PROVIDERS. -

(1) IN GENERAL

(A) HEALTH CARE PROVIDERS FOR RURAL AREAS. - A telecommunications carrier shall, upon receiving a bona fide request, provide telecommunications services which are necessary for the provision of health care services in a State, including instruction relating to such services, to any public or nonprofit health care provider that serves persons who reside in rural areas in that State at rates that are reasonably comparable to rates charged for similar services in urban areas in that State. A telecommunications carrier providing service under this paragraph shall be entitled to have an amount equal to the difference, if any, between the rates for services provided to health care providers for rural areas in a State and the rates for similar services provided to other customers in comparable rural areas in that State treated as a service obligation as a part of its obligation to participate in the mechanisms to preserve and advance universal service.

(B) EDUCATIONAL PROVIDERS AND LIBRARIES. - All telecommunications carriers serving a geographic area shall, upon a bona fide request for any of its services that are

within the definition of universal service under subsection (c)(3), provide such services to elementary schools, secondary schools, and libraries for educational purposes at rates less than the amounts charged for similar services to other parties. The discount shall be an amount that the Commission, with respect to interstate services, and the State, with respect to intrastate services, determine is appropriate and necessary to ensure affordable access to and use of such services by such entities. A telecommunications carrier providing service under this paragraph shall -

(i) have an amount equal to the amount of the discount treated as an offset to its obligation to contribute to the mechanisms to preserve and advance universal service, or

(ii) notwithstanding the provisions of subsection (e) of this section, receive reimbursement utilizing the support mechanisms to preserve and advance universal service.

(2) ADVANCED SERVICES. - The Commission shall establish competitively neutral rules-

(A) to enhance, to the extent technically feasible and economically reasonable, access to advanced telecommunications and information services for all public and nonprofit elementary and secondary school classrooms, health care providers, and libraries; and

(B) to define the circumstances under which a telecommunications carrier may be required to connect its network to such public institutional telecommunications users.

(3) TERMS AND CONDITIONS.- Telecommunications services and network capacity provided to a public institutional telecommunications user under this subsection may not be sold, resold, or otherwise transferred by such user in consideration for money or any other thing of value.

(4) ELIGIBILITY OF USERS. - No entity listed in this subsection shall be entitled to preferential rates or treatment as required by this subsection, if such entity operates as a for-profit business, is a school described in paragraph (5)(A) with an endowment of more than $50,000,000, or is a library not eligible for participation in State-based plans for funds under title III of the Library Services and Construction Act (20 U.S.C. 335c et seq.).

(5) DEFINITIONS.- For purposes of this subsection:

(A) ELEMENTARY AND SECONDARY SCHOOLS.- The term "elementary and secondary schools" means elementary schools and secondary schools, as defined in paragraphs (14) and (25), respectively, of section 14101 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 8801).

(B) HEALTH CARE PROVIDER.- The term "health care provider" means-

(i) post-secondary educational institutions offering health care instruction, teaching hospitals, and medical schools;

(ii) community health centers or health centers providing health care to migrants;

(iii) local health departments or agencies;

(iv) community mental health centers;

(v) not-for-profit hospitals

(vi) rural health clinics; and

(vii) consortia of health care providers consisting of one or more entities described in clauses (i) through (vi).

(C) PUBLIC INSTITUTIONAL TELECOMMUNICATIONS USER.- The term "public institutional telecommunications user" means an elementary or secondary school, a library, or a health care provider as those terms are defined in this paragraph.

(i) CONSUMER PROTECTION. - The Commission and the States should ensure that universal service is available at rates that are just, reasonable, and affordable.

(j) LIFELINE ASSISTANCE. - Nothing in this section shall affect the collection, distribution, or administration of the Lifeline Assistance Program provided for by the Commission under regulations set forth in section 69.117 of title 47, Code of Federal Regulations, and other related sections of such title.

(k) SUBSIDY OF COMPETITIVE SERVICES PROHIBITED. - A telecommunications carrier may not use services that are not competitive to subsidize services that are subject to competition. The Commission, with respect to interstate services, and the States, with respect to intrastate services, shall establish any necessary cost allocation rules, accounting safeguards, and the guidelines to ensure that services included in the definition of universal service bear no more than a reasonable share of the joint and common costs of facilities used to provide those services.

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AT&T CORP., *et al.*,
Petitioners,
v.
IOWA UTILITIES BOARD, *et al.*,
Respondents.

AT&T CORP., *et al.*,
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v.
PEOPLE OF THE STATE OF CALIFORNIA, *et al.*,
Respondents.

AND RELATED CASES

On Writs of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF BELL ATLANTIC CORPORATION, BELLSOUTH CORPORATION, AND SBC COMMUNICATIONS INC.

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QUESTIONS PRESENTED

1. Whether the Communications Act of 1934, as amended—which gives States sole authority to "establish" and "determine" just and reasonable rates for local interconnection arrangements (47 U.S.C. § 252(c), (d)) and which provides that "nothing in this Act shall be construed . . . to give the [Federal Communications] Commission jurisdiction" with respect to intrastate matters (*id.* § 152(b))—forecloses the FCC's assertion of preemptive jurisdiction to regulate the rates and certain other terms of local interconnection arrangements.

2. Whether FCC rules requiring incumbent telephone companies to provide their competitors with preassembled combinations of "unbundled network elements" conflict with statutory text stating that unbundled network elements need only be provided "in a manner that allows *requesting carriers* to combine such elements" (47 U.S.C. § 251(c)(3) (emphasis added)).

3. Whether FCC rules requiring incumbents to provide their competitors, in fully preassembled form and at cost-based rates, a "platform" of all the network elements needed to duplicate the incumbent's finished telecommunications service violate the wholesale pricing requirements and marketing restrictions governing a competitor's resale of the incumbent's telecommunications services (47 U.S.C. §§ 252(d)(3), 271(e)(1)).

4. Whether the FCC improperly expanded an incumbent's obligation to provide access to essential "network elements" (a) by ignoring the statute's threshold requirement that access to network elements is required only when such access is "necessary" or when the incumbent's failure to provide such access would "impair" a competitor's ability to provide service (47 U.S.C. § 251(d)(2)), and (b) by expanding the definition of "network element" (*id.* § 153(29)) to include assets extrinsic to an incum-

bent's transmission network and complete telecommunications services that incumbents offer at retail.

5. Whether FCC rules allowing a competitor to force upon an incumbent carrier any isolated provision from any of the incumbent's approved interconnection agreements conflicts with the Act's reliance on private negotiations and binding agreements and with statutory text providing that an incumbent carrier must make such provisions available to other carriers only "upon the same terms and conditions" as in the original agreement (47 U.S.C. § 252(i)).

LIST OF PARTIES AND AFFILIATES

Pursuant to Supreme Court Rule 29.6, the parties to this brief submit the following statement concerning parent companies and non-wholly owned subsidiaries:

Bell Atlantic Corporation has no parent companies. It owns the following subsidiaries having securities in the hands of the public: Bell Atlantic-Delaware, Inc., Bell Atlantic-Maryland, Inc., Bell Atlantic-New Jersey, Inc., Bell Atlantic-Pennsylvania, Inc., Bell Atlantic-Virginia, Inc., Bell Atlantic-Washington, D.C., Inc., Bell Atlantic-West Virginia, Inc., Bell Atlantic Financial Services, Inc., NYNEX Corporation, New York Telephone Company, New England Telephone and Telegraph Company, Bell Atlantic Credit Corporation, and Bell Atlantic Global Funding Corporation. In addition Bell Atlantic has the following non-wholly owned subsidiaries: One Parkway, Inc., ICA Foreign Financial, Inc., Chesapeake Directory Sales Company, Atlantic West B.V., Grupo Iusacell, S.A. de C.V., Bell Atlantic New Zealand Holdings, Inc., PrimeCo Personal Communications, L.P., Washington, D.C. SMSA Limited Partnership, New York SMSA Limited Partnership, Upstate Cellular Network, Orange County Poughkeepsie MSA Limited Partnership, Pittsfield Cellular Telephone Company, Allentown SMSA Limited Partnership, Reading SMSA Limited Partnership, Pittsburgh SMSA Limited Partnership, Pennsylvania RSA No. 6(II) Limited Partnership, Columbia Cellular Telephone Company, Anderson Cellular Telephone Company, Las Cruces Cellular Telephone Company, TELE-TV, TELE-TV Media, L.P., TELE-TV Systems, L.P., NYNEX Master Lease Partners, Global Directory Services Company, MEDIATEL spol. s.r.o., Bell Atlantic Information Services Hellas S.A., Polskie Ksiazki Telefoniczne Sp. z o. o., Nord Trans Biuro Reklam Sp. z o. o., NYNEX Worldwide Directories Company, Kipling Associates L.L.C., NYNEX International (Asia) Ltd., and Gibraltar NYNEX Communications Limited.

BellSouth Corporation has no parent companies. BellSouth Corporation's non-wholly owned subsidiaries are 1155 Peachtree Associates, BellSouth New Zealand, Compania de Radiocomunicaciones Moviles S.A., Telcel Celular C.A., Tele 2000, S.A., BellSouth Wireless Data, L.P., RAM Mobile Data Belgium, S.C.S., RAM Mobile Data C.V., BellSouth Carolinas PCS, L.P. (d/b/a BellSouth Mobility DCS in NC & SC), Bloomington Cellular Telephone Company, Chattanooga MSA Limited Partnership, Decatur RSA Limited Partnership, Florida RSA #2B (Indian River) Limited Partnership, Georgia RSA No. 1 Limited Partnership, Georgia RSA No. 2 Limited Partnership, Georgia RSA No. 3 Limited Partnership, Gulf Coast Cellular Telephone Company, Jacksonville MSA Limited Partnership, Lafayette MSA Limited Partnership, Los Angeles Cellular Telephone Company, Louisiana RSA No. 7 Cellular General Partnership, MCTA, Memphis SMSA Limited Partnership, Muncie Cellular Telephone Company, Inc., Orlando SMSA Limited Partnership, Richmond Cellular Telephone Company, Tennessee RSA Limited Partnership, and Terre Haute Cellular Telephone Company, Inc.

SBC Communications Inc., which has shares outstanding in the hands of the public, is the parent company of Southwestern Bell Telephone Company and Southwestern Bell Yellow Pages, Inc. SBC Communications Inc. has the following non-wholly owned subsidiaries which have shares or partnership interests outstanding in the hands of the public: Abilene SMSA Limited Partnership, Amarillo SMSA Limited Partnership, Buffalo Telephone Company, Cellular Mobile Corporation, Champaign CellTelco, Dallas SMSA Limited Partnership, Decatur Cellular Telephone Company, Inc., Eastern Missouri Cellular Limited Partnership, Gainesville Development Associates Limited, Gary Cellular Telephone Company, Kansas City SMSA Limited Partnership, Lubbock SMSA Limited Partnership, McAllen/Edinburgh SMSA Limited

Partnership, Midland-Odessa SMSA Limited Partnership, Missouri RSA 8 Limited Partnership, Missouri RSA 9 B1 Limited Partnership, Oklahoma City SMSA Limited Partnership, Oklahoma RSA 3 Limited Partnership, Oklahoma RSA 9 Limited Partnership, PTF/FCLC Associates (LP), PTF/GECC (California) Associates (LP), San Antonio SMSA Limited Partnership, SBMS Cellular Telecommunications Bloomington, Inc., SBMS Cellular Telecommunications Springfield, Inc., S.T.L.M. Programming Services Limited, St. Joseph SMSA Limited Partnership, Texas RSA 9B4 Limited Partnership, Texas RSA 10B1 Limited Partnership, Texas/Illinois Cellular Limited Partnership, Topeka SMSA Limited Partnership, Washington/Baltimore Cellular Limited Partnership, Wichita SMSA Limited Partnership, and Worcester Telephone Company.

On April 1, 1997, SBC Communications Inc., Pacific Telesis Group ("PAC"), and SBC Communications (NV) Inc., a wholly owned subsidiary of SBC Communications Inc., completed an agreement and plan of merger by the means of which PAC and SBC Communications (NV) Inc. were merged into PAC, and PAC became a wholly owned subsidiary of SBC Communications Inc. PAC, formerly a publicly held corporation, and its wholly owned subsidiaries, Pacific Bell and Nevada Bell, provide telecommunications services subject to the general jurisdiction of the Federal Communications Commission.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

Nos. 97-826, 97-829, 97-830, 97-831,
97-1075, 97-1087, 97-1099, 97-1141

AT&T CORP., *et al.*,

Petitioners,

v.

IOWA UTILITIES BOARD, *et al.*,

Respondents.

AT&T CORP., *et al.*,

Petitioners,

v.

PEOPLE OF THE STATE OF CALIFORNIA, *et al.*,

Respondents.

AND RELATED CASES

On Writs of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF BELL ATLANTIC CORPORATION, BELLSOUTH CORPORATION, AND SBC COMMUNICATIONS INC.

STATEMENT OF THE CASE

This case presents two sets of questions triggered by the FCC's misguided attempt to reconfigure the Telecommunications Act of 1996 (the "1996 Act").[1]

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[1] Relevant provisions of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, are set forth in the addendum to this brief.

First, breaching a 60-year old statutory barrier that Congress had purposely left in place, the Commission asserted authority to superintend nearly every aspect of competition in local telephone markets—including, in particular, the prices that incumbent local carriers may charge their competitors for access to local networks. The FCC made that unprecedented claim despite Congress's express directive that "State commissions," not the FCC, shall "establish" and "determine" the relevant prices according to standards set forth in the 1996 Act itself (47 U.S.C. § 252(c) and (d)); despite the FCC's frank admission that the new statute "do[es] not contain an explicit grant of intrastate authority to the Commission" (J.A. 448 (¶ 84)); and despite the deeply rooted principle that only the most direct and unambiguous statutory language can override the Communications Act's express prohibition against any such FCC assertion of intrastate jurisdiction.

Second, the FCC's substantive rules effectively nullified the Act's fundamental distinction between two discrete paths by which a competitor may enter local service: leasing unbundled portions of an incumbent carrier's local network at cost-based rates, and purchasing for resale a finished telecommunications service at the incumbent's retail rate less a wholesale discount. The FCC sanctioned a scheme of sham unbundling, under which a competitor could purchase a finished service for resale, *not* at the wholesale discount specified in the Act, but at the cost-based price reserved for unbundled network elements. The competitor could do so merely by relabeling its request for the incumbent's finished service as a request for a fully preassembled package of all the elements of an incumbent's network needed to provide the identical finished service that the incumbent itself provides. That result not only destroyed the statutory distinction between resale and unbundled network elements, but also subverted the important goal of preserving universal telephone service. Regulators require incumbent carriers to keep their

rates for local residential service artificially low and allow them to recover their losses elsewhere. If new entrants could obtain at cost-based rates the services that incumbents necessarily provide above cost, they could cherry-pick the incumbent's profitable customers, leaving the incumbent with no way to recover its losses on basic residential service.

1. Background. For over 60 years, since the enactment of the Communications Act of 1934, Congress has expressly confined the FCC's jurisdiction to interstate and foreign communications and has reserved for the States exclusive jurisdiction over intrastate communications. Section 2(b) of the Act provides (with exceptions not relevant here) that "*nothing* in this [Act] shall be construed to apply *or to give the Commission jurisdiction* with respect to . . . charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier." 47 U.S.C. § 152(b) (emphasis added). This Court has squarely held that section 2(b) "fence[s] off from FCC reach or regulation intrastate matters," and that only an "unambiguous" and "straightforward" grant of specific intrastate jurisdiction to the FCC can "override the command of [§ 2(b)]." *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 370, 377 (1986).

Until recently, most States exercised their federally guaranteed authority over local telephone service by granting exclusive franchises in each local service area and pervasively regulating these franchised "local exchange carriers" (or "LECs") with an eye to securing affordable "universal service." To keep prices low even for high-cost customers, the States mandated an extensive system of interservice subsidies under which LECs were typically required to charge below-cost rates for basic residential service and above-cost rates for business and other services. The level and structure of these subsidies naturally varied throughout the country depending on each State's local conditions and prevailing social policies.

Interservice subsidy arrangements were economically sustainable only because the States preserved certain legal barriers to entry that prevented competitors from cherry-picking LEC business customers whose above-cost rates fund universal service. In the years leading up to the 1996 Act, however, a number of States began to depart from the exclusive franchise model. These States took the lead in the difficult and inherently localized process of opening up local telephone markets to competition while still ensuring affordable, high-quality service to all consumers. *See* J.A. 241 (*Iowa Utils. Bd. v. FCC*, 109 F.3d 418, 427 n.7 (8th Cir. 1996)).

2. The 1996 Act. Building significantly on the work already done by the States, Congress crafted in the 1996 Act a "pro-competitive, de-regulatory national policy framework" designed to "open[] all telecommunications markets to competition." S. Conf. Rep. No. 104-230, at 113 (1996) ("Conf. Rep."). With respect to local service markets, Congress expressly preempted all State and local legal barriers to entry, such as exclusive franchises. *See* 47 U.S.C. § 253(a).

Congress also imposed on incumbent local exchange carriers several affirmative duties. First, an incumbent carrier must allow competitors to interconnect with the incumbent's network in order to complete calls to and from that network. *Id.* § 251(c)(2). Second, an incumbent must sell competitors access to "network elements" on an "unbundled basis"—that is, allow competitors to supplement their own network facilities by leasing individual pieces of "equipment" or a "facility" from the incumbent's transmission network. *Id.* § 251(c)(3); *see also id.* §153(29). Third, an incumbent must sell competitors its retail telephone services at wholesale prices so that competitors can resell those complete, finished services to their own customers. *Id.* § 251(c)(4). These duties ensure that, instead of having to build a complete network from scratch before entering the local market, a com-

petitor will be able to enter gradually by leasing individual facilities to fill in gaps in its own network or by reselling the incumbent's existing services.

Recognizing, however, that these steps implicated the intensely local concerns of 50 different jurisdictions—each with its own system of rate structures, regulations, and subsidies—Congress enlisted the State public utility commissions to ensure that local competition would be implemented fairly and with due regard to local conditions. In keeping with its deregulatory purposes, Congress chose to rely in the first instance on private party negotiations to reach interconnection agreements consistent with the 1996 Act.[2] But where the parties cannot agree on all issues within a prescribed bargaining period, Congress provided that either party may petition the State commission "to arbitrate any open issues." 47 U.S.C. § 252(b)(1). Most significantly for present purposes, the Act entrusts solely to State commissions the resolution of disputes concerning the crucial question of pricing. It provides that "*a State commission* shall . . . establish any rates for interconnection, services, or network elements," in accordance with the pricing standards spelled out in the statute. *Id.* § 252(c)(2) (emphasis added); *see also id.* § 252(d)(1) (specifying that "a State commission" shall "determin[e]" just and reasonable rates).

Congress provided for ultimate federal oversight of State arbitrations, but it chose a judicial, not an administrative, mechanism for this oversight. Once an arbitrated agreement has been finally approved by a State commission, any aggrieved party may bring an action in federal district court to determine whether the decision

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[2] Incumbent carriers have signed more than 2,400 voluntary agreements with 280 local service competitors. *See* Roy Neel, President, United States Telephone Association, En Banc Presentation on Local Competition before the FCC, Jan. 29, 1998; USTA Competition Report (Nov. 3, 1997).

"meets the requirements of section 251 . . . and [section 252]." *Id.* § 252(e)(6).

In contrast to its broad reliance on private negotiations, State-supervised arbitrations, and federal judicial review, Congress assigned the FCC a limited role under the Act's local competition provisions. The statute provides that, if a State commission actually declines to carry out its responsibilities under section 252, the FCC "shall assume the responsibility of the State commission . . . with respect to the proceeding or matter." *Id.* § 252(e)(5). Otherwise, with a few specifically stated exceptions,[3] Congress scrupulously avoided authorizing the FCC to intrude on the States' jurisdiction to oversee intrastate telephone service. In particular, while directing the FCC to issue within six months regulations implementing the provisions for which it was assigned specific responsibility (*id.* § 251(d)(1)), Congress gave the FCC *no* role with respect to the pricing of interconnection arrangements.

3. The FCC's Order. Unwilling to accept its circumscribed role under the new statute, the FCC moved aggressively to transform the deregulatory, State-centered plan Congress enacted into a massive new federal regulatory program. In its First Report and Order—a 700-page, 3,200-footnote opus—the Commission undertook to promulgate "uniform, national rules" addressing every conceivable local interconnection issue (J.A. 431 (¶ 53)), and it declared those rules "binding on the states, even with respect to intrastate issues" (*id.* at 455 (¶ 101)).

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[3] For example, Congress gave the FCC "exclusive jurisdiction" over the administration of "telecommunications numbering," including the responsibility to make numbers available "on an equitable basis." 47 U.S.C. § 251(e)(1). It also gave the FCC a role in defining a carrier's duty to provide "number portability" (*id.* § 251(b)(2)); in determining what network elements should be unbundled (*id.* § 251(d)(2)); in prescribing permissible resale restrictions (*id.* § 251(c)(4)(B)); and in providing for the treatment of comparable carriers as "incumbents" (*id.* § 251(h)(2)).

Although the FCC conceded that the 1996 Act "do[es] not contain an explicit grant of intrastate authority to the Commission" (*id.* at 448 (¶ 84)), it nevertheless proclaimed that it had authority "without limitation" (*id.* at 463-64 (¶ 115)) to issue such binding rules because, in its view, the "1996 Act moves beyond the distinction between interstate and intrastate matters that was established in the 1934 Act" (*id.* at 417 (¶ 24)). As the FCC's Chairman declared in plainer terms, the 1996 Act threw the States' traditional intrastate authority into "the trash can of history."[4]

Having asserted unconstrained intrastate authority, the FCC turned its attention to the pricing of local interconnection arrangements. Even though section 252(d) expressly assigns to "State commission[s]" the authority to determine "just and reasonable" rates, the FCC declared that Congress intended the *federal* agency to take the lead role in implementing the statutory pricing provisions. Divining a jurisdictional dichotomy nowhere expressed in the statutory text, the Commission asserted jurisdiction to adopt "national pricing rules" and to relegate the States to the subordinate and largely ministerial role of mechanically applying those rules. J.A. 448-49, 461-62 (¶¶ 85, 111).

In particular, the Commission mandated a new pricing methodology known as "total element long run incremental cost" (or "TELRIC"), which required States to set prices based solely on the incremental, forward-looking cost of an ideally efficient network—a hypothetical network that, by design, ignored nearly every aspect of an incumbent's actual current "cost . . . of providing the interconnection or network element" (47 U.S.C. § 252(d)(1)). *See* J.A. 419 (¶ 29). The FCC then defined in elaborate detail the steps that State commissions must take

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[4] *Hundt Looks toward 'Radical' Overhaul of Regulatory Regimes, Major Business Moves*, Telecommunications Reports, at 6 (July 15, 1996).

to adhere to the TELRIC standard. *See, e.g.*, J.A. 751-69 (¶¶ 672-715); 47 C.F.R. §§ 51.501 *et seq.* The Commission further specified the result that States must reach as to every other pricing issue of consequence, from the extent of geographical rate "deaveraging" (at least three different rate zones in each State) to the appropriate divisions between recurring and non-recurring charges. *See* 47 C.F.R. §§ 51.505(b)(3), 51.507(f). The FCC even ordered each State to apply specific FCC-prescribed rates (known as "proxy" prices) until the State could conduct a detailed cost study in compliance with the FCC's newly minted TELRIC methodology. J.A. 419, 790-91 (¶¶ 29, 767-770).[5]

In addition to these intricate pricing rules, the FCC's First Report and Order also contained lengthy and detailed regulations governing non-pricing aspects of the 1996 Act. Of particular importance here, the FCC's order completely dismantled the statute's distinction between access to an incumbent carrier's unbundled network elements—which must be priced at "cost" plus "a reasonable profit" (47 U.S.C. § 252(d)(1))—and the provision of finished services for resale—which must be priced at the incumbent's "retail rates" less "avoided" costs (*id.* § 252(d)(3)). Because States have set above-cost rates for business and advanced services to fund affordable, below-cost service for basic residential service, the retail-less-avoided-cost standard of section 252(d)(3) ensures that the wholesale price paid by a resale competitor reflects the same contribution toward the cost of providing universal service that is contained in

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[5] In a separate order in the same proceeding (J.A. 1161-357 (Second Report and Order)), the FCC also asserted power to dictate to the States the terms and conditions for implementing intrastate "toll" (*i.e.*, short-haul long-distance) "dialing parity"—a system that allows callers to choose a carrier other than their local telephone company for such service without dialing extra digits. *See* 47 U.S.C. §§ 153(15), 251(b)(3). The FCC asserted this power even though Congress directed the States, not the FCC, to implement dialing parity for such intrastate calls. *See id.* § 271(e)(2)(B).

the incumbent's retail rates.[6] By contrast, because regulators generally have refused to consider these interservice subsidies as part of the "cost" of unbundled network elements under section 252(d)(1), the actual prices for network elements provide no support for universal service.

The Commission nonetheless ruled that a competitor could purchase at cost-based rates *all* the elements needed to provide a complete service. And despite the statute's express statement that incumbents need provide access only "in a manner that allows *requesting carriers* to combine such elements" (47 U.S.C. § 251(c)(3) (emphasis added)), the Commission ruled that a competitor could even require the incumbent to provide those elements in *pre-combined, fully bundled form*. J.A. 551-54, 571-76 (¶¶ 292-297, 328-340). The FCC's rules therefore allowed a competitor to obtain a finished service at cost-based, unbundled element rates—thereby negating the statutory pricing structure—merely by framing its request in different terms: instead of requesting the incumbent's retail service for resale at a wholesale discount off the regulated retail rate, the competitor could simply demand, in fully preassembled form and at cost-based prices, all the supposedly "unbundled" network elements needed to provide that same retail service.

The FCC exacerbated the problem by twisting the definition of "network elements" beyond all recognition. In the Commission's view, an incumbent must provide its competitors with access, not only to the essential physical facilities that a competitor might need to fill out its own local network, but also to essentially *all* of the incumbent's assets and operations, including even its back-office support systems and live operators—hardly "network elements" in any common understanding of that term. J.A.

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[6] *See* H.R. Rep. No. 104-204, at 72 (1995) (in recognition of the "pricing structures for telephone exchange service in the State," the resale rate "should reflect whether, and to what extent, the local dialtone service is subsidized by other services").

670, 679-80 (¶¶ 516, 536). The FCC also swept within its definition of unbundled network elements such optional retail services as Caller ID and Call Waiting, which provide significant universal service contributions. Under the Commission's rules they, too, must be offered to competitors at cost-based rates. *See* J.A. 538-39, 612 (¶¶ 263, 413).

In the process, the Commission essentially read out of the statute a restrictive provision directing the FCC to consider, in determining what network elements must be made available, whether lack of access to a particular element would "impair" a competitor's ability to provide telecommunications services and, in the case of proprietary elements, whether such access is "necessary." 47 U.S.C. § 251(d)(2). In the Commission's view, the "necessary" and "impair" standards have nothing to do with whether a requesting carrier can "obtain an element from a source other than the incumbent"; instead, an element qualifies under both standards unless a requesting carrier can offer the same service using other "elements *within an incumbent LEC's network,*" without experiencing any decrease in quality or increase in cost. J.A. 547, 548, 549 (¶¶ 283, 285, 287) (emphasis added).

Finally, the FCC transformed the 1996 Act's unexceptional most-favored-nation requirement—under which an incumbent must make available to requesting carriers, "upon the same terms and conditions," any interconnection arrangement contained in an approved agreement (47 U.S.C. § 252(i))—into an extreme "pick-and-choose" rule that subverts voluntary negotiations and undermines binding agreements. Under the FCC's order, a competitor may pluck any isolated provision from an approved agreement and force it upon the incumbent carrier without accepting the other "terms and conditions" negotiated as part of the same agreement. J.A. 1044-46 (¶¶ 1309-1315). A competitor may even unilaterally revise a signed, State-approved agreement by "avail[ing] itself of more advantageous terms and conditions *subsequently* negotiated by

any other carrier." J.A. 1046-47 (¶ 1316) (emphasis added).

4. The Stay Proceedings. Numerous parties, including many State commissions and incumbent carriers, petitioned for review of the FCC's order. Those petitions were consolidated in the Eighth Circuit pursuant to 28 U.S.C. § 2112(a)(3).

Because the FCC's arrogation of pricing jurisdiction seemed so clearly to usurp authority that Congress granted to the States, a number of States, as well as some private petitioners, sought an interim stay of the FCC's rules pending judicial review. After full briefing and oral argument, the Eighth Circuit granted the requested stay in October 1996 because of what "appear[ed] to be the rather clear and direct indication [in the statutory text] that the state commissions"—not the FCC—"should establish prices." J.A. 236 (109 F.3d at 424).

The FCC, AT&T, and MCI filed applications to vacate the stay. Justice Thomas denied those applications. 117 S. Ct. 378; 117 S. Ct. 379 (1996). The FCC immediately reapplied to Justice Ginsburg, and AT&T and MCI reapplied to Justice Stevens. The renewed applications were referred to the full Court, which likewise denied them. 117 S. Ct. 429 (1996).

5. The Decision Below. After further briefing and oral argument, the court of appeals confirmed its earlier tentative holding that the plain language of section 252(c) and (d) "directly and straightforwardly assigns to the states the authority to set . . . prices." Pet. App. 17a. Those specific congressional directives were entirely sufficient to resolve the issue of pricing jurisdiction. The court made plain, however, that, even if there were "[a]ny ambiguity," it would be resolved against the FCC because of the jurisdictional proscription of section 2(b), as interpreted by this Court in *Louisiana PSC*. Pet. App. at 15a. As the court of appeals explained, "the prices that incumbent local exchange carriers may charge their new competitors for interconnection, unbundled access, and resale . . . qualify as 'charges . . . for or in connection

with intrastate communications service.'" *Id.* at 15a (quoting section 2(b)).[7]

The Eighth Circuit also addressed a lengthy series of non-jurisdictional challenges to the substance of the FCC's rules. First, the court set aside the FCC's "pick-and-choose" rule because, contrary to the Act's terms and structure, it "would thwart the negotiation process and preclude the attainment of binding negotiated agreements." Pet. App. 26a. The court then turned to the various issues concerning unbundled network elements. It denied challenges to both the FCC's all-encompassing definition of "network element[s]" and its lax understanding of the "necessary" and "impair" standards. *Id.* at 41a-45a, 47a-50a. The court ruled, however, that the FCC's attempt to collapse the fundamental statutory distinction between resale and access to unbundled elements conflicted with both the language and the structure of the Act.

In particular, the court concluded that "the FCC's rule requiring incumbent LECs, rather than the requesting carriers, to recombine network elements that are purchased . . . on an unbundled basis . . . cannot be squared with the terms of subsection 251(c)(3)" (*id.* at 52a), which states that "requesting carriers" are to "combine such elements" to provide telecommunications services. In light of that holding, the court concurrently rejected the incumbents' contention that new entrants cannot obtain access to all of the network elements that, when combined by the requesting carrier, are sufficient to provide service. *Id.* at 54a-58a. Because entrants must

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[7] In a separate appeal that was briefed and argued independently of the main appeal and that the court decided in a separate opinion, the Eighth Circuit concluded that the FCC lacked jurisdiction to issue mandatory rules governing the States' implementation of "intraLATA toll [*i.e.*, short-haul long-distance] dialing parity." Pet. App. 81a-89a. The court of appeals relied on the express terms of section 271(e)(2)(B)—which "indicates that state commissions, not the FCC, have the authority to issue intraLATA dialing parity rules" (Pet. App. 88a)—as well as on this Court's analysis of section 2(b) in *Louisiana PSC*.

make an "up-front investment" and incur additional "costs and risks" in combining the elements themselves, the Eighth Circuit reasoned, recombining all the elements needed to provide a complete service would not simply be resale under another name. *Id.* at 56a-57a.

AT&T and others immediately sought to sidestep the Eighth Circuit's ruling on the issue of combining network elements. Citing the court's failure to vacate a particular subsection of the FCC's rules (47 C.F.R. § 51.315(b))—which provided that, "[e]xcept upon request, an incumbent [carrier] shall not separate requested network elements that the incumbent [carrier] currently combines" (Pet. App. 294a)—AT&T argued in proceedings around the country that it could still skirt the resale pricing rules by obtaining at cost-based prices a "platform" of all the necessary network elements already combined into a complete service by the incumbent.

Once it was alerted to these attempted evasions of its ruling, the Eighth Circuit granted rehearing and vacated the FCC rule at issue as inconsistent with the plain statutory text. The court stated that "§ 251(c)(3) does not permit a new entrant to purchase the incumbent [carrier's] assembled platform(s) of combined network elements"; indeed, if that were allowed, it would "obliterate the careful distinctions Congress has drawn" between resale and unbundled elements. Pet. App. 71a.

SUMMARY OF ARGUMENT

I. Despite the tortuous complexity of the FCC's regulations, the primary legal issue here is actually quite simple. At bottom, the question of pricing jurisdiction turns on the plain language of the specific statutory provisions in which Congress assigned pricing authority. Those provisions make clear that Congress intended State commissions to "establish" and "determine" rates in accordance with the pricing standards expressly laid out in the statute. 47 U.S.C. § 252(c), (d). The text of these provisions could not be clearer, and it leaves no room for the FCC's assertion of broad federal pricing authority. Simply put, Con-

gress considered this precise issue and determined that State commissions, not the FCC, should determine rates. That should be the end of the matter.

In the teeth of these directly applicable statutory provisions, the FCC claims that it has authority to issue enormously complex pricing rules that would turn State commissions into nothing more than "field agents" of the Washington bureaucracy, "sent out to execute the will of FCC officials."[8] That result simply cannot be squared with Congress's decision to assign expressly to State commissions the authority to determine rates according to the statutory standards.

Nor is it in any way supported by the ambiguous, general statutory provisions on which the FCC places exclusive reliance. Even if such general provisions could override a specific assignment of pricing jurisdiction—which they cannot—the provisions cited by the FCC have no applicability here. In particular, by its plain terms, section 251(d)(1)—on which the FCC rests most heavily—directs the agency merely to prescribe within six months whatever rules may be necessary to implement the specific requirements in *section 251* for which the FCC was given express responsibility, not the separate pricing standards in section 252 for which the States were given express responsibility. Nothing in this procedural provision confers any new substantive jurisdiction on the FCC, and certainly nothing in it can be read to override section 252's express grant of pricing jurisdiction to the States. Congress plainly knows how to give the FCC substantive jurisdiction over intrastate communications: it did precisely that in other portions of section 251, in other sections of the 1996 Act, and in the analogous Cable Act. The crucial language found in each of those provisions is altogether missing from section 251(d)(1).

Even if the Court were to find some ambiguity here, that would not change the result. Section 2(b), as a spe-

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[8] Joint Reply Brief for the State Commission Parties at 2 (8th Cir. No. 96-3321, filed Jan. 6, 1997).

cial rule of construction, reverses the usual principle of *Chevron* deference, so that any jurisdictional ambiguity is fatal to the FCC's position. As this Court explained in *Louisiana PSC*, only the most straightforward and unambiguous assignment of intrastate jurisdiction to the FCC can overcome the jurisdictional bar of section 2(b). Petitioners cannot sweep aside *Louisiana PSC* on the theory that section 251 *applies* to intrastate matters and that the FCC's jurisdiction is necessarily coextensive with the scope of the Act's provisions. As the FCC acknowledges, section 2(b) is written in the disjunctive—"nothing in this Act shall be construed to apply *or to give the Commission jurisdiction*" with respect to intrastate communications. As a result, it is not enough under section 2(b) that a provision of the Act applies to intrastate matters; the Act also must clearly and unambiguously give the FCC jurisdiction with respect to those matters. Petitioners have offered no plausible justification for ignoring the plain text of that provision.

The FCC argues that this Court should disregard section 2(b) in this case. Its theory, drawn from an "impossibility" doctrine developed by some courts of appeals, is that the local network is used for both intrastate and interstate calls, that only one regulatory authority can exercise pricing power over such indivisible facilities, and that Congress must have intended the FCC to be that regulatory authority. But the FCC relied on no such theory in its order, and for good reason: it is wrong. To begin with, most of the issues dealt with in the 1996 Act and addressed by the FCC's pricing rules are purely intrastate in nature and have no interstate component at all. Even where there is an interstate component, moreover, the settled jurisprudence is that the FCC may not preempt State price regulation merely because the same facility is used for both interstate and intrastate calls; rather, preemption is permissible only when the FCC can demonstrate with precision that State regulation negates the FCC's exercise of its own lawful interstate authority. And here, where the FCC has continued to exercise jurisdiction

over the pricing of interstate calls, the agency has not made—and cannot make—any such showing.

Finally, the FCC asks the Court to indulge the agency's attenuated jurisdictional inferences on the ground that it would be inefficient for 50 different States to apply the statute's pricing standards in disparate fashion. It claims that Congress must have expected the federal agency to issue general rules prescribing basic pricing methodologies, and must have intended the States to apply those rules in setting specific rates. But that is not what Congress said. On the contrary, Congress specifically *protected* the States' authority to issue rules implementing the Act's provisions. 47 U.S.C. § 261(b). And, in any event, the FCC's order goes far beyond the boundaries marked out by its lawyers in this Court: not only did the agency itself mandate specific "proxy" prices that States *must* apply, but also its extraordinarily detailed rules dictate specific results as to every other significant pricing matter, leaving the States with barely more than a ministerial role.

II. A number of the FCC's non-jurisdictional determinations are also incompatible with the 1996 Act. Most important, the Commission abrogated the statute's clear distinction between resale of an incumbent's finished telecommunications services and access to an incumbent's unbundled network elements. The 1996 Act permits resellers to purchase an incumbent's services only at rates based on the incumbent's retail price less any avoided costs. This pricing scheme ensures that the incumbent will continue to recover any universal service subsidy built into its retail rates; it also preserves incentives for new entrants to build facilities of their own.

The FCC's rules cut the legs out from under this statutory scheme. Those rules allow a competitor to obtain a finished service *not* at the wholesale rate required by statute, but at the cost-based rates reserved for unbundled network elements. Under the FCC's sham-unbundling theory, a reseller who wants to offer exactly the same service provided by an incumbent may freely circumvent the statutory scheme by requesting, on a fully pre-

combined and bundled basis, all of the "unbundled" network elements that the incumbent uses to provide the retail service.

That approach suffers from multiple flaws. First, the statute makes abundantly clear that unbundled elements, unlike resold services, need not be provided on a pre-combined basis. Congress required an incumbent to provide network elements only in a manner that allows "*requesting carriers* to combine such elements." 47 U.S.C. § 251(c)(3) (emphasis added). There is no ambiguity in that language, and it provides a complete response to the FCC's misguided attempt to require incumbents to provide pre-combined packages of elements to competitors.

Second, even if the Commission could properly ignore the terms of section 251(c)(3) and force incumbents, rather than "requesting carriers," to "combine" unbundled elements, the FCC's rules still violate the Act by allowing requesting carriers to obtain, at cost-based rates, *all* the pre-combined network elements needed to provide a service. Access to all those pre-combined elements is resale, plain and simple, and the statutory resale rules must apply if they are to have any meaning at all. Indeed, the FCC itself has recognized that this use of network elements must be distinguished from resale, and it has struggled in vain to find a substantive distinction of any significance. None exists. Further, the language of the 1996 Act expressly contemplates that a user of unbundled network elements will have a network of its own and that an incumbent will allow that user physical access to its facilities to connect the two networks. *See* 47 U.S.C. § 251(c)(2), (c)(3). Those statutory provisions would serve little purpose if access to unbundled elements were simply a way to requisition an incumbent's complete network.

The FCC also expanded beyond all recognition the statutory obligation to provide unbundled network elements. Congress directed the FCC, in determining what network elements should be made available, to consider whether the unavailability of such elements would "impair" the competitor's ability to provide service or, in the

case of proprietary elements, whether access to such elements is "necessary." 47 U.S.C. § 251(d)(2). The Commission simply read those requirements out of the 1996 Act. It determined that incumbents must allow competitors to lease their network elements even if equivalent facilities are freely available from sources other than the incumbent. That result cannot be squared with any reasonable understanding of "necessary" or "impair." Similarly, while Congress defined network elements in terms of the incumbent's "facilit[ies] or equipment" used to complete calls, the FCC expanded that rule to require incumbents to provide their competitors with assets, including their live operators, that have nothing to do with the incumbent's essential physical facilities.

III. Finally, the FCC grossly misread the Act's most-favored-nation provision in a manner that undermines Congress's reliance on private negotiations and binding agreements as the principal means of opening local telephone markets to competition. The statute provides that an incumbent must make available to a requesting carrier, "upon the *same terms and conditions*," any interconnection, service, or network element provided under a prior agreement to which the incumbent is a party. 47 U.S.C. § 252(i) (emphasis added). Under the Commission's "pick-and-choose" rule, however, a competitor may lift out of any of the incumbent's prior interconnection agreements the single term in each that is most disadvantageous to the incumbent, may leave behind the other terms and conditions in each such agreement, may stitch these unfavorable terms together, and may force the resulting agreement on the incumbent. That rule would preclude any semblance of free negotiation between incumbents and potential entrants. Any provision to which an incumbent agrees would immediately become a new high-water mark that could be selected by all other competitors—*even those who have already agreed to less favorable terms*—wholly without regard to the countervailing trade-offs embodied in the agreement as a whole. Nothing in section 252(i) can possibly be understood to justify this absurd result.

ARGUMENT

I. CONGRESS EXPRESSLY ASSIGNED PRICING JURISDICTION EXCLUSIVELY TO THE STATES AND DELIBERATELY PRESERVED THE STATUTE'S HISTORICAL PROHIBITION AGAINST FCC CLAIMS OF INTRASTATE JURISDICTION.

The FCC's jurisdictional argument is fundamentally misconceived. The agency starts from the premise that it has generic authority to implement every provision of the Communications Act, whether interstate *or* intrastate, because Congress could not possibly have enacted a statute that did not authorize FCC micro-management of every last interpretive issue. *See* FCC Br. 20-21. The agency then scours the statute looking for any general provision that could conceivably be read to support—however vaguely or inferentially—the agency's egocentric view that Congress has given it plenary authority over all intrastate matters.

But the FCC approaches the issue from precisely the wrong direction. First, contrary to the agency's argument, the strong presumption here—a presumption written into the very text of the Communications Act—is that Congress has "fence[d] off" intrastate matters "from FCC reach or regulation." *Louisiana PSC*, 476 U.S. at 370. As we discuss below, nothing in section 251(d)(1), section 201(b), or the grab-bag of other provisions on which the FCC relies overcomes that controlling principle. Even more to the point, Congress left nothing to the imagination on the crucial question of pricing jurisdiction: it *specifically* assigned that authority to the States. That express grant of authority would be decisive here even without section 2(b). In tandem with section 2(b), it provides overwhelming support for the Eighth Circuit's conclusion. Accordingly, it is with those directly relevant—indeed, dispositive—provisions that we begin.[9]

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[9] This brief focuses principally on the question of pricing authority, the lead jurisdictional issue presented in this case. The separate briefs of the Mid-Sized LECs and the United States Telephone

A. The Plain Language of the 1996 Act Grants Pricing Jurisdiction to the States.

1. There is nothing ambiguous about the 1996 Act's assignment of pricing authority. Section 252(c)(2) empowers "a State commission" to "establish any rates . . . according to subsection (d)." In turn, section 252(d), entitled "Pricing Standards," specifies that "a State commission" is to "determin[e]" the relevant rates in accordance with the standards spelled out in the Act itself. Thus, section 252(d)(1) provides that "a *State commission*" shall determine the "just and reasonable rate" for interconnection and access to network elements based on the "cost . . . of providing" the interconnection or network elements. Section 252(d)(2) provides that "a *State commission*" shall consider reciprocal compensation for the transport and termination of traffic to be "just and reasonable" only if certain criteria are satisfied. Finally, section 252(d)(3) provides that "a *State commission* shall determine wholesale rates" for resale of complete telecommunications services by deducting from the current retail rate the "costs that will be avoided" by the incumbent carrier by selling at wholesale.

For all the ink that has been spilled, the question of pricing jurisdiction is ultimately just that simple. Sections 252(c) and (d) unambiguously give State commissions the authority to determine appropriate rates pursuant to the statutory pricing standards. Congress provided the pricing rules that it wanted followed, and it entrusted State commissions with the responsibility to determine rates in accordance with those rules. That express assignment of pricing jurisdiction to State commissions resolves the primary issue in dispute here. *See, e.g., Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992) ("when a statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary circumstances, is finished").

Association expose flaws in other aspects of the FCC's jurisdictional assertions.

2. Given the lucidity of this directly relevant statutory language—and the absence of any statement in the 1996 Act suggesting that the FCC was to have a role in pricing —the FCC can defend its assertion of pricing authority only by speculating that Congress intended to divide pricing authority in a manner that is nowhere evident on the face of the statute. The FCC conjectures that, notwithstanding the plain directives of sections 252(c) and (d), Congress gave it "concurrent" jurisdiction over pricing. FCC Br. 26. In particular, the Commission asserts that Congress expected the FCC to issue pricing rules governing "general methodological issues," even if it left to the States "considerable discretion" in applying those federal rules to particular cases. FCC Br. 26; MCI Br. 30.

That argument is remarkable for several reasons. Most fundamentally, the "concurrent" jurisdictional scheme exists only in the imagination of the FCC and its supporting petitioners. Congress told the *States* to "establish" and "determine" rates according to the standards set forth in section 252(d); it did not say that the *FCC* was to take the lead role in determining prices and that the States were merely to apply FCC-derived formulas to individual cases. The responsibility to "establish" and "determine" rates, under any natural reading of those terms, encompasses more than the rote application of detailed rules formulated by a different body. It necessarily subsumes as well the authority to develop pricing methodologies sufficient to satisfy the statutory standards. And, as we explain further below, nothing in section 251(d)(1) suggests that, despite the clear directives of section 252, Congress in fact intended to subordinate the States to the federal bureaucracy on pricing matters—indeed, nothing in even the most generous reading of section 251(d)(1) gives the FCC authority over any part of section 252.

In any event, the FCC's order belies the very theory of concurrent jurisdiction that its lawyers espouse in this Court. In a portion of the order that the FCC never even mentions in its brief, the Commission prescribed a set of *specific rates* (dubbed "proxy prices"), and it purported

to *require* State commissions to apply those specific rates until they could complete detailed cost studies sufficient to satisfy the FCC's TELRIC cost standards. *See* J.A. 719, 801-04, 867-70 (¶¶ 619, 792-794, 925-932).

Even apart from these specific proxy prices, the FCC's pricing rules were far more intrusive than its brief implies. It is simply inaccurate to say, as the Commission now insists, that the agency confined itself to "general methodological rules" and allowed the States "considerable discretion" in determining actual rates. In fact, the FCC promulgated detailed pricing standards that covered every rate issue of significance and that consigned the States to a subordinate role consisting largely of plugging numbers into FCC-generated formulas. Indeed, the FCC's explanation of its determinations as to pricing of interconnection, network elements, resale, and transportation and termination consumes more than 370 paragraphs of the agency's order. J.A. 719-836, 843-71, 925-65 (¶¶ 618-862, 878-934, 1046-1118). In short, the FCC left no pricing issue of significance to the discretion of the very State commissions to whom Congress expressly assigned pricing authority.

For that reason, the States themselves have understandably been much less sanguine than the FCC about the effect of the Commission's pricing rules on their traditional authority. As 30 States jointly explained to the Eighth Circuit, "[t]he detail in the [FCC's] rules offer little discretion to the states to use their knowledge of local conditions to 'establish' the actual rates that will be paid to the [incumbent carriers]. . . . [Under the federal agency's rules], [t]he States do not share an 'essential, overlapping role' with the FCC, but become field agents sent out to execute the will of FCC officials." [10] Nothing in the statute supports—and nothing in the FCC's brief comes close to justifying—the agency's arrogation of power to conscript

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[10] Joint Reply Brief for the State Commission Parties at 2 (8th Cir. No. 96-3321, filed Jan. 6, 1997).

these State regulators as foot soldiers for the federal bureaucracy.[11]

3. The structure of section 252(c) fortifies the conclusion that Congress entrusted pricing authority solely to the States. In defining the State commissions' arbitration responsibilities, section 252(c) creates a clear dichotomy between pricing and other matters. Subsection (c)(1) provides that, when States arbitrate "open issues" within the bounds of the matters assigned to the FCC, they must ensure that the result meets both "the requirements of section 251" *and* "the regulations prescribed by the [FCC] pursuant to section 251." Subsection (c)(2), by contrast, addresses pricing as a separate matter and makes *no* reference to any FCC rules. It provides only that States shall "establish rates . . . *according to subsection (d).*" Where Congress intended the State commissions to conform their arbitration decisions to FCC rules, it expressly said so. Congress said nothing about the State commissions following FCC *pricing* rules, precisely because no such FCC rules were contemplated. On the contrary, Congress intended the States alone to implement the Act's pricing standards, and that is why the only command to the States in section 252(c)(2) is that they set rates according to section 252(d). *See* Pet. App. 13a-14a.[12]

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[11] AT&T mistakenly asserts that this Court, in *Wilder v. Virginia Hospital Association*, 496 U.S. 498 (1990), inferred a federal rulemaking role despite a clear grant of authority to the States to develop methods and standards. AT&T Br. 26. AT&T overlooks a pivotal fact: the statute at issue in *Wilder* expressly gave the Secretary of Health and Human Services a supervisory role over the States' formulation of the relevant standards. In the very provision AT&T cites, Congress specified that each State must "'mak[e] assurances satisfactory to the Secretary'" concerning the adequacy of the "'standards'" it develops. *See* 496 U.S. at 503 (quoting 42 U.S.C. § 1396(a)(13)(A) (Supp. 1982)). It is the absence of any comparable language in section 252(d) of the 1996 Act that dooms AT&T's argument and validates the Eighth Circuit's jurisdictional holding.

[12] The same dichotomy is echoed elsewhere in section 252. Congress provided that a State commission may reject an agreement

The FCC argues that the Court should disregard this important textual evidence because the "open issues" with which subsection (c)(1) is concerned necessarily include open *rate* issues. But rate issues are dealt with specifically in section 252(c)(2), and for several reasons it would make no sense to subject those issues *also* to section 252(c)(1). First, the regulations to which section 252(c)(1) refers are those implementing section 251; they can have nothing to do with pricing, which is dealt with in section 252. Second, if section 252(c)(1) could nonetheless be read to mandate adherence to FCC pricing rules, section 252(c)(2) would be rendered wholly superfluous. But "[s]tatutes must be interpreted, if possible, to give each word some operative effect." *Walters v. Metropolitan Educ. Enters., Inc.*, 117 S. Ct. 660, 664 (1997). An interpretation that renders an entire provision superfluous is presumptively unreasonable. *See Lane v. Pena*, 116 S. Ct. 2092, 2100 (1996).

Finally, the FCC's argument ignores the 1996 Act's drafting history, which confirms that Congress separated out section 252(c)(2) as part of its effort to preserve State authority over the pricing of local interconnection arrangements. The predecessor to what is now section 252(c) was part of section 251 in the Senate bill that reached the Conference Committee. That predecessor provision, however, did *not* include the dichotomy now contained in section 252(c) and thus could have been read to require States to adhere to all FCC rules, including pricing rules. *See* S. 652, 104th Cong., 1st Sess. § 251(d)(5)(D) (1995) ("In resolving any open issues and imposing conditions upon the parties to the agree-

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adopted by arbitration only if it finds that the agreement "does not meet the requirements of section 251 . . ., including the regulations prescribed by the Commission pursuant to section 251 . . ., *or the standards set forth in subsection (d) of this section.*" 47 U.S.C. § 252(e)(2)(B) (emphasis added). As in section 252(c), Congress specifically differentiated between the statute's pricing standards and the FCC's regulations—further confirmation that the two things are separate from and unrelated to each other.

ment, a State shall ensure that the requirements of this section are met by the solution imposed by the State and are consistent with the Commission's rules defining minimum standards.").

In response to objections from the States,[18] however, the Conference Committee took several actions to revise the bill to protect traditional State authority over intrastate communications. First, the Conference Committee created a whole new statutory section, section 252, that treated pricing as a distinct issue entrusted exclusively to State authority. Then, to accommodate that important change, the Committee concurrently moved what had been part of section 251 to section 252(c) and, for the first time, bifurcated that provision to make clear that, as to pricing issues in particular, States need adhere only to the standards set forth in section 252(d) of the statute, not to any FCC regulations. *See* Conf. Rep. at 13. In combination with the plain language of sections 252(c) and 252(d), that history confirms that Congress affirmatively rejected a statutory scheme that would give the FCC the pricing authority it now claims and instead created one under which State commissions retain exclusive authority to set rates according to the statutory standards.

B. Section 2(b) and this Court's Decision in *Louisiana Public Service Commission* Confirm That the States Retain Exclusive Authority over Pricing.

1. Even if the Court were to determine that section 252(c) and (d) leave some doubt about whether Congress decided to retain State authority over pricing mat-

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[18] *See, e.g.*, Initial Comments of National Association of Regulatory Utility Commissioners, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, at 10 (FCC May 16, 1996) (describing States' efforts to influence the Act before the Conference Committee); Comments of the Florida Public Service Commission, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, at 8 (FCC May 15, 1996).

ters, the result here would be no different. For over 60 years, Congress has confined the FCC's jurisdiction to interstate and foreign communications and has reserved for the States jurisdiction over intrastate communications. Section 2(b) of the Act, which was part of the original Communications Act of 1934, states that "*nothing* in this [Act] shall be construed to apply *or to give the Commission jurisdiction* with respect to . . . charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier." 47 U.S.C. § 152(b) (emphasis added).

As this Court explained in *Louisiana PSC*, section 2(b) "defines the jurisdictional reach" of the FCC. 476 U.S. at 370. It "fences off" intrastate matters from the federal agency's authority, and its express limitations may be overcome only by an "unambiguous" and "straightforward" grant of specific intrastate jurisdiction to the Commission. *Id.* at 377. Section 2(b) thus functions both as a "jurisdictional limit[ation] on the power of [the] federal agency" and as a "rule of statutory construction" that prevents the FCC from asserting authority in any case where it is "*at least possible*" that Congress intended to withhold such power. 476 U.S. at 376 n.5, 377 (emphasis added); *see id.* at 379 (where the Communications Act was not a "perfect puzzle" providing "crisp answers to all of the contentions of either party," section 2(b) mandated rejection of the FCC's assertion of intrastate authority).[14]

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[14] Section 2(b) reinforces an already powerful presumption against federal preemption of State public utility regulation—an area that this Court has recognized is traditionally a State concern. *See Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983) ("the regulation of utilities is one of the most important of the functions traditionally associated with the police power of the States"). As the Court has explained, such "historic police powers of the States" may not be "superseded . . . unless that [is] the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

Moreover, because section 2(b) provides its "own specific instructions regarding the correct approach to the statute" (476 U.S. at 376 n.5), it necessarily prevents the FCC from claiming deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). *Compare* FCC Br. 17, 42; AT&T Br. 19. The *Chevron* rule is intended to honor a presumed congressional intention to delegate to a federal agency the policy-making authority to interpret an ambiguous statute. *See, e.g., Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 696 (1991). But when Congress itself spells out the governing interpretive principles—as it has done in the plain text of section 2(b)—its specific intentions necessarily override any discretion the agency might have to apply any "reasonable" construction of a provision. Were it otherwise, a tool designed to implement an unstated congressional delegation of interpretive authority would operate perversely to frustrate an *express* interpretive principle contained in the statute itself.

2. The 1996 Act did nothing to undermine section 2(b)'s well-established role as a guarantor of federalism. The 1996 Act is an amendment to the Communications Act—the "Act" to which section 2(b) applies—and the new statute does not purport to supersede section 2(b)'s directive that "nothing" in the Communications Act shall be construed to give the FCC intrastate authority.

In fact, Congress expressly rejected attempts to strip States of the jurisdictional protections that section 2(b) provides. Just as the Conference Committee restored State pricing authority by creating a separate section 252 and introducing the important dichotomy between section 252(c)(1) and (c)(2), that Committee also ensured that section 2(b) would apply with full force to the 1996 Act. Both bills that reached the Conference Committee would have added "part II of title II"—that is, the local competition provisions of the 1996 Act—to the list of provisions exempted from section 2(b). *See* S. 652, 104th Cong., 1st Sess. § 101(c)(2) (1995); H.R. 1555, 104th

Cong., 1st Sess. § 101(e)(1) (1995). But, again to address State concerns, the Conference Committee deleted the proposed amendment of section 2(b).[15]

Because of that revision, the statute as enacted leaves the traditional interstate-intrastate division wholly intact except where section 251 or 252 clearly provides otherwise. And, for all the reasons we have discussed, far from providing the kind of "straightforward" or "unambiguous" assignment of pricing authority to the FCC that would be necessary to overcome section 2(b), the 1996 Act expressly indicates that the *States* are to have authority over such matters. Given the language of section 252(c) and (d), one cannot sensibly deny that "[i]t is . . . at least *possible*" (*Louisiana PSC*, 476 U.S. at 377 (emphasis added)) that Congress intended States to retain their longstanding authority. In the face of any such uncertainty, section 2(b) precludes an interpretation that would give the FCC the intrusive intrastate pricing jurisdiction it here demands.[16]

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[15] The FCC responds to this significant legislative history by relying on an exceedingly strained inference from the *absence* of explanatory discussion in the Conference Committee's Report. But, contrary to the Commission's suggestion, the Conference Committee nowhere indicated that its removal of these revisions to section 2(b) was "a technical, non-substantive change." FCC Br. 33 n.13; *see* MCI Br. 32-33. On the contrary, the Committee made clear that alterations which, like this one, were not specifically discussed in the Conference Report included not merely "minor drafting and clerical changes," but also "conforming changes made necessary by agreements reached by the conferees." Conf. Rep. at 113. Because the conferees did make a number of significant changes in the statute to preserve State authority—changes that *were* discussed in the Report (*id.* at 117-26)—it was inevitable that the revisions to section 2(b) would be deleted to conform to those changes.

[16] The same jurisdictional analysis applies to the dialing parity issue addressed in the Eighth Circuit's separate ruling (and covered thoroughly in California's brief in this Court). As in the lead case, the statutory language indicates that intrastate dialing parity issues were within the jurisdiction of the States, not the FCC. *See* 47 U.S.C. § 271(e)(2)(B) (specifying the dates by which "a State"

3. The FCC and its supporting petitioners make two attempts to avoid the clear import of section 2(b) and this Court's decision in *Louisiana PSC*. Neither has merit.

a. First, the Commission invites the Court to disregard the plain language of section 2(b). Despite the acknowledged fact (FCC Br. 34) that section 2(b) speaks in the disjunctive—it states that "nothing in this Act shall be construed to apply *or* to give the Commission jurisdiction with respect to" intrastate matters—the FCC contends that it is simply inconceivable that Congress meant what it said. Working from the Washington-centric, and entirely counter-textual, assumption that Congress would *never* pass a communications statute without intending the FCC to superintend every aspect—even every *intrastate* aspect—of that law, the agency argues that section 2(b) cannot "logically" be read to "detach" the scope of the statute from the scope of FCC authority. *See* FCC Br. 34; MCI Br. 43-44.

But that argument cannot be squared with the language Congress enacted. This Court has "refused to ignore the statutory meaning which would be presumed from . . . disjunctive language," explaining that "the use of the term 'or' indicates an intent to give the nouns their separate, normal meanings." *Garcia v. United States*, 469 U.S. 70, 73 (1984); *see also Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979). As this Court recently admonished: " 'Where there is no ambiguity in the words, there is no room for construction. The case must be a strong one indeed, which would justify a court in departing from the plain meaning of words . . . in search of an intention which the words themselves did not suggest.' "

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may or may not order dialing parity). Furthermore, the FCC cannot point to any unambiguous grant of dialing parity jurisdiction sufficient to overcome section 2(b). Indeed, the FCC expressly acknowledged in its dialing parity order that the interstate and intrastate aspects of dialing parity could easily be regulated separately. *See* J.A. 1183 (Second Report and Order, ¶ 37). That concession in itself is fatal to the Commission's jurisdictional assertion in this Court.

United States v. Gonzales, 117 S. Ct. 1032, 1036 (1997) (quoting *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95-96 (1820) (Marshall, C.J.)). Indeed, the language of section 2(b) is so free of ambiguity that the FCC hazards no textual argument at all to support its interpretation of the statute.

The only argument the FCC *does* make to support its idiosyncratic understanding of section 2(b) has already been rejected by this Court. The FCC contends that section 2(b) was intended exclusively to overturn the ruling in the so-called *Shreveport Rate Case* (*Houston, E. & W. Tex. Ry. v. United States*, 234 U.S. 342 (1914)). In the Commission's view, because that case dealt only with "ancillary" FCC jurisdiction over topics not expressly covered by the statute, section 2(b) cannot be understood to extend beyond that context. FCC Br. 34-35; MCI Br. 44-45. The argument crashes head-on into this Court's decision in *Louisiana PSC*. The respondents there, like petitioners here, argued that section 2(b) should be read narrowly as merely an attempt to overturn the *Shreveport Rate Case*. But the Court squarely rejected that assertion, holding that "the *Shreveport Rate Case* [does not] carry the load that respondents ask of it." 476 U.S. at 372. The Court concluded that, "given the breadth of [its] language," section 2(b) *cannot* be cabined in the very manner that the FCC suggests here. *Id.* at 373.

b. The Commission's other argument as to why the Court should not give effect to section 2(b)'s plain language is no more compelling. The FCC contends that, under a narrow exception recognized in some court of appeals decisions, it may use its *inter*state authority as an entering wedge to usurp control over all aspects of local, *intra*state communications.

The short—and conclusive—answer to this argument is that it appears *nowhere* in the FCC's 700-page First Report and Order. That is not surprising, because the Commission could not possibly have justified its jurisdictional claims on the basis of that theory.

The governing rule, under the cases the FCC itself invokes, is that the agency must demonstrate "with some specificity" that it is *"impossib[le]"* for both the FCC and a State to regulate a facility used jointly for interstate and intrastate calls and that the State's regulation "negates the exercise by the FCC of its own lawful authority over *interstate* communication." *NARUC v. FCC*, 880 F.2d 422, 429-30 (D.C. Cir. 1989) (emphasis added); *accord California v. FCC*, 905 F.2d 1217, 1243 (9th Cir. 1990). The First Report and Order contains no discussion at all of the impossibility doctrine, much less a showing of how the strict requirements of that preemption doctrine can be satisfied here.[17] That deficiency is fatal, because this Court has said repeatedly that courts may not accept "*post hoc* rationalizations for agency action." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983). An agency's order must be upheld, if at all, on "the basis upon which it purports to rest." *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947).

The FCC had good reason not to rely on any such analysis in its order. In the first place, this after-the-fact justification does not even support what the agency actually did in its order. The bulk of the matters for which the FCC purported to create pricing rules include services that have *no interstate component at all.* Resale of an incumbent's existing local services and reciprocal compensation for the transport and termination of local calls, for example, are purely intrastate matters. Indeed, although the FCC's brief to this Court completely ignores this in-

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[17] The portions of the agency's order cited in the FCC's brief are not to the contrary. *See* FCC Br. 36-37 (citing Pet. App. 191a, 194a-95a, which reprint ¶¶ 84-85 and 90-93 of the First Report and Order (J.A. 448-49, 450-52. Those paragraphs merely explain the FCC's jurisdictional theory, including why it believed that a dual federal-State pricing regime for interconnection agreements would be inconsistent with sections 251 and 252. What is missing is any analysis of the sort necessary to sustain, in the face of section 2(b), an assertion of intrastate pricing jurisdiction.

convenient fact, the Commission actually *conceded* the point in the Eighth Circuit. *See* Brief for Respondents FCC and the United States at 30 (8th Cir. No. 96-3321, filed Dec. 23, 1996) (noting that certain matters covered by the agency's pricing rules, including the "resale of local exchange service," are "admittedly solely intrastate"). That alone is fatal to the FCC's impossibility claim. It is untenable to suggest that the 1996 Act tacitly lifts the section 2(b) bar as to some, but not all, of these pricing issues.

Even as to the one significant aspect of the pricing rules for which the FCC can plausibly identify an interstate component—access to unbundled network elements that may be used to deliver long-distance calls—the agency's theory plainly proves too much. Under the FCC's logic, the Commission would have had jurisdiction to impose every single one of its rules governing access to these local facilities, including its pricing rules, based entirely on its jurisdiction over interstate communications, *even before Congress adopted the 1996 Act*. Sections 251 and 252 were largely superfluous, in the FCC's view, because under the Communications Act the agency has had latent power for six decades to regulate intrastate rates for every aspect of the local network.

This Court rejected essentially the same argument in *Louisiana PSC*. The FCC there sought to preempt State depreciation rules and to substitute its own nationally uniform rules on the theory (echoed almost verbatim here) that the telephone equipment at issue was used for both interstate and intrastate calls and that "it makes no sense within the context of the Act to depreciate one piece of property two ways." 476 U.S. at 375. But, observing that "virtually *all* telephone plant that is used to provide intrastate service is also used to provide interstate service" (*id.* at 360 (emphasis added)), the Court *refused* to "confine[]" State regulation (as the FCC again asks the Court to do) "to intrastate matters which are separable from and do not substantially affect interstate communication" (*id.* at 373 (internal quotation marks omitted)).

After *Louisiana PSC*, the courts of appeals have consistently rejected similar FCC arguments in other contexts. The settled rule is that preemption may "*not* be justified merely by the dual intrastate and interstate aspects of [a particular service]; the FCC [has] to show that it [can]not separate the interstate and intrastate components of its regulation." *Public Util. Comm'n of Texas v. FCC*, 886 F.2d 1325, 1333 (D.C. Cir. 1989) (emphasis added); *see also Public Serv. Comm'n of Maryland v. FCC*, 909 F.2d 1510, 1516 (D.C. Cir. 1990). No such showing could be made here. The simple fact is that the FCC and the States have separately determined the prices for interstate and intrastate calls delivered over local telephone networks for more than 60 years, and the impossibility exception has never been applied in this context. And here, far from being powerless to regulate interstate aspects of unbundled network elements, the FCC has continued to issue regulations governing the interstate charges that incumbents may levy (or not levy) when competitors deliver long-distance calls over those elements. *See Competitive Telecom. Ass'n v. FCC*, 117 F.3d 1068 (8th Cir. 1997) (upholding FCC rules on payment of interstate access charges by purchasers of network elements).

Nor can the FCC demonstrate that a State commission's regulation of the rates for local interconnection would "negate" the federal agency's exercise of its own lawful interstate authority. In particular, while the FCC *assumes* that it has some sort of interstate pricing authority with respect to unbundled network elements beyond its traditional authority over charges assessed for the delivery of long-distance calls over the local network, that assumption begs the very question before the Court. Contrary to the FCC's supposition, it can point to *no* lawful pricing jurisdiction of its own that is even arguably negated by State pricing regulation, because Congress expressly assigned only to the States the authority to determine rates for access to network elements.

C. Neither Section 251(d)(1) Nor Any of the Other Provisions Cited by the Commission Justifies the FCC's Assertion of Pricing Authority.

Unable to ground its argument in the directly applicable pricing provisions of the 1996 Act, and unable to circumvent the jurisdictional barrier of section 2(b), the FCC seeks support for its expansive jurisdictional aspirations elsewhere in the statute. But none of the provisions to which the Commission points gives the FCC supervisory power to regulate the pricing of local interconnection arrangements.

1. The FCC rests principally on section 251(d)(1). FCC Br. 18-20. That provision—which directs the agency to complete, within six months of enactment, all actions necessary "to establish regulations to implement the requirements of this section"—does not support the Commission's jurisdictional theory.

First, when Congress issues clear directions on a specific subject—as it did in authorizing State commissions to "determine" appropriate rates under the standards of section 252(d)—that specific directive takes precedence over a general provision like section 251(d)(1). "However inclusive may be the general language of a statute, it will not be held to apply to a matter specifically dealt with in another part of the same enactment. . . . Specific terms prevail over the general in the same or another statute which otherwise might be controlling." *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222, 228-29 (1957) (internal quotation marks omitted).

Second, section 251(d)(1) does not even purport to encompass the pricing provisions of section 252. Rather, its scope is confined, by its plain terms, to "the requirements of *this section*"—that is, section 251. The statutory pricing rules are not in "this section"—they are in section 252(d). Accordingly, the FCC's lead argument invites this Court to ignore the statute's specific assignment of pricing jurisdiction to the States in section 252 as well as the jurisdictional prohibition of section 2(b), in favor of

a general rulemaking provision that, on its face, imposes a time-limit for the FCC to implement *a different statutory section*. That approach does violence to the ordinary rules of statutory interpretation.

In an attempt to plug the holes in its argument, the FCC says that subsections 251(c)(2) and (c)(3), which impose interconnection and unbundling obligations on incumbents, refer to "the requirements of this section and section 252." FCC Br. 28 n.10. From that premise, it argues that its authority to implement section 251 extends by implication to section 252. But if Congress had intended the FCC to implement section 251 *and* section 252, it could easily have said so in section 251(d)(1). It had no reason to express such an intention in the circuitous fashion reflected in the FCC's reading.

Furthermore, the FCC's theory does not support what the agency actually did. The FCC's order claimed authority to set prices not only for interconnection and network elements under subsections (c)(2) and (c)(3)—the two provisions that mention section 252—but also for the purchase of services for resale under subsection (c)(4). In its argument here, however, the Commission neglects to mention that subsection (c)(4) contains no such reference to section 252. Even on its own terms, therefore, the FCC's argument falls short of its target: the agency has no textual foundation at all for its arrogation of authority to dictate pricing principles for resale. And this flaw in its analysis undermines the Commission's improbable theory that, despite the restrictive language of section 251(d)(1), "this section" must be understood to signify *both* section 251 *and* section 252.

Even if the FCC's analysis were not deficient on its face, it would be thoroughly discredited by section 252(d). That section demonstrates the real meaning of the references to section 252: it specifies in plain language that "a State commission" is to determine the just and reasonable rates "*for purposes of*" section 251(c)(2) and section 251(c)(3)—the very sections on which the FCC

relies for its appropriation of the States' ratemaking function. That specific and unambiguous provision closes the loop between section 251 and section 252 and makes clear that a State commission, not the FCC, has jurisdiction to determine prices. It therefore stands squarely in the path of the FCC's theory: one cannot plausibly infer from section 251's references to section 252 that Congress intended to give the FCC indirectly pricing authority that it withheld from section 251(d)(1) and that it conferred expressly on the States in section 252(d).

In any event, section 251(d)(1) actually has no bearing at all on the scope of the FCC's jurisdiction. As its plain language suggests, subsection (d)(1) deals not with jurisdiction, but with the distinct question of rulemaking power—and, as the Eighth Circuit held, it operates to restrict rather than expand that power. The section directs the FCC, "[w]ithin 6 months [after the date of enactment]," to "complete all actions *necessary to establish regulations* to implement the requirements of this section." 47 U.S.C. § 251(d)(1) (emphasis added). Nothing in that procedural mandate delegates substantive authority to the FCC, and it certainly does not do so in the unambiguous manner required to surmount the section 2(b) hurdle.

When Congress wanted to extend the FCC's authority to intrastate matters, it did so explicitly. In section 276 of the 1996 Act, for example, Congress not only directed the FCC to prescribe payphone regulations within nine months using terms nearly identical to those in section 251(d)(1),[18] but also separately gave the FCC substantive jurisdiction with respect to "each and every completed *intrastate and interstate* call," and expressly preempted any contrary state regulations. 47 U.S.C. § 276(b), (c) (emphasis added). Similarly, in section 225, a provision that predates the 1996 Act, Congress not only instructed the FCC to issue regulations within one year to implement the requirements

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[18] "[W]ithin 9 months [of enactment of the Telecommunications Act of 1996], the Commission shall take all actions necessary (including any reconsideration) to prescribe regulations that— . . . ." 47 U.S.C. § 276(b)(1).

of that section (*id.* § 225(d)(1)), but also provided that the Commission "shall have the same authority, power, and functions with respect to . . . *intrastate* communications" as it does with respect to interstate communications. *Id.* § 225(b)(2) (emphasis added).

And the Cable Act—to which the FCC itself pointed as a jurisdictional analog in the court of appeals—provides an even more vivid illustration. There, as in section 251(d)(1), Congress directed the Commission to prescribe regulations within 180 days to carry out its responsibilities under the Act. 47 U.S.C. § 543(b)(2). Unlike the 1996 Act, however, the Cable Act also assigned the Commission *substantive jurisdiction* over the rates to be charged by cable systems. The Cable Act provides that "[t]he Commission shall, by regulation, ensure that [cable] rates . . . are reasonable" (*id.* § 543(b)(1)), and it enumerates seven "factors" that the FCC is required to "take into account" in prescribing its rate regulations (*id.* § 543(b)(2)). Also unlike the 1996 Act, the Cable Act expressly directed State regulators to follow the FCC's rate regulations: "the rates for the provision of basic cable service shall be subject to regulation by a franchising authority . . . *in accordance with the regulations prescribed by the Commission.*" *Id.* § 543(a)(2)(A) (emphasis added).

These provisions bring sharply into focus the missing links in the FCC's statutory argument. The 1996 Act assigns the FCC *no* substantive pricing jurisdiction. Instead, Congress entrusted pricing authority entirely to State commissions. 47 U.S.C. § 252(c), (d). Nor does the 1996 Act require States to follow any FCC pricing rules. On the contrary, as we have discussed, Congress went out of its way in section 252(c) to specify separately that States are to set rates only "according to subsection (d)."

The FCC would have this Court treat section 251 as if it contained the same terms found in these other provisions, an approach that cannot be squared with fundamental canons of statutory interpretation. As this Court

has said repeatedly, " '[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.' " *Bates v. United States*, 118 S. Ct. 285, 290 (1997) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)).

2. Because the language of section 251(d)(1) is so different from the text of these other provisions—and so clearly fails to provide the requisite straightforward grant of pricing jurisdiction—the FCC must rummage through the statute searching for other shreds of supporting evidence. Its quest is fruitless.

The FCC argues most strenuously that, unless section 251(d)(1) provides sweeping jurisdiction over *every* local competition issue, including pricing, there is no way to explain how the FCC obtains authority over other specific issues as to which all parties agree that the FCC has some role. According to the FCC, these other provisions "assume[]" a separate assignment of pricing authority that can come only from section 251(d)(1). FCC Br. 22.

But no such inference is required to make sense of these other provisions. On the contrary, where Congress wanted the FCC to exercise authority over a specific matter, it made that quite clear on the face of the statute. Section 251(e)(1), for example, grants the FCC "exclusive jurisdiction" over the administration of "telecommunications numbering." Similarly, section 251(h) states that "[t]he Commission may, by rule, provide for the treatment of a local exchange carrier (or class or category thereof) as an incumbent local exchange carrier." And section 251(b)(2) makes plain that the Commission is to "prescribe" the "requirements" for "number portability." There is nothing either equivocal or obscure about these specific grants of jurisdiction, and there is consequently no need at all to invest section 251(d)(1) with

an importance that its plain language will not support. Indeed, the real question here is this: if section 251(d)(1) *already* provided the FCC with generic authority over all of sections 251 and 252, why would Congress have included these specific delegations of authority to the FCC?

Section 251(d)(2), on which the FCC places particular reliance, does not differ meaningfully from these other grants of authority. By stating that the FCC must consider certain factors "in determining what network elements should be made available," that provision *itself* necessarily authorizes the FCC to make such a "determina[tion]" in the first place. Indeed, the FCC has read the provision in precisely that fashion. *See* J.A. 546 (¶ 279) (discussing the "authority we derive from section 251(d)(2)").[19] There is simply no basis for the Commission's theory that the syntax of section 251(d)(2) bears significant jurisdictional implications that dictate a reading of section 251(d)(1) not supported by the plain terms of that provision.

In any event, the fact that the FCC is driven to rely on such tenuous implications from statutory provisions having nothing to do with pricing demonstrates just how far the agency has strayed from establishing that Congress straightforwardly and unambiguously granted it intrastate jurisdiction. Indeed, the FCC's arguments on this score again conflict with *Louisiana PSC*, where this Court concluded that much stronger—and more directly applicable—implications in the statutory text fell short of the clear

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[19] The FCC has similarly relied upon the other specific provisions in section 251 as sources of authority. *See, e.g.*, First Report and Order and Further Notice of Proposed Rulemaking, *Telephone Number Portability*, 11 FCC Rcd 8352, 8370, 8411 (¶¶ 36, 114) (1996) ("section[] 251(b)(2) . . . give[s] to the Commission the authority . . . ."); *id.* at 8417 (¶ 126) ("section 251(e)(2) gives us specific authority"); *id.* at 8464 (¶ 220) ("section 251(e)(2) gives the Commission the authority").

congressional directive necessary to overcome section 2(b).[20]

The other provisions on which the FCC relies provide even weaker evidence of a congressional design to subject States to all-encompassing supervision by the federal bureaucracy. Contrary to the FCC's argument, section 251(d)(3) is an *anti*-preemption provision which limits the FCC's ability to "preclude the enforcement" of any *State* access or interconnection regulations. That subsection, like the many other anti-preemption provisions in the statute,[21] is intended to preserve State authority and presumes that the States, not the FCC, have authority to adopt intrastate access and interconnection regulations in the first instance. Section 253(d), another provision cited by the Commission, also undermines the

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[20] In *Louisiana PSC*, respondents asked the Court to infer from indications in section 220 that Congress "'clearly intended'" to give the FCC authority over depreciation issues for both interstate and intrastate purposes. *See* 476 U.S. at 367-68 (quoting respondents' brief). Respondents stressed, among other things, (1) that a subsection of section 220 made it unlawful to "keep *any* other accounts" apart from those mandated by the FCC, (2) that another part of section 220 required all carriers to adhere to FCC rules over any contrary State rules unless the FCC specifically "except[s]" them from federal regulation, and (3) that the FCC must have been given intrastate authority because a provision authorized the States only to "present [their] views" to the federal agency. *See id.* This Court found that these provisions, even in combination, were not sufficient to grant the FCC intrastate authority. *Id.*

[21] *See, e.g.*, 47 U.S.C. 261(b) ("Nothing in this part shall be construed to prohibit any State commission from . . . prescribing regulations . . . in fulfilling the requirements of this part, if such regulations are not inconsistent with the provisions of this part."); 1996 Act § 601(c) ("This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments." (reprinted at 47 U.S.C. § 152 note)).

FCC's claim. Section 253(d) again assumes that the States, not the FCC, will issue rules in the first instance. It authorizes the FCC to preempt such rules only where it determines, on a case-by-case basis and "after notice and an opportunity for public comment," that a State "has permitted or imposed" an offending legal requirement. 47 U.S.C. § 253(d). That case-specific, after-the-fact preemption authority does not empower the Commission, acting in advance and without reference to any particular requirements, broadly to displace the States from their historical regulatory domain.[22]

3. The FCC also suggests that section 271 provides "compelling evidence" of the federal agency's pricing authority. *See* FCC Br. 29-31; AT&T Br. 31-32. In the FCC's view, because section 271 authorizes the FCC to assess a Bell company's compliance with section 271's "competitive checklist" in order to determine whether the company may provide long-distance service, and because the checklist requires interconnection "in accordance with the requirements of sections 251(c)(2) and 252(d)(1)"

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[22] The final item on the FCC's laundry list of inapplicable 1996 Act provisions is section 160, the statutory "forbearance" provision. Because the FCC and its supporters failed to present this argument in their briefs below, the court of appeals refused to consider it (Pet. App. 13a n.11), and this Court should do likewise. In any event, it has no merit. As the FCC notes (FCC Br. 24-25), section 160 states that the FCC may not forbear from applying *"the requirements* of section 251(c)," which impose obligations on incumbent LECs. 47 U.S.C. § 160(d). But there is no dispute here that the FCC has authority over certain aspects of section 251(c): Congress expected the FCC to impose appropriate limitations on resale (*see* 47 U.S.C. § 251(c)(4)(B)) and to determine "what network elements should be made available for purposes of subsection (c)(3)" (*see* 47 U.S.C. § 251(d)(2)). Contrary to the FCC's claim, it would not have "made little sense" for Congress to preclude the forbearance of these provisions until section 251(c) is "fully implemented." FCC Br. 24-25. What *does* make little sense is to read into this forbearance provision an implication that the FCC must have pricing jurisdiction nowhere granted in the Act's substantive provisions.

(47 U.S.C. § 271(c)(2)(B)(i)),[23] section 271 necessarily authorizes the agency to formulate substantive pricing standards. *See* FCC Br. 29-31.

That inference is unwarranted. Section 271 by its terms neither creates pricing standards nor empowers the FCC to define any such standards. Instead, it incorporates the substantive pricing determinations that the statute entrusts to State commissions: the pricing "requirements" to which section 271 refers are the "just and reasonable rate[s]" that are "[d]etermin[ed] by a *State commission*." 47 U.S.C. § 252(d)(1) (emphasis added). With respect to pricing, therefore, it necessarily follows that the FCC, in passing on a section 271 application, can require no more than interconnection in accordance with the pricing principles promulgated *by the States* pursuant to sections 251 and 252.

Contrary to the FCC's supposition, this conclusion does not force the FCC to "abdicate [its] compliance inquiry to each of 50 state commissions." FCC Br. 30. On the contrary, the FCC still has the ultimate responsibility to "find[]" (47 U.S.C. § 271(d)(3)) whether a Bell company is in *compliance* with the relevant pricing requirements—in statutory terms, the Bell company has "fully implemented" its obligations. The State commissions' responsibility, by contrast, is to *define* the pricing obligations with which the Bell company must comply. Those discrete roles are wholly compatible and complementary.[24]

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[23] *See also* 47 U.S.C. § 271(c)(2)(B)(ii), (xiii), (xiv).

[24] Nor does the existence of the Communications Act's administrative complaint provision, 47 U.S.C. § 208, provide any support for the notion that the FCC is expected to play a role in reviewing State pricing determinations. *See* AT&T Br. 29, 30; MCI Br. 38. On the contrary, as the Eighth Circuit correctly held (Pet. App. 31a-34a), Congress prescribed a carefully tailored review mechanism under which any aggrieved party may seek relief only from a *federal district court*, not from the FCC. *See* 47 U.S.C. § 252(e)(6). Nothing in section 208 permits the FCC to override that congres-

4. Finally, section 201(b) does not fill the FCC's jurisdictional void. Wrenching the last sentence of section 201(b) entirely out of context, the FCC claims that section 201 allows the FCC to exercise jurisdiction over every section of the Communications Act, whether interstate or intrastate. *See* FCC Br. 19-20. But section 201, by its plain terms, involves only the FCC's authority over "*interstate or foreign* communication" services. 47 U.S.C. § 201(a) (emphasis added). It is altogether implausible to infer that section 201(b) provides "unqualified textual authority" (FCC Br. 20) wholly detached from the limitations contained in section 201(a). On the contrary, section 201(b) uses the phrase "*such* communication service," and the word "such" plainly refers to the "*interstate or foreign* communication" services mentioned in the immediately preceding sentence in section 201(a). Thus, the FCC's argument ultimately boils down to the improbable proposition that, unlike every other aspect of section 201, the last sentence of section 201(b)—the sentence that gives the FCC authority over the "provisions of this Act"—applies to intrastate as well as interstate matters. But all statutory language, "plain or not," must be read in context. *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991). And the context here plainly forecloses the FCC's understanding.

Furthermore, Congress does not legislate in a vacuum. Section 201(b), like every other provision of the Act, must be read in light of section 2(b), which establishes the jurisdictional framework on which Congress has built the statute. If an isolated sentence in a provision dealing exclusively with interstate and foreign communications can be ripped out of that provision and construed to

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sional determination by holding itself out as an alternative forum for reviewing precisely the same State determinations. *Cf. Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 209 (1994). That conclusion is fortified by the fact that the FCC's jurisdiction to hear complaints under section 208 is necessarily limited by the proscription of section 2(b). *See* Pet. App. 33a-34a.

give the FCC intrastate jurisdiction denied to the agency by section 2(b), then Congress truly wasted its breath when it stated that "nothing in [the Communications Act] shall be construed . . . to give the Commission jurisdiction with respect to" intrastate matters. The Court should reject this distorted reading of the statute. *See Louisiana PSC*, 476 U.S. at 369-70 (refusing to read 47 U.S.C. § 151, which sets forth the purposes of the Communications Act, in a manner inconsistent with section 2(b)).[25]

D. The FCC's Policy Arguments Do Not Support a Different Result.

In perhaps its most audacious argument, the FCC, joined by AT&T and MCI, presumes to second-guess the litigation judgment of the State commissions that have expended considerable resources vindicating their jurisdictional prerogatives. The FCC claims that the State commissions are wasting their time and money, because even if they prevail in this case, they will have gained no greater authority. As the FCC sees the matter, the federal courts will ultimately dictate the proper results to the States in reviewing arbitration decisions under section 252(e)(6). To the FCC, the only question here is not "whether" the States will be put in a federal straitjacket but "when." FCC Br. 40.

The FCC is wrong in all respects. To begin with, the decentralized, State-centered scheme the FCC decries as

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[25] Nor does section 4(i) advance the FCC's position. *Compare* FCC Br. 19-20 n.5; MCI Br. 28 n.19. It is merely a generic "necessary and proper" clause empowering the FCC to execute the substantive authority granted elsewhere in the statute; it confers no added jurisdiction itself. *California v. FCC*, 905 F.2d 1217, 1241 n.35 (9th Cir. 1990); *AT&T v. FCC*, 487 F.2d 865, 877 (2d Cir. 1973). The same is true of section 303(r), which applies "*except as otherwise provided in this [Act]*" (47 U.S.C. § 303 (emphasis added)) and which appears in Title III of the Act: "Provisions Relating to Radio." Neither of these provisions can take precedence over the allocation of pricing authority in section 252 or the jurisdictional rule of section 2(b).

"cumbersome" is known as federalism, and it is the scheme that Congress believed best in these circumstances. The FCC's self-aggrandizing belief that Congress would have done better by centralizing all significant authority in Washington is an argument best made to the legislature, not this Court.

Equally important, the FCC's theory is predicated on a mistaken premise. The statute does not impose a one-size-fits-all regime in which every question has only one possible answer. Rather, the statute leaves room for differing discretionary judgments, allowing each State sufficient latitude to adapt the Act in a manner that best accommodates local needs and circumstances. That explains why Congress, perhaps anticipating the FCC's preemptive jurisdictional appetite, was so careful to protect the authority of State commissions to implement the statute's local competition provisions. It provided that "[n]othing in this part [*i.e.*, the provisions relating to local competition] shall be construed to prohibit any State commission from . . . prescribing regulations . . . in fulfilling the requirements of this part, if such regulations are not inconsistent with the provisions of this part." 47 U.S.C. § 261(b). That guarantee of State autonomy and discretion forecloses the FCC's vision of monolithic federal regulatory control and undermines its theory that the States are limited to adjudicating disputes according to rules announced in Washington.

To be sure, the statute imposes limits on the States' discretion—limits that the federal courts have authority to enforce.[26] But within the bounds of those limitations, the statute has sufficient play in its joints to permit States to

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[26] For example, Congress meant what it said when it required prices to be based on the incumbent's "cost . . . of providing" interconnection or network elements. 47 U.S.C. § 252(d)(1). Broad though the States' leeway may be, they could not lawfully set rates that disregard an incumbent's actual costs.

resolve disputes in reasonable ways that may vary from jurisdiction to jurisdiction.[27]

II. THE FCC'S UNBUNDLING RULES CANNOT BE RECONCILED WITH THE LANGUAGE, STRUCTURE, OR PURPOSES OF THE 1996 ACT.

In the 1996 Act, Congress was careful to preserve a clear statutory distinction between resale and the purchase of unbundled network elements. It established separate pricing schemes and separate marketing rules for the two modes of entry. And it placed various limitations on the purchase and use of unbundled network elements. For example, the Act defined network elements only in terms of the incumbents' physical facilities (not its services); an incumbent must make network elements available only if their absence would otherwise impair the new entrant's ability to provide local service; and, most important, the requesting carrier, not the incumbent, has the responsibility to "combine such elements in order to provide . . . tele-

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[27] AT&T seeks illegitimately to smuggle into this case, under cover of its jurisdictional arguments, challenges to non-jurisdictional rulings that it failed to preserve in its petition for certiorari. *See* AT&T Br. 32-34. Nothing in the questions presented or the arguments made in that petition provided either the Court or the parties with notice that AT&T intended to raise these collateral, non-jurisdictional issues. This Court therefore should not consider them. *Taylor v. Freeland & Kronz*, 503 U.S. 638, 646 (1992) ("The Court decides which questions to consider through well-established procedures; allowing the able counsel who argue before us to alter these questions or to devise additional questions at the last minute would thwart this system."). In any event, AT&T's substantive arguments are meritless. The Eighth Circuit vacated each of the rules that AT&T defends, not because of any jurisdictionally based theory concerning the FCC's interpretive authority (*see* AT&T Br. 32-33), but because each violated the plain language and structure of the 1996 Act. *See* Pet. App. 46a-47a (presumption that incumbents must provide access to network elements to the extent technically feasible is "contrary to the plain meaning of the Act"); *id.* at 51a-52a (FCC's "superior quality" rules "cannot stand in light of the plain terms of the Act"); *id.* at 52a-53a (FCC's rules on combining elements not currently linked in the incumbent's network conflicts with the statute's "plain meaning").

communications service." 47 U.S.C. § 251(c)(3). Thus, although the incumbent must make physical parts of its network available to the new entrant, it is up to the new entrant itself to incorporate those pieces into its own network in order to provide a finished service. The use of unbundled elements is therefore fundamentally different from resale, in which a competitor purchases the incumbent's finished retail service at a wholesale price for resale to the competitor's customers.

The FCC's regulations utterly obliterated the statutory distinction between resale and the use of unbundled network elements. Most egregiously, the Commission allowed new entrants to purchase all the elements necessary to provide the same finished service that the incumbent provides and required the incumbent itself to combine those network elements into such a complete service for the new entrant. Consequently, a competitor without any facilities of its own and without performing any additional work can order the functional equivalent of resale—all the incumbent's network elements pre-combined into the same finished service provided by the incumbent—under the separate pricing and marketing rules that are supposed to apply only to unbundled network elements. At the same time, the Commission expanded the definition of network elements beyond all proper bounds and vitiated statutory restrictions on the circumstances under which a new entrant can order those elements.

Each of the Commission's rules that we discuss below is contrary to the language and structure of the statute, and each is inconsistent with Congress's goals in the 1996 Act—increased competition through greater investment and innovation, the preservation of universal service, and enhanced consumer welfare. Taken together, these rules thoroughly undermine those objectives and yield a scheme that bears no resemblance to the one Congress enacted into law.

A. The FCC Has Destroyed the Statutory Distinction Between Resale and Unbundled Network Elements.

1. The 1996 Act requires incumbents to offer network elements to entrants "on an unbundled basis at any technically feasible point" and in a "manner that allows requesting carriers to combine such elements in order to provide . . . telecommunications service." 47 U.S.C. § 251(c)(3). This rule allows companies that have some network facilities of their own to fill in their networks by purchasing individual pieces of the incumbent's network. Congress understood, for example, that cable television companies planned to use their existing door-to-door networks to carry telephone calls as well as TV signals, but lacked the switches needed to direct calls from one customer to another. *See* Conf. Rep. at 148. Similarly, the press reported during consideration of the 1996 Act that AT&T had already installed local telephone switches, but would seek to buy the wires (known as "local loops") needed to connect those switches to individual homes and businesses.[28] Access to unbundled elements is a way to assist such *facilities-based* carriers by giving them access to specific elements so that they will not have to replicate the incumbent's entire network overnight. *See* Conf. Rep. at 148 (recognizing "that it is unlikely that competitors will have a *fully* redundant network in place when they initially offer local service" and that competitors may need initially to obtain "[*s*]*ome* facilities and capabilities (*e.g.*, central office switching)" from the incumbent) (emphasis added).

Resale is different. Instead of giving facilities-based competitors an opportunity to obtain and combine individual pieces of the incumbent's network, resale allows competitors *without* facilities—or without facilities sufficient to provide certain services or to meet the needs of certain customers—to obtain at wholesale prices the *complete* telecommunications services that the incumbent

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[28] *See* John Keller, *AT&T Eagerly Plots a Strategy to Gobble Local Phone Business*, Wall St. J., Aug. 21, 1995, at A1.

currently provides at retail. *See* 47 U.S.C. § 251(c)(4)(A) (requiring incumbents "to offer for resale at wholesale rates any telecommunication service that the carrier provides at retail to subscribers who are not telecommunications carriers").

Congress did not intend these methods of entry to be interchangeable. On the contrary, the 1996 Act repeatedly distinguishes between them. Most importantly, Congress provided different pricing rules for each mode of entry. Users of network elements need pay rates based only on the incumbent's "cost . . . of providing" those elements. *See id.* § 252(d)(1)(A). By contrast, resellers pay rates based on the retail prices that the incumbent currently charges its customers for the services at issue. The statute directs State commissions to determine wholesale rates "on the basis of the [incumbent's] retail rates charged to subscribers" less only those costs that "will be avoided" by selling at wholesale. *Id.* § 252(d)(3).

Nor is that the only distinction between resale and unbundled network elements. The 1996 Act allows the major long-distance carriers to offer jointly marketed local and long-distance service *only* if they enter the local market by using some of their own facilities, supplemented as necessary by the incumbent's network elements. If these companies enter merely as resellers, they may not offer such "one-stop shopping" packages of local and long-distance services for three years or until the relevant Bell company receives long-distance authority. *See* 47 U.S.C. § 271(e)(1).

These statutory distinctions serve crucial purposes. First, as we have explained, most jurisdictions require incumments to charge below-cost rates for basic service (especially for rural and residential customers), and allow incumbents to offset those under-recoveries by charging above-cost rates to business and other customers. And, contrary to the baseless suggestion in MCI's brief (MCI Br. 25), that situation may persist indefinitely: while section 254(f) requires States with a universal service pro-

gram to ensure that all carriers contribute equitably to universal service, it does not specify a date certain for the removal of implicit *intra*state subsidies.

If, during the potentially lengthy period in which incumbents must rely on these implicit subsidies to recover their costs, new entrants may obtain complete services at cost-based rates, they will easily siphon away the incumbents' valuable business customers. They will do so *not* by providing a better or lower-cost service, but simply by undercutting the above-cost rates that incumbents must charge to subsidize their other services. Such regulatory arbitrage would take away the revenues that incumbents use to support affordable rates for rural and residential consumers, leading to massive pressure on the rates of those consumers and enormous losses for incumbents.

Simply put, the end result of such gamesmanship would be that competitors would steal incumbents' profitable customers without adding any value to the incumbents' service and would leave incumbents with the high-cost customers that competitors have no interest in serving. By tying wholesale prices to *retail* rates and thus ensuring that these prices account for universal service subsidies, Congress sought to avoid these negative effects. *See* H.R. Rep. No. 104-204, at 72 ("The [wholesale] rate should reflect whether, and to what extent, the local dialtone service is subsidized by other services . . . .").

Second, as even the FCC has recognized, "[t]he interconnection provisions of the Act, Section[s] 251 and 252, are designed to promote *facilities-based* local exchange competition." Notice of Proposed Rulemaking, Order on Remand, and Waiver Order, *Amendment of the Commission's Rules to Establish Competitive Service Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Services*, 11 FCC Rcd 16639, 16678-79 (¶ 80) (1996) (emphasis added). Congress understood that a vigorous competitive market in local telephony will exist only when newcomers have built their own physical facilities to

compete with the incumbent's networks. The Act is thus intended to "give[] new entrants the incentive to build their own local facilities-based networks, rather than simply repackaging and reselling the local services of the local telephone company." 141 Cong. Rec. H8465 (daily ed. Aug. 2, 1995) (Rep. Goodlatte); Conf. Rep. at 1 (statute intended "to accelerate rapidly private sector deployment of advanced telecommunications and information technologies"). *See generally* 3A Philip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 773b1 at 204 (revised ed. 1996) ("competition [is] increased by encouraging [firms] to [develop rival facilities], rather than taking the easier and less competitive course of obtaining access to another's facilities").

The statutory pricing rules are carefully calibrated to achieve that goal. A reseller must pay a wholesale price that reflects the universal service subsidies built into the incumbent's retail rates; it can compete with the incumbent by performing marketing and billing functions more efficiently. A facilities-based competitor, by contrast, can avoid the universal service component in the incumbent's retail rates, and it can seek efficiency advantages throughout its network. To the extent that it does not yet have a complete network of its own, moreover, it can purchase at cost-based rates the incumbent's individual network elements. The statute thus encourages a new entrant to avoid buying at wholesale, but only by building a network of its own, supplemented where necessary with the incumbent's unbundled network elements.

2. Ever since Congress enacted the 1996 Act, however, AT&T and MCI have fought to obtain the very thing that Congress denied them—the ability to obtain incumbents' complete retail services at cost-based rates instead of wholesale rates based on current retail prices.

The mechanism that AT&T and MCI have seized upon to obtain that goal is the so-called unbundled network element "platform." Under the "platform" approach, AT&T and MCI do not expressly ask an incumbent for access to a particular finished service for resale. Instead,

they ask for the same thing using different words: they request *all* the network elements needed to replicate that same service, *already combined* in the configuration necessary to provide the service. Simply by using those different words, AT&T and MCI hope to obtain the identical product—the finished retail service of the incumbent carrier—at much lower, cost-based rates. For the reasons we have discussed, if AT&T and MCI are allowed to use this "platform" approach, they will obtain enormous, guaranteed profits through regulatory arbitrage without making any contribution to universal service, without investing in any facilities, without incurring any of the ongoing costs associated with maintaining a real telecommunications network (costs related to such obligations as testing and repairing facilities and maintaining network records), and without undertaking any business risk. As AT&T's President accordingly boasted, the "platform" is simply *"another way to resell,"* but it results in discounts for AT&T that are as much as *300%* larger than those authorized under the statutory resale pricing rules.[29]

Instead of putting a stop to these improper and destructive attempts to evade the statutory resale rules, the FCC has chosen to facilitate them. The FCC's rules permit a new entrant to pay cost-based rates and to avoid the joint marketing proscription even when that entrant does nothing more than a reseller—that is, even when it (1) relies exclusively on the incumbent's network elements to recreate an existing end-to-end service and (2) obtains those elements *already combined* by the incumbent into that complete service. *See* J.A. 551-54, 571-76 (¶¶ 292-297, 328-341); 47 C.F.R. § 51.315(b)-(f).

Incumbent carriers challenged both of those determinations in the Eighth Circuit. That court upheld the rule allowing entrants to obtain all the elements needed to

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[29] Transcript, AT&T Investment Community Meeting (March 3, 1997) (comments of John Zeglis) (attached to Petition for Rehearing of GTE entities, *et al.* (8th Cir. No. 96-3321, filed Aug. 19, 1997)).

provide service, but only because it vacated the series of FCC rules allowing entrants to obtain all of those elements on a pre-combined basis. Pet. App. 53a-58a, 70a-71a. As we now explain, both sets of FCC rules are inconsistent with the text and structure of the 1996 Act.

3. The fundamental principle here is clear—Congress placed specific limitations on the use of resale, and those limitations must be respected. Accordingly, AT&T and MCI cannot obtain all the pre-combined elements necessary to provide service and pretend that they are anything other than resellers who should be subject to the statutory resale restrictions.

a. First, it is clear from the face of the 1996 Act that one of the fundamental distinctions between resale and the use of network elements is that, unlike finished services for resale, network elements are provided on an individual piece-by-piece basis. If a competitor wants to use multiple elements, the competitor itself must combine those elements.

In particular, the 1996 Act says in no uncertain terms that incumbents need only provide "access to network elements on an unbundled basis" and only in a "manner that allows *requesting carriers* to *combine such elements*." 47 U.S.C. § 251(c)(3) (emphasis added). As the Eighth Circuit correctly stated (Pet. App. 70a), this language simply cannot "be read to levy a duty on the incumbent LECs to do the actual combining of elements." The incumbent must "provide elements in a manner that enables the competing carriers to combine them," but the "requesting carriers"—not the incumbent—are expected "to combine the unbundled elements themselves." *Id.* It is difficult to see how Congress could have been any clearer on that point.

The FCC's response to the plain language of section 251(c)(3) focuses on the word "unbundled." The agency contends that, in past orders, that word has referred

exclusively to charging separate prices for different services. FCC Br. 44. Accordingly, the FCC argues, as long as they are priced separately, network elements are still "unbundled" even if they are pre-combined by the incumbent into a complete, ready-to-use service.

As an initial matter, the FCC is wrong that, even in isolation, "separately priced" is the only reasonable, or even the most plausible, meaning of the word "unbundled." On the contrary, just last year, the Commission itself used the word "unbundle" as a synonym for "physically sever": "Although we conclude that shared transport is *physically severable* from switching, incumbent LECs may not *unbundle* switching and transport facilities that are already combined, except upon request by a requesting carrier." [30] The FCC's claim that "unbundled" has a single, predetermined meaning that contradicts the Eighth Circuit's conclusion is thus contrary to petitioners' *own* prior usage of that word.

In any event, like all statutory terms, the word "unbundled" must be understood in context. *See St. Vincent's Hosp.*, 502 U.S. at 221. Given that "requesting carriers" are to "combine such elements" under section 251(c)(3), the context here requires the conclusion that the Eighth Circuit reached. It is the responsibility of the requesting carrier physically to combine the various piece-parts that it receives from the incumbent in order to provide a finished telecommunications service. The

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[30] J.A. 1385 (Third Order on Reconsideration, ¶ 44) (emphasis added). *See also* J.A. 597-98 (¶ 384) ("[o]*ne way to unbundle* an individual loop" is *"to separate the unbundled loop(s)* prior to connecting the remaining loops to the switch") (emphasis added); Department of Justice Reply Comments, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, at 28 n.33 (FCC May 30, 1996) ("[i]n jurisdictions which have begun to open up local markets by requiring the *unbundling* of the local network into the loop . . ., local switching and interoffice transport elements, a variety of problems have developed in *separating* a customer's loop . . . from the local switch") (emphasis added).

incumbent itself has no obligation to combine those elements for its competitor. In this context, the unbundled network elements are not only separately priced, but also physically separate.

Significantly, even the FCC makes no attempt in this Court to resuscitate its now-vacated rules requiring incumbents to combine elements in new ways at a competitor's request. *See* 47 C.F.R. § 51.315(c)-(f). As the FCC apparently recognizes, there is no statutory anchor for any such duty. But neither is there any textual basis—in section 251(c)(3) or elsewhere—for requiring an incumbent to provide preassembled packages of elements for a competitor merely because the incumbent happens to have combined the elements for its own use.

Nor does the FCC gain anything by engaging in word games about the "rights" and "duties" created by section 251(c)(3). The FCC argues (FCC Br. 45) that the Eighth Circuit erred in concluding that an incumbent's "duty to provide" network elements under section 251(c)(3) "encompasses a *right* . . . to disconnect those elements." According to the FCC, since "a 'duty' is an obligation, not a right, . . . the grammatical implication of the Eighth Circuit's construction . . . is that incumbent LECs *must* provide access to network elements, including shared facilities, only on a *disconnected* basis." FCC Br. 45-46 (emphasis in original); *see* AT&T Br. 46.

That analysis simply misreads the Eighth Circuit's opinion. The court of appeals' understanding of section 251(c)(3) does not give incumbents any "rights"; it simply limits the *scope* of an incumbent's "duty" in accordance with the plain text of the statute. The incumbent's duty under the statute is to provide elements in a way that allows "requesting carrier[s]" to "combine" them—no more and no less.

The FCC also errs in contending that it would somehow constitute "discrimination" for an incumbent to provide network elements on a separated basis to new en-

trants when those elements are already combined in its own network. *See* FCC Br. 46. As an initial matter, any understanding of what constitutes "discrimination" under section 251(c)(3) must take account of the rest of section 251(c)(3). And it cannot be that Congress understood it to be "discriminatory" for an incumbent to do just what section 251(c)(3) expressly requires of it—provide network elements in a manner that allows a new entrant to combine them.

In any event, the FCC's argument rests on the false premise that incumbents, unlike entrants, are not required to combine network elements. *See* FCC Br. 46. Existing network element combinations do not materialize spontaneously out of nowhere. For a combination of facilities to exist, the incumbent must have invested the time and effort to combine the constituent elements. And where a new customer seeks local telephone service, the incumbent must create the connections needed to provide service to that customer, just as a new entrant would be required to do. Accordingly, MCI is wrong in stating that the vacated FCC rule "simply placed the potential competitor in the same position as the incumbent." MCI Br. 15. Just the opposite is true: the FCC's rule gave new entrants an artificial and unjustified advantage. By vacating the FCC's rule, the Eighth Circuit ensured that competitors and incumbents would bear the same burdens and that neither would have an inherent cost advantage or disadvantage.

Finally, there is no substance to the FCC's attempt to prove that network elements must be combined by focusing on the characteristics of one particular network element, a "signalling system." According to the FCC, it is not technically feasible to "disconnect[]" that element, so a new entrant could not be expected to undertake the work necessary to combine signaling with other network elements. FCC Br. 45. But the signaling system example supports our argument, not the FCC's. In particular, because a switch cannot be separated from the signaling

associated with it, the FCC's rules consider signaling and switching to be part of the *same* element for these purposes, *not* two inseparable elements. *See* 47 C.F.R. § 51.319(c)(1)(i)(C)(2). On the other hand, because signaling *can* be provided without switching, a competitor may obtain that item separately and, in that context, must obtain access to the incumbent's network to make a physical connection between the incumbent's signaling system and the competitor's own network. *See* J.A. —— (¶ 483) ("Carriers that provide their own switching facilities should be able to access the incumbent LEC's [signaling] network for each of their switches via a signaling link between their switch and the incumbent LEC's [network] . . . . This could be accomplished by the incumbent providing an unbundled signaling link from its [network] to the competitor's switch . . . .").

b. Even if we—and the Eighth Circuit—were wrong about the evident meaning of the statutory directive that incumbents are to provide elements in a manner that allows "requesting carriers to combine such elements," the statute still would not allow competitors to obtain a "platform" containing *all* the pre-combined elements necessary to provide service.

First, the language of the individual provisions governing network elements is clear that unbundled elements may be purchased only by a competitor with at least some network facilities of its own. Thus, section 251(c)(3) states—in language that MCI (MCI Br. 14-15) and the FCC (FCC Br. 43-44) conspicuously omit from their recitations of the statute—that the incumbent's duty is to provide "access" to network elements at a "technically feasible point." Those terms plainly contemplate a physical interconnection of networks that allows the new entrant to incorporate portions of the incumbent's network. *See* S. Rep. No. 104-23, at 20 (describing "unbundled access" as a form of physical access needed to ensure "the interoperability of *both carriers' networks*") (emphasis added). The reference to providing "access" at a "point"

makes clear that competitors will receive access at a physical place in the world. And that conclusion is further reinforced by the fact that the "point" of "access" must be "technically feasible," a restriction that makes sense *only* if the statute requires a new entrant to make a physical connection.[21]

Indeed, outside of litigation, the FCC itself has recognized that the statutory reference to "technical feasibility" necessarily assumes *physical* access to the incumbent's network: "We conclude that the term 'technically feasible' refers solely to technical or operational concerns. . . . We further conclude that the obligations imposed by sections 251(c)(2) and 251(c)(3) include modifications to incumbent LEC facilities to the extent necessary to accommodate interconnection or access to network elements." J.A. 507-08 (¶ 198).

The evident meaning of section 251(c)(3) is also strongly fortified by the language of related statutory provisions. In particular, under the 1996 Act, incumbents must permit "physical collocation"—that is, installation of a competitor's equipment on the incumbent's premises—"for interconnection or access to unbundled network elements." 47 U.S.C. § 251(c)(6). Congress would have had no need to require physical collocation for this pur-

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[21] Of all the petitioners, only AT&T even mentions this language. It argues that because the statute provides for access to "elements" at a single "point," Congress must have anticipated that elements would be provided in combination. AT&T Br. 38. But of course that argument does not dispute the basic point made in text that the entrant must have some sort of network to interconnect with the incumbent in order to obtain those elements. Thus, the entrant cannot simply buy all the elements from the incumbent; otherwise, there is no point at which two networks interconnect. As for AT&T's attempt to wring significance out of the plural "elements" and the singular "point" in that sentence, its theory doesn't work. An entrant can obtain multiple physically separated elements at a single point—typically, the "collocation cage" that it places in an incumbent's central office precisely to permit "access to unbundled network elements at the premises of the local exchange carrier." 47 U.S.C. § 251(c)(6).

pose if, as the FCC asserts, entrants would never actually be required to enter onto the incumbent's premises to connect equipment.

This notion of a physical interconnection—a technically feasible point of access—between networks is fundamentally incompatible with a system that allows the new entrant to order from the incumbent everything it needs for a finished service. If the new entrant can order a complete "platform" of network elements, then it has no network to interconnect with that of the incumbent. The only connection between the new entrant and the incumbent is a phone call to order the platform.

Indeed, even under the FCC's own argument, access to all the pre-combined elements needed to provide service is not "unbundling." In the prior decisions on which the FCC has relied, the fundamental issue was whether one part of the network could be physically "unplugged" from the rest of the incumbent's facilities and separately priced so that other companies could compete to provide just that single piece of the network (for example, customer premises equipment or inside wiring). *See, e.g., Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 77 F.C.C.2d 384 (1980); *Detariffing the Installation and Maintenance of Inside Wiring*, 59 Rad. Reg.2d 1143 (1986).

The "platform" approach sanctioned by the FCC turns that understanding of "unbundling" on its head. What is at issue in this case is *not* whether the network may be physically subdivided into separately priced parts so that competitors who have their own facilities (*e.g.*, their own customer premises equipment) may use those facilities to compete in the market for that network subpart. Rather, it is whether competitors who have no facilities of their own may pay a *single* price to obtain pre-combined packages of all the elements needed to reproduce the *complete* service the incumbent currently provides at retail. The FCC's prior decisions are thus directly contrary to the theory that access to such a preassembled platform may

be understood as "unbundling"—and, even more clearly, they do nothing to buttress the truly extraordinary claim, made by AT&T and MCI, that those companies may obtain all those pre-combined elements at rates that, when added together, are *below* the price at which, by statute, they may obtain the complete service.

In fact, contrary to the FCC's new-found theory, access to pre-assembled platforms has always been understood to be just what it is—resale. And that brings us to our last key point.

Congress enacted specific limitations on the use of resale, and the Commission cannot allow those restrictions to be evaded by entrants engaging in the exact equivalent of resale under another name. "[A] statute is to be considered in all its parts" (*Lexecon Inc. v. Milberg Weiss Bershad Hines & Lerach*, 118 S. Ct. 956, 962 (1998)), and a conclusion that renders important statutory limitations meaningless cannot stand. *See Colautti v. Franklin*, 439 U.S. 379, 392 (1979) (relying on the "elementary canon of construction that a statute should be interpreted so as not to render one part inoperative"); *Bennett v. Spear*, 117 S. Ct. 1154, 1166 (1997) (rejecting an interpretation that "emasculate[s] an entire section" of a statute) (internal quotation marks omitted). Thus, the FCC's attempt to allow competitors to construct an entire fictional network under the guise of purchasing unbundled network elements is contrary not only to the language of the specific provisions governing unbundling, but also to the basic statutory distinction between resale and access to unbundled network elements. As one facilities-based competitor has explained, "the careful balance crafted by Congress would be upset . . . if local entrants could undermine the comprehensive scheme of the Act by manipulating the provisions of Sections 251(c)(3) and 252(d)(1) to acquire complete services as platforms of network elements, and to have those services priced at cost rather than at wholesale rates as required by Sections

251(c)(4) and 252(d)(3)."[82] This view was echoed by a group of the key legislators who actually wrote the 1996 Act.[83]

For these reasons, this fundamental flaw in the FCC's rules cannot be brushed aside as a mere "policy concern." FCC Br. 47. The problem with the FCC's position is not simply that it is inconsistent with what the agency *concedes* are important statutory policies, such as encouraging facilities-based competition—though that is assuredly a significant problem. It is also, and more fundamentally, that the FCC's conclusion is inconsistent with the separate statutory treatment accorded resale and unbundling.

Our argument, therefore, is *not* that, as a matter of policy, the FCC should artificially make the use of unbundled elements a "less attractive entry option." FCC Br. 47. Rather, we contend that the FCC's rules must make the use of both resale and unbundled elements *only as attractive as Congress intended them to be.* And the FCC has no discretion at all to promulgate rules that disregard the limitations that the 1996 Act imposes on those entry vehicles; such rules are fundamentally inconsistent with the scheme Congress enacted into law. *See, e.g., Maislin Indus. v. Primary Steel, Inc.*, 497 U.S. 116, 131 (1990) (declining to defer to agency interpretation that was "flatly inconsistent with the statutory scheme as a whole"); *Dole v. United Steelworkers*, 494 U.S. 26, 41 (1990) (agency interpretation rejected "in light of language and structure of the Act as a whole").

In fact, the FCC itself has recognized that a reading of the statute that makes the use of unbundled elements interchangeable with resale—and thus nullifies the statutory resale restrictions—is insupportable. Accordingly, it has attempted to show that there is some real difference between resale and access to *all* the pre-combined network

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[82] Time Warner Communications Mem. in Support of Petitions for Rehearing, at 3 (8th Cir. No. 96-3321, filed Oct. 1, 1997).

[83] *See* Brief of Amici Curiae the Honorable John D. Dingell, *et al.*, at 12-18 (8th Cir. No. 96-3321, filed Nov. 15, 1996).

elements needed to provide a service. In its First Report and Order, the Commission asserted that a carrier using unbundled elements confronts unique competitive perils. Unlike a reseller, such a carrier allegedly must make an up-front investment and thus "faces the risk that end-user customers will not demand a sufficient number of services using that facility for the carrier to recoup its costs." J.A. 573-74 (¶ 334); *see also* FCC Br. 47.

That is simply wrong. Under the FCC's own view of the 1996 Act, competitors are *not* required to make any up-front investment. Generally speaking, local telephone networks can be divided into three segments: (1) the local loop, which connects an individual customer to a central telephone switch; (2) the switch, which directs calls to their destination; and (3) the trunk connections between switching centers (and thus their associated loops), which transport calls that originate and terminate in areas served by different switches. With respect to switching and trunks, the FCC has squarely held that competitors may order whatever quantities they need to meet customer demand, even if that requires shared use of particular facilities.[34] According to the Commission, a competitor may demand that the incumbent's switch and transport facilities be "*priced on an actual usage basis*"—in other words, the competitor need make no up-front investment and need bear no risk of demand fluctuations.[35] Similarly, a competitor need make no up-front investment in loops, which are purchased individually when a customer switches providers.[36]

The FCC argued before the court of appeals that, even if considerations of investment risk would not lead a competitor to choose resale over unbundled elements, a competitor might do so with respect to some customers for

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[34] *See* J.A. 1384-85 (Third Order on Reconsideration, ¶¶ 43-44).

[35] Response of Federal Respondents to Petitions for Rehearing, at 12 (8th Cir. No. 96-3321, filed Oct. 1, 1997) (emphasis added).

[36] *Id.* at 13.

whom the State has set retail rates at artificially low levels to promote universal service. FCC Rehearing Response, *supra* note 35, at 13. The FCC explained that, when retail rates are low relative to costs, "the 'retail less avoided cost' standard of section 252(d)(3) will allow a new entrant to compete via resale, while access to unbundled elements at rates 'based on the cost' of those elements likely will not." *Id.*

But that, of course, is precisely the point. The FCC's rules would allow new entrants to engage in regulatory arbitrage—invoking the resale pricing rules when those are advantageous, and the network element rules when those are advantageous—without any substantive difference in the service provided, the work done, or the new entrant's up-front investment. The fact that the resale provisions of section 251(c)(4) provide a more favorable path for potential competitors in some instances does not justify creating a new extra-statutory pricing regime to address other situations in which end-to-end use of network elements is more expedient.

4. The FCC and its supporting petitioners ultimately seek shelter in policy arguments of their own. AT&T argues, for instance, that preassembled "combinations of network elements . . . are particularly critical for providing competition for residential service" and that "the Eighth Circuit's decision . . . 'effectively has killed off local competition' in much of the local market." AT&T Br. 37 (internal citation omitted).

All the Eighth Circuit has "killed off," however, is the ability of companies to do something Congress never intended—make a quick buck by gaming the regulatory system without investing in any facilities and without supporting universal service. The Eighth Circuit has done nothing to hinder competition by companies that seek to engage in real facilities-based competition.[37] For that rea-

[37] Nor has it done anything to prevent resale by companies that do not object to following the rules that Congress enacted into law. Indeed, the FCC's Chairman recently emphasized that resale is

son, many of those companies have cheered the Eighth Circuit's ruling. As one competitor stated, the Eighth Circuit "made the right decision": those demanding that incumbents provide fully preassembled sets of network elements are part of a "rear-guard action being fought by the big long distance carriers to essentially get in there and not have to make any investment." [38] Another facilities-based competitor echoed the point: true local competitors "owe[] a debt of gratitude to the Eighth Circuit. . . . The fact that there will be no free ride for interexchange carriers seeking a cheap method of local market entry is a plus for our industry." [39] Those competitors have also made clear that the result advocated by the FCC in this case would undermine facilities-based competition because "[i]f a competing carrier can obtain an entire platform at incremental cost that effectively replaces a tariffed service, it will have no incentive to invest in deploying its own facilities in the local network." [40]

By the same token, AT&T's and MCI's overheated rhetoric about incumbents gratuitously "ripping apart" their own networks is at best disingenuous. The 1996 Act itself requires incumbents to separate their networks into piece-parts so that new entrants may obtain access to those

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"economically viable." *Kennard Targets Phone, Cable Competition in 'Very Ambitious' Agenda*, Communications Daily (Feb. 2, 1998). *See also* Krause, *Computers & Technology: Kennard's Call Is Implementing Telecom Reform*, Investor's Business Daily (Feb. 18, 1998) ("Yes, I'm aware that the large (long-distance carriers) have backed away from a resale strategy. But some smaller CLECs (competitive local exchange carriers) haven't backed away from resale, and it seems to be viable for some new entrants") (statement of Chairman Kennard).

[38] *CLECs Revenue and Market Share Predicted to Grow 60% Next Year*, Communications Daily, at 2 (Dec. 10, 1997) (quoting Royce Holland, Chairman of Allegiance Telecom).

[39] Telecommunications Reports, at 18 (Nov. 10, 1997) (quoting James Allen, CEO of Brooks Fiber Properties, Inc.).

[40] Reply Comments of Intermedia Communications, Case No. 97-C-1963, at 5 (N.Y. P.S.C. Dec. 12, 1997).

parts. But, ever since Congress passed the 1996 Act, AT&T and MCI have sought at every turn to transform that straightforward statutory requirement into something it plainly is not—a duty to provide access to complete finished services. It should be no surprise that such an attempt to misuse the statutory scheme has run into significant difficulties that derive directly from the text of the 1996 Act itself. Nor is there anything improper about the incumbents' insisting upon strict adherence to that statutory text to forestall massive losses resulting not from genuine competition, but from illegitimate regulatory arbitrage.

B. The FCC's View of the Network Elements That Incumbents Must Make Available Is Contrary to the Act's Language, Structure, and Policy.

Having allowed new entrants to use an incumbent's network elements in a way that Congress never intended, the FCC then compounded the problem by expanding the number of such elements that incumbents must provide. The Commission did so in several ways, none of which is consistent with the 1996 Act.

1. First, the FCC nullified the statutory directive that, in determining what elements an incumbent must make available, the FCC "shall consider, at a minimum," whether access to proprietary network elements is "necessary," and whether the failure to provide access to other network elements would "impair" the ability of the requesting carriers to provide service. 47 U.S.C. § 251(d)(2). That provision reflects Congress's recognition that access to an unbundled network element is economically justified only when a new entrant has a genuine need for such an element. As AT&T itself explained in its opening brief, the effect of these provisions was to "allow new entrants to obtain *essential facilities* that a LEC controls." AT&T Br. 2 (emphasis added).

The FCC disregarded Congress's direction. The Commission determined that the "necessary" and "impair" standards required no consideration of "whether a request-

ing carrier could obtain the desired elements from an alternative source"; the only proper inquiry, in the FCC's view, is whether the equivalent functionality can be obtained elsewhere in *the incumbent's own network*. *See* J.A. 547, 549 (¶¶ 283, 287). In other words, the only situation in which a new entrant is *not* entitled to an incumbent's network element is when *some other* element in the incumbent's network can perform the same function. *See id.*

That astonishing conclusion defies the plain meaning of the 1996 Act. Access to a proprietary element from an incumbent simply cannot be "necessary," and failure to provide an element cannot "impair" a new entrant's ability to provide service, if an equivalent element is readily available from a source other than the incumbent. Yet, under the blinkered inquiry required by the FCC's rules, a particular facility may be available from dozens of suppliers at competitive prices, but access may nevertheless be deemed "necessary" for an entrant to provide service.

That is an irrational result, and it is not the one Congress enacted into law. On the contrary, as noted above, by mandating an evaluation of the actual need for an element—under the necessity and impairment standards—Congress expressed its preference that new entrants rely on non-incumbent facilities where possible, in order to promote facilities-based competition and encourage innovation. After all, it is precisely where the new entrant can avail itself of facilities other than the incumbent's that the potential for true facilities-based competition is greatest. And, contrary to the Eighth Circuit's apparent belief, that does not mean that access to elements is not required whenever an "element[] could theoretically be duplicated eventually." Pet. App. 47a-48a. It simply means that *some* inquiry into actual market conditions should be made before the incumbent is conscripted into providing its competitors with access to its network equipment.

Indeed, it is hornbook antitrust law that "essential facilities" must be made available to competitors only if they are not *"available from another source or capable of being duplicated by the [competitor] or others."* 3A Areeda &

Hovenkamp, ¶ 773b, at 202 (1996) (emphasis added). The lower courts have repeatedly held that a prerequisite for access to an essential facility is a showing of the "competitor's inability practically or reasonably to duplicate" that facility. *MCI Communications Corp. v. AT&T*, 708 F.2d 1081, 1132-33 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983).[41] The reason for that rule is straightforward, and it is fully applicable here. When the government "order[s] the [owner] to provide the facility and regulat[es] the price to competitive levels, then the [prospective entrant's] incentive to build an alternative facility is destroyed altogether." 3A Areeda & Hovenkamp, ¶ 771b, at 175. To protect against precisely that danger, Congress required an inquiry into "necessity" and "impairment" before the FCC could force incumbents to offer access to their network elements. By ignoring those statutory standards, the FCC created the very result—loss of any incentive to build facilities—that courts have scrupulously guarded against in antitrust cases.

The FCC's rule is particularly troublesome in the context of proprietary elements. Congress required the Commission to apply strict standards to the unbundling of such elements because it understood that no incumbent will invest in research and development if innovations must automatically be turned over to the incumbent's competitors. *See, e.g., Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 480 (1974) (right of exclusivity provides "an incentive to inventors to risk the often enormous costs in terms of time, research, and development"). But, under the FCC's rules, an incumbent can be required, after investing millions of dollars in developing a new service or feature, to turn that service or feature over to its competitors at

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[41] *Accord Twin Labs, Inc. v. Weider Health & Fitness*, 900 F.2d 566, 568 (2d Cir. 1990); *Ideal Dairy Farms, Inc. v. John Labatt, Ltd.*, 90 F.3d 737, 748 (3d Cir. 1996); *Laurel Sand & Gravel, Inc. v. CSX Trans., Inc.*, 924 F.2d 539, 544 (4th Cir. 1991); *City of Malden v. Union Elec. Co.*, 887 F.2d 157, 160 (8th Cir. 1989); *City of Anaheim v. Southern Calif. Edison Co.*, 955 F.2d 1373, 1379-80 (9th Cir. 1992).

forward-looking cost regardless of whether those competitors can obtain its equivalent elsewhere. That rule will quite obviously provide a significant disincentive to research and development by incumbents. Indeed, the FCC has admitted as much. See J.A. 546-47 (¶ 282) ("prohibiting incumbents from refusing access to proprietary elements could reduce their incentives to offer innovative services"). That result cannot be squared with the statutory text, and it should be reversed.

2. Having created a rule under which competitors are entitled to obtain just about anything deemed to be a "network element," the FCC then construed the term "network element" to encompass virtually every asset an incumbent owns. As a result, the FCC's unbundling rules require an incumbent to turn over to competitors essentially its entire business.

The Act defines a network element as a "*facility or equipment* used in the provision of a telecommunications service," as well as "features, functions, and capabilities that are provided *by means of such facility or equipment*, including subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service." 47 U.S.C. § 153(29) (emphasis added). Thus, the concept of network elements under the Act is rooted in discrete *physical* facilities carriers use in providing local exchange service and "features" that may be made available "by means of" such facilities.

The Act's definition of a "network element" therefore reflects the basic purpose of the unbundling provisions—to give entrants access to those essential physical facilities they need to provide telecommunications service but could not reasonably duplicate, at least in the short term. At the same time, the term "network element" does not encompass aspects of an incumbent's business that Congress had no reason to believe could not be duplicated, such as back-office billing or other support functions that any new competitor could reasonably perform for itself.

The FCC, however, defined "network element" so broadly that it effectively permits competitors to make use of every part—both physical and non-physical—of an incumbent's business. Several such rulings are at issue here.

a. First, the FCC's order requires incumbent carriers to unbundle their operational support systems (or "OSS"). 47 C.F.R. § 51.319(f). These support systems consist of computer software that serves a number of functions relating to an incumbent's customer service operations, such as processing customer orders and routing customer requests to the right person in the company.

These systems are not "network elements" within the meaning of the statute. They are neither "a facility or equipment" used in the provision of "a telecommunications service"—that is, used in the "routing" or "transmission" of telephone calls—nor "features . . . provided *by means of* such facility or equipment." 47 U.S.C. § 153(29), (43), (46) (emphasis added). Rather, as their name suggests, they are *support* systems that an incumbent uses to run its business—to process orders, to dispatch repair personnel, to keep track of customer service requests. Requiring an incumbent to make these systems available to competitors has nothing to do with unbundling the pieces of the network actually used to deliver calls. As a result, the plain terms of the definition in the Act simply do not reach these software systems.

Indeed, the FCC does not even attempt to characterize these support systems as part of the equipment used to route or transmit a call. Rather, the FCC has made clear that its objective in unbundling support systems is to ensure that new entrants will be able to perform *business* functions such as "pre-ordering, ordering, . . . and billing" and "basic service functions [such] as scheduling customer appointments" in "substantially the same time and manner that an incumbent can for itself." J.A. 670-71 (¶ 518). But nothing in Congress's definition of network elements suggests that the incumbents' business skills, in contrast to portions of their physical networks, must be turned over to competitors. On the contrary, Congress specifically tied

the unbundling requirement to the physical "features and equipment" owned by the incumbent.

Nor can incumbents be required to provide these back-office support systems on the Eighth Circuit's theory that, since a "telecommunications service" is the "offering of telecommunications for a fee directly to the public" (47 U.S.C. § 153(46)), a facility is "used" in providing a "telecommunications service" any time it assists in the overall "commercial offering of telecommunications." Pet. App. 42a-43a. Under that principle, *any* asset that might be useful in running a telecommunications company—desks, repair trucks, office space—could be requisitioned by a competitor. But no one has seriously suggested that Congress intended any such result. And the statute's definition of "telecommunications"—which encompasses only the *physical* "transmission, between or among points specified by the user, of information of the user's choosing" (47 U.S.C. § 153(43))—is incompatible with the Eighth Circuit's expansive theory. Operational support systems—like desks, trucks, and office space—having nothing to do with the transmission of calls, and they therefore cannot qualify as "network elements" under any reasonable reading of the statutory terms.

b. The FCC also erred in deciding that *services* offered by incumbent LECs, such as operator services and directory assistance, should be treated as "elements" subject to unbundling. *See* J.A. 678-81 (¶¶ 534-540); 47 C.F.R. § 51.319(g). These services do not fall within the definition of "network elements": they are not a "facility or equipment" in the telephone transmission network; neither are they "features, functions, [or] capabilities . . . provided by means of" such facilities. 47 U.S.C. § 153(29). In fact, although the unbundling provision of the House bill originally applied to "*services*, elements, features, functions, and capabilities," the Conference Committee chose to eliminate the term "services" when it defined the scope of unbundling. H.R. 1555, § 242(a)(2) (emphasis added). The FCC improperly reversed Congress's decision in favor of its own policy preferences.

Straining to find a textual hook for its illegitimate stretching of the term "network element," the FCC asserted that operator services and directory assistance qualify as "*information* . . . used in the transmission, routing, or *other provision* of a telecommunications service." 47 U.S.C. § 153(29) (emphasis added). According to the Commission, the concluding phrase "other provision" expands the category of network elements to include any information related to the provision of telecommunications services. J.A. 537-38 (¶ 261).

Under established principles, however, that phrase must be understood in light of the company it keeps. When a general term such as "other provision" is tacked on at the end of a list, it is properly understood as limited by the more specific terms that precede it. *See, e.g., Hughey v. United States*, 495 U.S. 411, 419 (1990) ("general statutory term should be understood in light of the specific terms that surround it"); *Federal Maritime Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 734 (1973) ("catchall provision" is to be "read as bringing within a statute categories similar in type to those specifically enumerated"). Here, the other elements of the list—"transmission" and "routing"—are functions used in the physical delivery of calls, and nothing in the statute suggests that the reference to "other provision" should expand that definition so broadly that it includes essentially all assets owned by a company that provides telephone service.

The full absurdity of the Commission's theory is illustrated by its insistence that even such optional, discretionary services as Caller ID and Call Waiting must be treated as "network elements." All parties agree that these so-called "vertical services" are retail services that incumbents currently sell to their customers and that therefore must be made available at the statutory wholesale discount. But under the FCC's rules, new entrants may *also* obtain access to these same vertical services as network elements at cost-based rates—and may do so despite the incontestable fact that these services do not route, transmit, or oth-

erwise play a role in the physical delivery of a telephone call.

Congress had no reason to require incumbents to make the same service available at two different prices, and it did not do so. Indeed, adherence to the statutory resale rules is particularly important in the context of these services because, as with business services, State commissions typically set retail prices for vertical services at above-cost rates to support low prices for other services. Allowing competitors to obtain the same services at the cost-based rates reserved for true network elements would simply invite them to engage in yet another form of regulatory arbitrage. Congress intended no such result—indeed, as noted, it affirmatively decided to exclude "services" from the definition of network elements. And because an asset can qualify as a network element only if it is "*used* in the provision of a telecommunications service," it makes no sense at all to say that a telecommunications service is *itself* a network element.

III. THE FCC'S "PICK-AND-CHOOSE" RULE IS INCOMPATIBLE WITH THE ACT'S SCHEME OF PRIVATE NEGOTIATIONS AND BINDING AGREEMENTS.

The FCC's order precludes effective negotiation of binding agreements by allowing new entrants "to choose among individual provisions contained in publicly filed interconnection agreements" that the incumbent carriers have reached with other carriers. J.A. 1044-45 (¶ 1310). Competitors may poach "any individual interconnection, service, or network element arrangement contained in any agreement to which [the incumbent] is a party." 47 C.F.R. § 51.809(a) (emphasis added). Moreover, the competitor need not enter into renegotiations that would give the incumbent a chance to rebalance the relationship to take account of the terms imported from other agreements. Rather, the order lets the competitor bypass the statutory negotiations *entirely* and demand that a State regulator award it any term agreed to by others. J.A. 1048 (¶ 1321). In effect, the FCC transformed a negotiated agreement into a series of tariff provisions from which competitors

can pick and choose at will. The Eighth Circuit correctly set this rule aside as incompatible with the statutory structure.

Section 252(i), on which the FCC relies, requires nothing remotely like this bizarre rule. It provides only that an incumbent LEC "shall make available" in the negotiating process "any interconnection, service, or network element" that it provides under an approved agreement with any other carrier "*upon the same terms and conditions* as those provided in the agreement." 47 U.S.C. § 252(i) (emphasis added). This provision establishes a straightforward nondiscrimination principle that requires an incumbent LEC to put on the bargaining table for negotiation any item contained in another agreement, but *only* on the same terms and conditions—embodying all the same tradeoffs—that appear in that other agreement. This requirement ensures that a LEC cannot restrict a particular service to a specific carrier and that a second entrant can step into the shoes of an earlier one if it wishes to accept the deal that the earlier one has struck. It certainly does *not* mean that a second entrant can take what it likes from a prior agreement and leave behind what it doesn't like.[42]

Moreover, any agreements that *are* concluded under the FCC's "pick-and-choose" rule are not binding. A competitor may demand for itself a new term from another agreement at *any* time, even after it has already signed a contract with an incumbent agreeing to a full package of terms and conditions. *See* J.A. 1046-47 (¶ 1316). As this Court has recognized, a contract that gives one party unfettered discretion " 'to deny or change the effect of the promise[] is an absurdity.' " *United States Trust Co. v. New Jersey*, 431 U.S. 1, 25 n.23 (1977) (quoting *Murray v. Charleston*, 96 U.S. 432, 445 (1878)).

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[42] The FCC's suggestion that this reading of the statute would encourage incumbents to lard an interconnection agreement with unrelated terms (FCC Br. 49-50) ignores the fact that any agreement must be approved by a State commission. 47 U.S.C. § 252(e). State commissions are amply equipped to reject any attempt to import such unrelated terms into an agreement.

The FCC's radical pick-and-choose regulation cannot be reconciled with a statutory scheme that relies on bilateral commercial negotiations to establish "binding agreement[s]." 47 U.S.C. § 252(a)(1). Bargaining is impossible where one party remains free to avoid its promises by selecting new contract terms at will, and where the other party cannot know the extent of its commitments because it cannot know who else in the future will demand the concessions it makes in a contract without agreeing to the same tradeoffs.

Pick-and-choose also distorts the *content* of interconnection arrangements. A complex commercial agreement is an integrated whole whose terms reflect the give and take of bargaining. Generally, each party makes concessions in some areas in exchange for benefits in others, reflecting the particular needs and priorities of the parties. A party might, for example, agree to a higher price for one service in exchange for a lower price for another. But pick-and-choose allows one side (the entrant) to demand the *quid* (the lower price on the first service) without having to take the *quo* (the higher price on the other) with which it was originally paired—regardless of differences in context or in the commercial assumptions on which each bilateral arrangement is based. Given this prospect, the incumbent simply cannot afford to make tradeoffs, and a negotiated agreement that would otherwise benefit the negotiating parties will not be reached.[43]

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[43] AT&T suggests that the FCC rule does not permit a competitor to take the *quid* without the *quo* where the tradeoff is "legitimate" and "express[]." AT&T Br. 50. But the FCC has never defended its rule on this ground. Moreover, that interpretation ignores the reality that complex commercial agreements involving multiple services must be viewed as a whole—one party may accept a tradeoff that it believes to be somewhat disadvantageous because another tradeoff embodied in the agreement is particularly advantageous. And forcing an incumbent to disclose this type of detailed analysis during negotiations in order to be able to prove later that particular terms were "expressly" linked and that such a link is "legitimate" would have its own chilling effect on negotiations.

In short, the FCC's pick-and-choose rule conflicts with the terms and structure of the Act and impermissibly thwarts the statute's reliance on negotiated, binding agreements. This Court should affirm the Eighth Circuit's decision to vacate the rule as unlawful.

CONCLUSION

Both judgments of the court of appeals should be affirmed insofar as they vacate the rules and order paragraphs specified in the court's opinions. *See* Pet. App. 66a & n.39, 71a-72a, 91a. The judgment of the court of appeals in the lead case below should be reversed insofar as it upheld the FCC's rules (1) permitting competitors to lease all of an incumbent's network elements needed to replicate a service provided by the incumbent; (2) nullifying the statute's "necessary" and "impair" standards; and (3) impermissibly expanding the definition of "network elements" to include operations support systems, operator services, directory assistance, and "vertical services."

Respectfully submitted,

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STATUTORY PROVISIONS

§ 152. Application of chapter

(a) Applicability to interstate and foreign communications or transmissions of energy originating in or received within the United States by wire or radio; Canal Zone exception; cable services

The provisions of this chapter shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States, in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereinafter provided; but it shall not apply to persons engaged in wire or radio communication or transmission in the Canal Zone, or to wire or radio communication or transmission wholly within the Canal Zone. The provisions of this chapter shall apply with respect to cable service, to all persons engaged within the United States in providing such service, and to the facilities of cable operators which relate to such service, as provided in subchapter V-A of this chapter.

(b) Exceptions to Federal Communications Commission jurisdiction

Except as provided in sections 223 through 227 of this title, inclusive, and section 332 of this title, and subject to the provisions of section 301 of this title and subchapter V-A of this chapter, nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier, or (2) any carrier engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly

or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (3) any carrier engaged in interstate or foreign communication solely through connection by radio, or by wire and radio, with facilities, located in an adjoining State or in Canada or Mexico (where they adjoin the State in which the carrier is doing business), of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (4) any carrier to which clause (2) or clause (3) of this subsection would be applicable except for furnishing interstate mobile radio communication service or radio communication service to mobile stations on land vehicles in Canada or Mexico; except that sections 201 to 205 of this title shall, except as otherwise provided therein, apply to carriers described in clauses (2), (3), and (4) of this subsection.

§ 153. Definitions

* * * *

(29) Network element

The term "network element" means a facility or equipment used in the provision of a telecommunications service. Such term also includes features, functions, and capabilities that are provided by means of such facility or equipment, including subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service.

* * * *

(43) Telecommunications

The term "telecommunications" means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.

* * * *

(46) Telecommunications service

The term "telecommunications service" means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.

(47) Telephone exchange service

The term "telephone exchange service" means (A) service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is

covered by the exchange service charge, or (B) comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service.

(48) Telephone toll service

The term "telephone toll service" means telephone service between stations in different exchange areas for which there is made a separate charge not included in contracts with subscribers for exchange service.

* * * *

(52) Wire communication

The term "wire communication" or "communication by wire" means the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.

* * * *

§ 220. Accounts, records, and memoranda

(a) Forms

(1) The Commission may, in its discretion, prescribe the forms of any and all accounts, records, and memoranda to be kept by carriers subject to this chapter, including the accounts, records, and memoranda of the movement of traffic, as well as of the receipts and expenditures of moneys.

(2) The Commission shall, by rule, prescribe a uniform system of accounts for use by telephone companies. Such uniform system shall require that each common carrier shall maintain a system of accounting methods, procedures, and techniques (including accounts and supporting records and memoranda) which shall ensure a proper allocation of all costs to and among telecommunications services, facilities, and products (and to and among classes of such services, facilities, and products) which are developed, manufactured, or offered by such common carrier.

(b) Depreciation charges

The Commission may prescribe, for such carriers as it determines to be appropriate, the classes of property for which depreciation charges may be properly included under operating expenses, and the percentages of depreciation which shall be charged with respect to each of such classes of property, classifying the carriers as it may deem proper for this purpose. The Commission may, when it deems necessary, modify the classes and percentages so prescribed. Such carriers shall not, after the Commission has prescribed the classes of property for which depreciation charges may be included, charge to operating expenses any depreciation charges on classes of property other than those prescribed by the Commission, or, after the Commission has prescribed percentages of depreciation, charge

with respect to any class of property a percentage of depreciation other than that prescribed therefor by the Commission. No such carrier shall in any case include in any form under its operating or other expenses any depreciation or other charge or expenditure included elsewhere as a depreciation charge or otherwise under its operating or other expenses.

(c) Access to information; burden of proof

The Commission shall at all times have access to and the right of inspection and examination of all accounts, records, and memoranda, including all documents, papers, and correspondence now or hereafter existing, and kept or required to be kept by such carriers, and the provisions of this section respecting the preservation and destruction of books, papers, and documents shall apply thereto. The burden of proof to justify every accounting entry questioned by the Commission shall be on the person making, authorizing, or requiring such entry and the Commission may suspend a charge or credit pending submission of proof by such person. Any provision of law prohibiting the disclosure of the contents of messages or communications shall not be deemed to prohibit the disclosure of any matter in accordance with the provisions of this section. The Commission may obtain the services of any person licensed to provide public accounting services under the law of any State to assist with, or conduct, audits under this section. While so employed or engaged in conducting an audit for the Commission under this section, any such person shall have the powers granted the Commission under this subsection and shall be subject to subsection (f) of this section in the same manner as if that person were an employee of the Commission.

(d) Penalty for failure to comply

In case of failure or refusal on the part of any such carrier to keep such accounts, records, and memoranda

on the books and in the manner prescribed by the Commission, or to submit such accounts, records, memoranda, documents, papers, and correspondence as are kept to the inspection of the Commission or any of its authorized agents, such carrier shall forfeit to the United States the sum of $6,000 for each day of the continuance of each such offense.

(e) False entry; destruction; penalty

Any person who shall willfully make any false entry in the accounts of any book of accounts or in any record or memoranda kept by any such carrier, or who shall willfully destroy, mutilate, alter, or by any other means or device falsify any such account, record, or memoranda, or who shall willfully neglect or fail to make full, true, and correct entries in such accounts, records, or memoranda of all facts and transactions appertaining to the business of the carrier, shall be deemed guilty of a misdemeanor, and shall be subject, upon conviction, to a fine of not less than $1,000 nor more than $5,000 or imprisonment for a term of not less than one year nor more than three years, or both such fine and imprisonment: *Provided*, That the Commission may in its discretion issue orders specifying such operating, accounting, or financial papers, records, books, blanks, or documents which may, after a reasonable time, be destroyed, and prescribing the length of time such books, papers, or documents shall be preserved.

(f) Confidentiality of information

No member, officer, or employee of the Commission shall divulge any fact or information which may come to his knowledge during the course of examination of books or other accounts, as hereinbefore provided, except insofar as he may be directed by the Commission or by a court.

(g) Use of other forms; alterations in prescribed forms

After the Commission has prescribed the forms and manner of keeping of accounts, records, and memoranda

to be kept by any person as herein provided, it shall be unlawful for such person to keep any other accounts, records, or memoranda than those so prescribed or such as may be approved by the Commission or to keep the accounts in any other manner than that prescribed or approved by the Commission. Notice of alterations by the Commission in the required manner or form of keeping accounts shall be given to such persons by the Commission at least six months before the same are to take effect.

(h) Exemption; regulation by State commission

The Commission may classify carriers subject to this chapter and prescribe different requirements under this section for different classes of carriers, and may, if it deems such action consistent with the public interest, except the carriers of any particular class or classes in any State from any of the requirements under this section in cases where such carriers are subject to State commission regulation with respect to matters to which this section relates.

(i) Consultation with State commissions

The Commission, before prescribing any requirements as to accounts, records, or memoranda, shall notify each State commission having jurisdiction with respect to any carrier involved, and shall give reasonable opportunity to each such commission to present its views, and shall receive and consider such views and recommendations.

(j) Report to Congress on need for further legislation

The Commission shall investigate and report to Congress as to the need for legislation to define further or harmonize the powers of the Commission and of State commissions with respect to matters to which this section relates.

* * * *

§ 225. Telecommunications services for hearing-impaired and speech-impaired individuals

(a) Definitions

As used in this section—

(1) Common carrier or carrier

The term "common carrier" or "carrier" includes any common carrier engaged in interstate communication by wire or radio as defined in section 153 of this title and any common carrier engaged in intrastate communication by wire or radio, notwithstanding sections 152(b) and 221(b) of this title.

(2) TDD

The term "TDD" means a Telecommunications Device for the Deaf, which is a machine that employs graphic communication in the transmission of coded signals through a wire or radio communication system.

(3) Telecomunications relay services

The term "telecommunications relay services" means telephone transmission services that provide the ability for an individual who has a hearing impairment or speech impairment to engage in communication by wire or radio with a hearing individual in a manner that is functionally equivalent to the ability of an individual who does not have a hearing impairment or speech impairment to communicate using voice communication services by wire or radio. Such term includes services that enable two-way communication between an individual who uses a TDD or other nonvoice terminal device and an individual who does not use such a device.

(b) Availability of telecommunications relay services

(1) In general

In order to carry out the purposes established under section 151 of this title, to make available to all individuals in the United States a rapid, efficient nationwide communication service, and to increase the utility of the telephone system of the Nation, the Commission shall ensure that interstate and intrastate telecommunications relay services are available, to the extent possible and in the most efficient manner, to hearing-impaired and speech-impaired individuals in the United States.

(2) Use of general authority and remedies

For the purposes of administering and enforcing the provisions of this section and the regulations prescribed thereunder, the Commission shall have the same authority, power, and functions with respect to common carriers engaged in intrastate communication as the Commission has in administering and enforcing the provisions of this title with respect to any common carrier engaged in interstate communication. Any violation of this section by any common carrier engaged in intrastate communication shall be subject to the same remedies, penalties, and procedures as are applicable to a violation of this chapter by a common carrier engaged in interstate communication.

(c) Provision of services

Each common carrier providing telephone voice transmission services shall, not later than 3 years after July 26, 1990, provide in compliance with the regulations prescribed under this section, throughout the area in which it offers service, telecommunications relay services, individually, through designees, through a competitively se-

lected vendor, or in concert with other carriers. A common carrier shall be considered to be in compliance with such regulations—

(1) with respect to intrastate telecommunications relay services in any State that does not have a certified program under subsection (f) of this section and with respect to interstate telecommunications relay services, if such common carrier (or other entity through which the carrier is providing such relay services) is in compliance with the Commission's regulations under subsection (d) of this section; or

(2) with respect to intrastate telecommunications relay services in any State that has a certified program under subsection (f) of this section for such State, if such common carrier (or other entity through which the carrier is providing such relay services) is in compliance with the program certified under subsection (f) of this section for such State.

(d) Regulations

(1) In general

The Commission shall, not later than 1 year after July 26, 1990, prescribe regulations to implement this section, including regulations that—

(A) establish functional requirements, guidelines, and operations procedures for telecommunications relay services;

(B) establish minimum standards that shall be met in carrying out subsection (c) of this section;

(C) require that telecommunications relay services operate every day for 24 hours per day;

(D) require that users of telcommunications relay services pay rates no greater than the rates

paid for functionally equivalent voice communication services with respect to such factors as the duration of the call, the time of day, and the distance from point of origination to point of termination;

(E) prohibit relay operators from failing to fulfill the obligations of common carriers by refusing calls or limiting the length of calls that use telecommunications relay services;

(F) prohibit relay operators from disclosing the content of any relayed conversation and from keeping records of the content of any such conversation beyond the duration of the call; and

(G) prohibit relay operators from intentionally altering a relayed conversation.

(2) Technology

The Commission shall ensure that regulations prescribed to implement this section encourage, consistent with section 157(a) of this title, the use of existing technology and do not discourage or impair the development of improved technology.

(3) Jurisdictional separation of costs

(A) In general

Consistent with the provisions of section 410 of this title, the Commission shall prescribe regulations governing the jurisdictional separation of costs for the services provided pursuant to this section.

(B) Recovering costs

Such regulations shall generally provide that costs caused by interstate telecommunications relay services shall be recovered from all subscribers for every interstate service and costs

caused by intrastate telecommunications relay services shall be recovered from the intrastate jurisdiction. In a State that has a certified program under subsection (f) of this section, a State commission shall permit a common carrier to recover the costs incurred in providing intrastate telecommunications relay services by a method consistent with the requirements of this section.

(e) Enforcement

(1) In general

Subject to subsections (f) and (g) of this section, the Commission shall enforce this section.

(2) Complaint

The Commission shall resolve, by final order, a complaint alleging a violation of this section within 180 days after the date such complaint is filed.

(f) Certification

(1) State documentation

Any State desiring to establish a State program under this section shall submit documentation to the Commission that describes the program of such State for implementing intrastate telecommunications relay services and the procedures and remedies available for enforcing any requirements imposed by the State program.

(2) Requirement for certification

After review of such documentation, the Commission shall certify the State program if the Commission determines that—

(A) the program makes available to hearing-impaired and speech-impaired individuals, either

directly, through designees, through a competitively selected vendor, or through regulation of intrastate common carriers, intrastate telecommunications relay services in such State in a manner that meets or exceeds the requirements of regulations prescribed by the Commission under subsection (d) of this section; and

(B) the program makes available adequate procedures and remedies for enforcing the requirements of the State program.

(3) Method of funding

Except as provided in subsection (d) of this section, the Commission shall not refuse to certify a State program based solely on the method such State will implement for funding intrastate telecommunication relay services.

(4) Suspension or revocation of certification

The Commission may suspend or revoke such cerification if, after notice and opportunity for hearing, the Commission determines that such certification is no longer warranted. In a State whose program has been suspended or revoked, the Commission shall take such steps as may be necessary, consistent with this section, to ensure continuity of telecommunications relay services.

(g) Complaint

(1) Referral of complaint

If a complaint to the Commission alleges a violation of this section with respect to intrastate telecommunications relay services within a State and certification of the program of such State under subsection (f) of this section is in effect, the Commission shall refer such complaint to such State.

(2) Jurisdiction of Commission

After referring a complaint to a State under paragraph (1), the Commission shall exercise jurisdiction over such complaint only if—

(A) final action under such State program has not been taken on such complaint by such State—

(i) within 180 days after the complaint is filed with such State; or

(ii) within a shorter period as prescribed by the regulations of such State; or

(B) the Commission determines that such State program is no longer qualified for certification under subsection (f) of this section.

* * * *

§ 251. Interconnection

(a) General duty of telecommunications carriers

Each telecommunications carrier has the duty—

(1) to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers; and

(2) not to install network features, functions, or capabilities that do not comply with the guidelines and standards established pursuant to section 255 or 256 of this title.

(b) Obligations of all local exchange carriers

Each local exchange carrier has the following duties:

(1) Resale

The duty not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications services.

(2) Number portability

The duty to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission.

(3) Dialing parity

The duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service, and the duty to permit all such providers to have nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listing, with no unreasonable dialing delays.

(4) Access to rights-of-way

The duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers

of telecommunications services on rates, terms, and conditions that are consistent with section 224 of this title.

(5) Reciprocal compensation

The duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.

(c) Additional obligations of incumbent local exchange carriers

In addition to the duties contained in subsection (b) of this section, each incumbent local exchange carrier has the following duties:

(1) Duty to negotiate

The duty to negotiate in good faith in accordance with section 252 of this title the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) of this section and this subsection. The requesting telecommunications carrier also has the duty to negotiate in good faith the terms and conditions of such agreements.

(2) Interconnection

The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network—

(A) for the transmission and routing of telephone exchange service and exchange access;

(B) at any technically feasible point within the carrier's network;

(C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and

(D) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title.

(3) Unbundled access

The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.

(4) Resale

The duty—

(A) to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers; and

(B) not to prohibit, and not to impose unreasonble or discriminatory conditions or limitations on, the resale of such telecommunications service, except that a State commission may, consistent with regulations prescribed by the Commission under this section, prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such service to a different category of subscribers.

(5) Notice of changes

The duty to provide reasonable public notice of changes in the information necessary for the transmission and rout-

ing of services using that local exchange carrier's facilities or networks, as well as of any other changes that would affect the interoperability of those facilities and networks.

(6) Collocation

The duty to provide, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier, except that the carrier may provide for virtual collocation if the local exchange carrier demonstrates to the State commission that physical collocation is not practical for technical reasons or because of space limitations.

(d) Implementation

(1) In general

Within 6 months after February 8, 1996, the Commission shall complete all actions necessary to establish regulations to implement the requirements of this section.

(2) Access standards

In determining what network elements should be made available for purposes of subsection (c)(3), the Commission shall consider, at a minimum, whether—

(A) access to such network elements as are proprietary in nature is necessary; and

(B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.

(3) Preservation of State access regulations

In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that—

(A) establishes access and interconnection obligation of local exchange carriers;

(B) is consistent with the requirements of this section; and

(C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.

(e) Numbering administration

(1) Commission authority and jurisdiction

The Commission shall create or designate one or more impartial entities to administer telecommunications numbering and to make such numbers available on an equitable basis. The Commission shall have exclusive jurisdiction over those portions of the North American Numbering Plan that pertain to the United States. Nothing in this paragraph shall preclude the Commission from delegating to State commissions or other entities all or any portion of such jurisdiction.

(2) Costs

The cost of establishing telecommunications numbering administration arrangements and number portability shall be borne by all telecommunications carriers on a competitively neutral basis as determined by the Commission.

(f) Exemptions, suspensions, and modifications

(1) Exemption for certain rural telephone companies

(A) Exemption

Subsection (c) of this section shall not apply to a rural telephone company until (i) such company has received a bona fide request for interconnection, services, or network elements, and (ii) the State commission determines (under subparagraph (B)) that such request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 of this title (other than subsections (b)(7) and (c)(1)(D) thereof).

(B) State termination of exemption and implementation schedule

The party making a bona fide request of a rural telephone company for interconnection, services, or network elements shall submit a notice of its request to the State commission. The State commission shall conduct an inquiry for the purpose of determining whether to terminate the exemption under subparagraph (A). Within 120 days after the State commission receives notice of the request, the State commission shall terminate the exemption if the request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 of this title (other than subsections (b)(7) and (c)(1)(D) thereof). Upon termination of the exemption, a State commission shall establish an implementation schedule for compliance with the request that is consistent in time and manner with Commission regulations.

(C) Limitation on exemption

The exemption provided by this paragraph shall not apply with respect to a request under subsection (c) of this section, from a cable operator providing video programming, and seeking to provide any telecommunications service, in the area in which the rural telephone company provides video programming. The limitation contained in this subparagraph shall not apply to a rural telephone company that is providing video programming on February 8, 1996.

(2) Suspensions and modifications for rural carriers

A local exchange carrier with fewer than 2 percent of the Nation's subscriber lines installed in the aggregate nationwide may petition a State commission for a suspension or modification of the application of a requirement or requirements of subsection (b) or (c) of this section to telephone exchange service facilities specified in such petition. The State commission shall grant such petition to the extent that, and for such duration as, the State commission determines that such suspension or modification—

(A) is necessary—

(i) to avoid a significant adverse economic impact on users of telecommunications services generally;

(ii) to avoid imposing a requirement that is unduly economically burdensome; or

(iii) to avoid imposing a requirement that is technically infeasible; and

(B) is consistent with the public interest, convenience, and necessity.

The State commission shall act upon any petition filed under this paragraph within 180 days after receiving such petition. Pending such action, the State commission may suspend enforcement of the requirement or requirements to which the petition applies with respect to the petitioning carrier or carriers.

(g) Continued enforcement of exchange access and interconnection requirements

On and after February 8, 1996, each local exchange carrier, to the extent that it provides wireline services, shall provide exchange access, information access, and exchange services for such access to interexchange carriers and information service providers in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier on the date immediately preceding February 8, 1996 under any court order, consent decree, or regulation, order, or policy of the Commission, until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after February 8, 1996. During the period beginning on February 8, 1996 and until such restrictions and obligations are so superseded, such restrictions and obligations shall be enforceable in the same manner as regulations of the Commission.

(h) Definition of incumbent local exchange carrier

(1) Definition

For purposes of this section, the term "incumbent local exchange carrier" means, with respect to an area, the local exchange carrier that—

(A) on February 8, 1996, provided telephone exchange service in such area; and

(B) (i) on February 8, 1996, was deemed to be a member of the exchange carrier association pursuant to section 69.601(b) of the Commission's regulations (47 C.F.R. 69.601(b)); or

(ii) is a person or entity that, on or after February 8, 1996, became a successor or assign of a member described in clause (i).

(2) Treatment of comparable carriers as incumbents

The Commission may, by rule, provide for the treatment of a local exchange carrier (or class or category thereof) as an incumbent local exchange carrier for purposes of this section if—

(A) such carrier occupies a position in the market for telephone exchange service within an area that is comparable to the position occupied by a carrier described in paragraph (1);

(B) such carrier has substantially replaced an incumbent local exchange carrier described in paragraph (1); and

(C) such treatment is consistent with the public interest, convenience, and necessity and the purposes of this section.

(i) Savings provision

Nothing in this section shall be construed to limit or otherwise affect the Commission's authority under section 201 of this title.

§ 252. Procedures for negotiations, arbitration, and approval of agreements

(a) Agreements arrived at through negotiation

(1) Voluntary negotiations

Upon receiving a request for interconnection, services, or network elements pursuant to section 251, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251 of this title. The agreement shall include a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement. The agreement, including any interconnection agreement negotiated before February 8, 1996, shall be submitted to the State commission under subsection (e) of this section.

(2) Mediation

Any party negotiating an agreement under this section may, at any point in the negotiation, ask a State commission to participate in the negotiation and to mediate any differences arising in the course of the negotiation.

(b) Agreements arrived at through compulsory arbitration

(1) Arbitration

During the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues.

(2) Duty of petitioner

(A) A party that petitions a State commission under paragraph (1) shall, at the same time as it submits

the petition, provide the State commission all relevant documentation concerning—

(i) the unresolved issues;

(ii) the position of each of the parties with respect to those issues; and

(iii) any other issue discussed and resolved by the parties.

(B) A party petitioning a State commission under paragraph (1) shall provide a copy of the petition and any documentation to the other party or parties not later than the day on which the State commission receives the petition.

(3) Opportunity to respond

A non-petitioning party to a negotiation under this section may respond to the other party's petition and provide such additional information as it wishes within 25 days after the State commission receives the petition.

(4) Action by State commission

(A) The State commission shall limit its consideration of any petition under paragraph (1) (and any response thereto) to the issues set forth in the petition and in the response, if any, filed under paragraph (3).

(B) The State commission may require the petitioning party and the responding party to provide such information as may be necessary for the State commission to reach a decision on the unresolved issues. If any party refuses or fails unreasonably to respond on a timely basis to any reasonable request from the State commission, then the State commission may proceed on the basis of the best information available to it from whatever source derived.

(C) The State commission shall resolve each issue set forth in the petition and the response, if any, by imposing appropriate conditions as required to implement

subsection (c) of this section upon the parties to the agreement, and shall conclude the resolution of any unresolved issues not later than 9 months after the date on which the local exchange carrier received the request under this section.

(5) Refusal to negotiate

The refusal of any other party to the negotiation to participate further in the negotiations, to cooperate with the State commission in carrying out its function as an arbitrator, or to continue to negotiate in good faith in the presence, or with the assistance, of the State commission shall be considered a failure to negotiate in good faith.

(c) Standards for arbitration

In resolving by arbitration under subsection (b) of this section any open issues and imposing conditions upon the parties to the agreement, a State commission shall—

(1) ensure that such resolution and conditions meet the requirements of section 251 of this title, including the regulations prescribed by the Commission pursuant to section 251 of this title;

(2) establish any rates for interconnection services, or network elements according to subsection (d) of this section; and

(3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

(d) Pricing standards

(1) Interconnection and network element charges

Determinations by a State commission of the just and reasonable rate for the interconnection of facilities and equipment for purposes of subsection (c)(2) of section 251 of this title, and the just and reasonable rate for network elements for purposes of subsection (c)(3) of such section—

(A) shall be—

(i) based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection of network element (whichever is applicable), and

(ii) nondiscriminatory, and

(B) may include a reasonable profit.

(2) Charges for transport and termination of traffic

(A) In general

For the purposes of compliance by an incumbent local exchange carrier with section 251(b)(5) of this title, a State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless—

(i) such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier; and

(ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls.

(B) Rules of construction

This paragraph shall not be construed—

(i) to preclude arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as bill-and-keep arrangements); or

(ii) to authorize the Commission or any State commission to engage in any rate regulation proceeding to establish with particularity the additional costs of transporting or terminating calls, or to require carriers to maintain records with respect to the additional costs of such calls.

(3) Wholesale prices for telecommunications services

For the purposes of section 251(c)(4) of this title, a State commission shall determine wholesale rates on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier.

(e) Approval by State commission

(1) Approval required

Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. A State commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies.

(2) Grounds for rejection

The State commission may only reject—

(A) an agreement (or any portion thereof) adopted by negotiation under subsection (a) of this section if it finds that—

(i) the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or

(ii) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity; or

(B) an agreement (or any portion thereof) adopted by arbitration under subsection (b) of this section if it finds that the agreement does not meet the requirements of section 251 of this title, including the regulations prescribed by the Commission pursuant to section 251 of this title, or the standards set forth in subsection (d) of this section.

(3) Preservation of authority

Notwithstanding paragraph (2), but subject to section 253 of this title nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

(4) Schedule for decision

If the State commission does not act to approve or reject the agreement within 90 days after submission by the parties of an agreement adopted by negotiation under subsection (a) of this section, or within 30 days after submission by the parties of an agreement adopted by arbitration under subsection (b) of this section, the agreement shall be deemed approved. No State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section.

(5) Commission to act if State will not act

If a State commission fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the Commission shall issue an order preempting the State commission's jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission.

(6) Review of State commission actions

In a case in which a State fails to act as described in paragraph (5), the proceeding by the Commission under such paragraph and any judicial review of the Commission's actions shall be the exclusive remedies for a State commission's failure to act. In any case in which a State commission makes a determination under this section, any

party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section.

(f) Statements of generally available terms

(1) In general

A Bell operating company may prepare and file with a State commission a statement of the terms and conditions that such company generally offers within that State to comply with the requirements of section 251 of this title and the regulations thereunder and the standards applicable under this section.

(2) State commission review

A State commission may not approve such statement unless such statement complies with subsection (d) of this section and section 251 of this title and the regulations thereunder. Except as provided in section 253 of this title nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of such statement, including requiring compliance with intrastate telecommiunications service quality standards or requirements.

(3) Schedule for review

The State commission to which a statement is submitted shall, not later than 60 days after the date of such submission—

(A) complete the review of such statement under paragraph (2) (including any reconsideration thereof), unless the submitting carrier agrees to an extension of the period for such review; or

(B) permit such statement to take effect.

(4) Authority to continue review

Paragraph (3) shall not preclude the State commission from continuing to review a statement that has been permitted to take effect under subparagraph (B) of such paragraph or from approving or disapproving such statement under paragraph (2).

(5) Duty to negotiate not affected

The submission or approval of a statement under this subsection shall not relieve a Bell operating company of its duty to negotiate the terms and conditions of an agreement under section 251 of this title.

(g) Consolidation of State proceedings

Where not inconsistent with the requirements of this chapter a State commission may, to the extent practical, consolidate proceedings under sections 214(e), 251(f), and 253, of this title, and this section in order to reduce administrative burdens on telecommunications carriers, other parties to the proceedings, and the State commission in carrying out its responsibilities under this chapter.

(h) Filing required

A State commission shall make a copy of each agreement approved under subsection (e) of this section and each statement approved under subsection (f) of this section available for public inspection and copying within 10 days after the agreement or statement is approved. The State commission may charge a reasonable and nondiscriminatory fee to the parties to the agreement or to the party filing the statement to cover the costs of approving and filing such agreement or statement.

(i) Availability to other telecommunications carriers

A local exchange carrier shall make available any interconnection, service, or network element provided under an

agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

(j) Definition of incumbent local exchange carrier

For purposes of this section, the term "incumbent local exchange carrier" has the meaning provided in section 251(h) of this title.

§ 253. Removal of barriers to entry

(a) In general

No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

(b) State regulatory authority

Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this section, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

(c) State and local government authority

Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

(d) Preemption

If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b) of this section, the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

(e) Commercial mobile service providers

Nothing in this section shall affect the application of section 332(c)(3) of this title to commercial mobile service providers.

(f) Rural markets

It shall not be a violation of this section for a State to require a telecommunications carrier that seeks to provide telephone exchange service or exchange access in a service area served by a rural telephone company to meet the requirements in section 214(e)(1) of this title for designation as an eligible telecommunications carrier for that area before being permitted to provide such service. This subsection shall not apply—

(1) to a service area served by a rural telephone company that has obtained an exemption, suspension, or modification of section 251(c)(4) of this title that effectively prevents a competitor from meeting the requirements of section 214(e)(1) of this title; and

(2) to a provider of commercial mobile services.

§ 254. Universal service

(a) Procedures to review universal service requirements

(1) Federal-State Joint Board on universal service

Within one month after February 8, 1996, the Commission shall institute and refer to a Federal-State Joint Board under section 410(c) of this title a proceeding to recommend changes to any of its regulations in order to implement sections 214(e) of this title and this section, including the definition of the services that are supported by Federal universal service support mechanisms and a specific timetable for completion of such recommendations. In addition to the members of the Joint Board required under section 410(c) of the title, one member of such Joint Board shall be a State-appointed utility consumer advocate nominated by a national organization of State utility consumer advocates. The Joint Board shall, after notice and opportunity for public comment, make its recommendations to the Commission 9 months after February 8, 1996.

(2) Commission action

The Commission shall initiate a single proceeding to implement the recommendations from the Joint Board required by paragraph (1) and shall complete such proceeding within 15 months after February 8, 1996. The rules established by such proceeding shall include a definition of the services that are supported by Federal universal service support mechanisms and a specific timetable for implementation. Thereafter, the Commission shall complete any proceeding to implement subsequent recommendations from any Joint Board on universal service within one year after receiving such recommendations.

(b) Universal service principles

The Joint Board and the Commission shall base policies for the preservation and advancement of universal service on the following principles:

(1) Quality and rates

Quality services should be available at just, reasonable, and affordable rates.

(2) Access to advanced services

Access to advanced telecommunications and information services should be provided in all regions of the Nation.

(3) Access in rural and high cost areas

Consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information services, including interexchange services and advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas.

(4) Equitable and nondiscriminatory contribution

All providers of telecommunications services should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service.

(5) Specific and predictable support mechanisms

There should be specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service.

(6) Access to advanced telecommunications services for schools, health care, and libraries

Elementary and secondary schools and classrooms, health care providers, and libraries should have access to advanced telecommunications services as described in subsection (h) of this section.

(7) Additional principles

Such other principles as the Joint Board and the Commission determine are necessary and appropriate for the protection of the public interest, convenience, and necessity and are consistent with this chapter.

(c) Definition

(1) In general

Universal service is an evolving level of telecommunications services that the Commission shall establish periodically under this section, taking into account advances in telecommunications and information technologies and services. The Joint Board in recommending, and the Commission in establishing, the definition of the services that are supported by Federal universal service support mechanisms shall consider the extent to which such telecommunications services—

(A) are essential to education, public health, or public safety;

(B) have, through the operation of market choices by customers, been subscribed to by a substantial majority of residential customers;

(C) are being deployed in public telecommunications networks by telecommunications carriers; and

(D) are consistent with the public interest convenience, and necessity.

(2) Alterations and modifications

The Joint Board may, from time to time, recommend to the Commission modifications in the definition of the services that are supported by Federal universal service support mechanisms.

(3) Special services

In addition to the services included in the definition of universal service under paragraph (1), the Commission

may designate additional services for such support mechanisms for schools, libraries, and health care providers for the purposes of subsection (h) of this section.

(d) Telecommunications carrier contribution

Every telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service. The Commission may exempt a carrier or class of carriers from this requirement if the carrier's telecommunications activities are limited to such an extent that the level of such carrier's contribution to the preservation and advancement of universal service would be de minimis. Any other provider of interstate telecommunications may be required to contribute to the preservation and advancement of universal service if the public interest so requires.

(e) Universal service support

After the date on which Commission regulations implementing this section take effect, only an eligible telecommunications carrier designated under section 214(e) of this title shall be eligible to receive specific Federal universal service support. A carrier that receives such support shall use that support only for the provision, maintenance, and upgrading of facilities and services for which the support is intended. Any such support should be explicit and sufficient to achieve the purposes of this section.

(f) State authority

A State may adopt regulations not inconsistent with the Commission's rules to preserve and advance universal service. Every telecommunications carrier that provides intrastate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, in a manner determined by the State to the preservation and advance-

ment of universal service in that State. A State may adopt regulations to provide for additional definitions and standards to preserve and advance universal service within that State only to the extent that such regulations adopt additional specific, predictable, and sufficient mechanisms to support such definitions or standards that do not rely on or burden Federal universal service support mechanisms.

(g) Interexchange and interstate services

Within 6 months after February 8, 1996, the Commission shall adopt rules to require that the rates charged by providers of interexchange telecommunications services to subscribers in rural and high cost areas shall be no higher than the rates charged by each such provider to its subscribers in urban areas. Such rules shall also require that a provider of interstate interexchange telecommunications services shall provide such services to its subscribers in each State at rates no higher than the rates charged to its subscribers in any other State.

(h) Telecommunications services for certain providers

(1) In general

(A) Health care providers for rural areas

A telecommunications carrier shall, upon receiving a bona fide request, provide telecommunications services which are necessary for the provision of health care services in a State, including instruction relating to such services, to any public or nonprofit health care provider that serves persons who reside in rural areas in that State at rates that are reasonably comparable to rates charged for similar services in urban areas in that State. A telecommunications carrier providing service under this paragraph shall be entitled to have an amount equal to the difference, if any, between the rates for services provided

to health care providers for rural areas in a State and the rates for similar services provided to other customers in comparable rural areas in that State treated as a service obligation as a part of its obligation to participate in the mechanisms to preserve and advance universal service.

(B) Educational providers and libraries

All telecomunications carriers serving a geographic area shall, upon a bona fide request for any of its services that are within the definition of universal service under subsection (c)(3) of this section, provide such services to elementary schools, secondary schools, and libraries for educational purposes at rates less than the amounts charged for similar services to other parties. The discount shall be an amount that the Commission, with respect to interstate services, and the States, with respect to intrastate services, determine is appropriate and necessary to ensure affordable access to and use of such services by such entities. A telecommunications carrier providing service under this paragraph shall

(i) have an amount equal to the amount of the discount treated as an offset to its obligation to contribute to the mechanisms to preserve and advance universal service, or

(ii) notwithstanding the provisions of subsection (e) of this section, receive reimbursement utilizing the support mechanisms to preserve and advance universal service.

(2) Advanced services

The Commission shall establish competitively neutral rules—

(A) to enhance, to the extent technically feasible and economically reasonable, access to advanced telecommunications and information services for all public and nonprofit elementary and secondary school classrooms, health care providers, and libraries; and

(B) to define the circumstances under which a telecommunications carrier may be required to connect its network to such public institutional telecommunications users.

(3) Terms and conditions

Telecommunications services and network capacity provided to a public institutional telecommunications user under this subsection may not be sold, resold, or otherwise transferred by such user in consideration for money or any other thing of value.

(4) Eligibility of users

No entity listed in this subsection shall be entitled to preferential rates or treatment as required by this subsection, if such entity operates as a for-profit business, is a school described in paragraph (5)(A) with an endowment of more than $50,000,000, or is a library or library consortium not eligible for assistance from a State library administrative agency under the Library Services and Technology Act [20 U.S.C.A. § 9121 *et seq.*].

(5) Definitions

For purposes of this subsection:

(A) Elementary and secondary schools

The term "elementary and secondary schools" means elementary schools and secondary schools, as defined in paragraphs (14) and (25), respectively, of section 8801 of Title 20.

(B) Health care provider

The term "health care provider" means—

(i) post-secondary educational institutions offering health care instruction, teaching hospitals, and medical schools;

(ii) community health centers or health centers providing health care to migrants;

(iii) local health departments or agencies;

(iv) community mental health centers;

(v) not-for-profit hospitals;

(vi) rural health clinics; and

(vii) consortia of health care providers consisting of one or more entities described in clauses (i) through (vi).

(C) Public institutional telecommunications user

The term "public institutional telecommunications user" means an elementary or secondary school, a library, or a health care provider as those terms are defined in this paragraph.

(i) Consumer protection

The Commission and the States should ensure that universal service is available at rates that are just, reasonable, and affordable.

(j) Lifetime Assistance

Nothing in this section shall affect the collection, distribution, or administration of the Lifeline Assistance Program provided for by the Commission under regulations set forth in section 69.117 of title 47, Code of Federal Regulations, and other related sections of such title.

(k) Subsidy of competitive services prohibited

A telecommunications carrier may not use services that are not competitive to subsidize services that are subject to competition. The Commission, with respect to interstate services, and the States, with respect to intrastate services, shall establish any necessary cost allocation rules, accounting safeguards, and guidelines to ensure that services included in the definition of universal service bear no more than a reasonable share of the joint and common costs of facilities used to provide those services.

* * * *

§ 261. Effect on other requirements

(a) Commission regulations

Nothing in this part shall be construed to prohibit the Commission from enforcing regulations prescribed prior to February 8, 1996, in fulfilling the requirements of this part, to the extent that such regulations are not inconsistent with the provisions of this part.

(b) Existing State regulations

Nothing in this part shall be construed to prohibit any State commission from enforcing regulations prescribed prior to February 8, 1996, or from prescribing regulations after such date of enactment, in fulfilling the requirements of this part, if such regulations are not inconsistent with the provisions of this part.

(c) Additional State requirements

Nothing in this part precludes a State from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the State's requirements are not inconsistent with this part or the Commission's regulations to implement this part.

* * * *

§ 271. Bell operating company entry into interLATA services

(a) General limitation

Neither a Bell operating company, nor any affiliate of a Bell operating company, may provide interLATA services except as provided in this section.

(b) InterLATA services to which this section applies

(1) In-region services

Bell operating company, or any affiliate of that Bell operating company, may provide interLATA services originating in any of its in-region States (as defined in subsection (i) of this section) if the Commission approves the application of such company for such State under subsection (d)(3) of this section.

(2) Out-of-region services

A Bell operating company, or any affiliate of that Bell operating company, may provide interLATA services originating outside its in-region States after February 8, 1996, subject to subsection (j) of this section.

(3) Incidental interLATA services

A Bell operating company, or any affiliate of a Bell operating company, may provide incidental interLATA services (as defined in subsection (g) of this section) originating in any State after February 8, 1996.

(4) Termination

Nothing in this section prohibits a Bell operating company or any of its affiliates from providing termi-

nation for interLATA services, subject to subsection (j) of this section.

(c) Requirements for providing certain in-region interLATA services

(1) Agreement or statement

A Bell operating company meets the requirements of this paragraph if it meets the requirements of subparagraph (A) or subparagraph (B) of this paragraph for each State for which the authorization is sought.

(A) Presence of a facilities-based competitor

A Bell operating company meets the requirements of this subparagraph if it has entered into one or more binding agreements that have been approved under section 252 of this title specifying the terms and conditions under which the Bell operating company is providing access and interconnection to its network facilities for the network facilities of one or more unaffiliated competing providers of telephone exchange service (as defined in section 153(47)(A) of this title, but excluding exchange access) to residential and business subscribers. For the purpose of this subparagraph, such telephone exchange service may be offered by such competing providers either exclusively over their own telephone exchange service facilities or predominantly over their own telephone exchange service facilities in combination with the resale of the telecommunications services of another carrier. For the purpose of this subparagraph, services provided pursuant to subpart K of part 22 of the Commission's regulations (47 C.F.R. 22.901 *et seq.*) shall not be considered to be telephone exchange services.

(B) Failure to request access

A Bell operating company meets the requirements of this subparagraph if, after 10 months after February 8, 1996, no such provider has requested the access and interconnection described in subparagraph (A) before the date which is 3 months before the date the company makes its application under subsection (d)(1) of this section, and a statement of the terms and conditions that the company generally offers to provide such access and interconnection has been approved or permitted to take effect by the State commission under section 252(f) of this title. For purposes of this subparagraph, a Bell operating company shall be considered not to have received any request for access and interconnection if the State commission of such State certifies that the only provider or providers making such a request have (i) failed to negotiate in good faith as required by section 252 of this title, or (ii) violated the terms of an agreement approved under section 252 of this title by the provider's failure to comply, within a reasonable period of time, with the implementation schedule contained in such agreement.

(2) Specific interconnection requirements

(A) Agreement required

A Bell operating company meets the requirements of this paragraph if, within the State for which the authorization is sought—

(i)(I) such company is providing access and interconnection pursuant to one or more agreements described in paragraph (1)(A), or

(II) such company is generally offering access and interconnection pursuant to a

statement described in paragraph (1)(B), and

(ii) such access and interconnection meets the requirements of subparagraph (B) of this paragraph.

(B) Competitive checklist

Access or interconnection provided or generally offered by a Bell operating company to other telecommunications carriers meets the requirements of this subparagraph if such access and interconnection includes each of the following:

(i) Interconnection in accordance with the requirements of sections 251(c)(2) and 252(d)(1) of this title.

(ii) Nondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1) of this title.

(iii) Nondiscriminatory access to the poles, ducts, conduits, and rights-of-way owned or controlled by the Bell operating company at just and reasonable rates in accordance with the requirements of section 224 of this title.

(iv) Local loop transmission from the central office to the customer's premises, unbundled from local switching or other services.

(v) Local transport from the trunk side of a wireline local exchange carrier switch unbundled from switching or other services.

(vi) Local switching unbundled from transport, local loop transmission, or other services.

(vii) Nondiscriminatory access to—

(I) 911 and E911 services;

(II) directory assistance services to allow the other carrier's customers to obtain telephone numbers; and

(III) operator call completion services.

(viii) White pages directory listings for customers of the other carrier's telephone exchange service.

(ix) Until the date by which telecommunications numbering administration guidelines, plan, or rules are established, nondiscriminatory access to telephone numbers for assignment to the other carrier's telephone exchange service customers. After that date, compliance with such guidelines, plan, or rules.

(x) Nondiscriminatory access to databases and associated signaling necessary for call routing and completion.

(xi) Until the date by which the Commission issues regulations pursuant to section 251 of this title to require number portability, interim telecommunications number portability through remote call forwarding, direct inward dialing trunks, or other comparable arrangements, with as little impairment of functioning, quality, reliability, and convenience as possible. After that date, full compliance with such regulations.

(xii) Nondiscriminatory access to such services or information as are necessary to allow the requesting carrier to implement

local dialing parity in accordance with the requirements of section 251(b)(3) of this title.

(xiii) Reciprocal compensation arrangements in accordance with the requirements of section 252(d)(2) of this title.

(xiv) Telecommunications services are available for resale in accordance with the requirements of sections 251(c)(4) and 252(d)(3) of this title.

(d) Administrative provisions

(1) Application to commission

On and after February 8, 1996, a Bell operating company or its affiliate may apply to the Commission for authorization to provide interLATA services originating in any in-region State. The application shall identify each State for which the authorization is sought.

(2) Consultation

(A) Consultation with the Attorney General

The Commission shall notify the Attorney General promptly of any application under paragraph (1). Before making any determination under this subsection, the Commission shall consult with the Attorney General, and if the Attorney General submits any comments in writing, such comments shall be included in the record of the Commission's decision. In consulting with and submitting comments to the Commission under this paragraph, the Attorney General shall provide to the Commission an evaluation of the application using any standard the Attorney General considers appropriate. The Commission shall give substantial weight to the Attor-

ney General's evaluation, but such evaluation shall not have any preclusive effect on any Commission decision under paragraph (3).

(B) Consultation with State commissions

Before making any determination under this subsection, the Commission shall consult with the State commission of any State that is the subject of the application in order to verify the compliance of the Bell operating company with the requirements of subsection (c) of this section.

(3) Determination

Not later than 90 days after receiving an application under paragraph (1), the Commission shall issue a written determination approving or denying the authorization requested in the application for each State. The Commission shall not approve the authorization requested in an application submitted under paragraph (1) unless it finds that—

(A) the petitioning Bell operating company has met the requirements of subsection (c)(1) of this section and—

(i) with respect to access and interconnection provided pursuant to subsection (c)(1)(A) of this section, has fully implemented the competitive checklist in subsection (c)(2)(B) of this section; or

(ii) with respect to access and interconnection generally offered pursuant to a statement under subsection (c)(1)(B) of this section, such statement offers all of the items included in the competitive checklist in subsection (c)(2)(B) of this section;

(B) the requested authorization will be carried out in accordance with the requirements of section 272 of this title; and

(C) the requested authorization is consistent with the public interest, convenience, and necessity.

The Commission shall state the basis for its approval or denial of the application.

(4) Limitation on Commission

The Commission may not, by rule or otherwise, limit or extend the terms used in the competitive checklist set forth in subsection (c)(2)(B) of this section.

(5) Publication

Not later than 10 days after issuing a determination under paragraph (3), the Commission shall publish in the Federal Register a brief description of the determination.

(6) Enforcement of conditions

(A) Commission authority

If at any time after the approval of an application under paragraph (3), the Commission determines that a Bell operating company has ceased to meet any of the conditions required for such approval, the Commission may, after notice and opportunity for a hearing—

(i) issue an order to such company to correct the deficiency;

(ii) impose a penalty on such company pursuant to title V; or

(iii) suspend or revoke such approval.

(B) Receipt and review of complaints

The Commission shall establish procedures for the review of complaints concerning failures by Bell operating companies to meet conditions required for approval under paragraph (3). Unless the parties otherwise agree, the Commission shall act on such complaint within 90 days.

(e) Limitations

(1) Joint marketing of local and long distance services

Until a Bell operating company is authorized pursuant to subsection (d) of this section to provide interLATA services in an in-region State, or until 36 months have passed since February 8, 1996, whichever is earlier, a telecommunications carrier that serves greater than 5 percent of the Nation's presubscribed access lines may not jointly market in such State telephone exchange service obtained from such company pursuant to section 251(c)(4) of this title with interLATA services offered by that telecommunications carrier.

(2) IntraLATA toll dialing parity

(A) Provision required

A Bell operating company granted authority to provide interLATA services under subsection (d) of this section shall provide intraLATA toll dialing parity throughout that State coincident with its exercise of that authority.

(B) Limitation

Except for single-LATA States and States that have issued an order by December 19, 1995, requiring a Bell operating company to implement intraLATA toll dialing parity, a State may not require a Bell operating company to implement intraLATA toll dialing parity in that State

before a Bell operating company has been granted authority under this section to provide interLATA services originating in that State or before 3 years after February 8, 1996, whichever is earlier. Nothing in this subparagraph precludes a State from issuing an order requiring intraLATA toll dialing parity in that State prior to either such date so long as such order does not take effect until after the earlier of either such dates.

(f) Exception for previously authorized activities

Neither subsection (a) of this section nor section 273 of this title shall prohibit a Bell operating company or affiliate from engaging, at any time after February 8, 1996, in any activity to the extent authorized by, and subject to the terms and conditions contained in, an order entered by the United States District Court for the District of Columbia pursuant to section VII or VIII(C) of the AT&T Consent Decree if such order was entered on or before February 8, 1996, to the extent such order is not reversed or vacated on appeal. Nothing in this subsection shall be construed to limit, or to impose terms or conditions on, an activity in which a Bell operating company is otherwise authorized to engage under any other provision of this section.

(g) Definition of incidental interLATA services

For purposes of this section, the term "incidental interLATA services" means the interLATA provision by a Bell operating company or its affiliate—

(1)(A) of audio programming, video programming, or other programming services to subscribers to such services of such company or affiliate;

(B) of the capability for interaction by such subscribers to select or respond to such audio program-

ming, video programming, or other programming services;

(C) to distributors of audio programming or video programming that such company or affiliate owns or controls, or is licensed by the copyright owner of such programming (or by an assignee of such owner) to distribute; or

(D) of alarm monitoring services;

(2) of two-way interactive video services or Internet services over dedicated facilities to or for elementary and secondary schools as defined in section 254(h)(5) of this title;

(3) of commercial mobile services in accordance with section 332(c) of this title and with the regulations prescribed by the Commission pursuant to paragraph (8) of such section;

(4) of a service that permits a customer that is located in one LATA to retrieve stored information from, or file information for storage in, information storage facilities of such company that are located in another LATA;

(5) of signaling information used in connection with the provision of telephone exchange services or exchange access by a local exchange carrier; or

(6) of network control signaling information to, and receipt of such signaling information from, common carriers offering interLATA services at any location within the area in which such Bell operating company provides telephone exchange services or exchange access.

(h) Limitations

The provisions of subsection (g) of this section are intended to be narrowly constued. The interLATA services provided under subparagraph (A), (B), or (C) of sub-

section (g)(1) of this section are limited to those inter-LATA transmissions incidental to the provision by a Bell operating company or its affiliate of video, audio, and other programming services that the company or its affiliate is engaged in providing to the public. The Commission shall ensure that the provision of services authorized under subsection (g) of this section by a Bell operating company or its affiliate will not adversely affect telephone exchange service ratepayers or competition in any telecommunications market.

(i) Additional definitions

As used in this section—

(1) In-region State

The term "in-region State" means a State in which a Bell operating company or any of its affiliates was authorized to provide wireline telephone exchange service pursuant to the reorganization plan approved under the AT&T Consent Decree, as in effect on the day before February 8, 1996.

(2) Audio programming services

The term "audio programming services" means programming provided by, or generally considered to be comparable to programming provided by, a radio broadcast station.

(3) Video programming services; other programming services

The terms "video programming service" and "other programming services" have the same meanings as such terms have under section 522 of this title.

(j) Certain service applications treated as in-region service applications

For purposes of this section, a Bell operating company application to provide 800 service, private line service, or their equivalents that—

(1) terminate in an in-region State of that Bell operating company, and

(2) allow the called party to determine the interLATA carrier,

shall be considered an in-region service subject to the requirements of subsection (b)(1) of this section.

* * * *

§ 276. Provision of payphone service

(a) Nondiscrimination safeguards

After the effective date of the rules prescribed pursuant to subsection (b) of this section, any Bell operating company that provides payphone service—

(1) shall not subsidize its payphone service directly or indirectly from its telephone exchange service operations or its exchange access operations; and

(2) shall not prefer or discriminate in favor of its payphone service.

(b) Regulations

(1) Contents of regulations

In order to promote competition among payphone service providers and promote the widespread deployment of payphone services to the benefit of the general public, within 9 months after February 8, 1996, the Commission shall take all actions necessary (including any reconsideration) to prescribe regulations that—

(A) establish a per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone, except that emergency calls and telecommunications relay service calls for hearing disabled individuals shall not be subject to such compensation;

(B) discontinue the intrastate and interstate carrier access charge payphone service elements and payments in effect on such date of enactment, and all intrastate and interstate payphone subsidies from basic exchange and exchange ac-

cess revenues, in favor of a compensation plan as specified in subparagraph (A);

(C) prescribe a set of nonstructural safeguards for Bell operating company payphone service to implement the provisions of paragraphs (1) and (2) of subsection (a) of this section, which safeguards shall, at a minimum, include the nonstructural safeguards equal to those adopted in the Computer Inquiry-III (CC Docket No. 90-623) proceeding;

(D) provide for Bell operating company payphone service providers to have the same right that independent payphone providers have to negotiate with the location provider on the location provider's selecting and contracting with, and, subject to the terms of any agreement with the location provider, to select and contract with, the carriers that carry interLATA calls from their payphones, unless the Commission determines in the rulemaking pursuant to this section that it is not in the public interest; and

(E) provide for all payphone service providers to have the right to negotiate with the location provider on the location provider's selecting and contracting with, and, subject to the terms of any agreement with the location provider, to select and contract with, the carriers that carry intraLATA calls from their payphones.

(2) Public interest telephones

In the rulemaking conducted pursuant to paragraph (1), the Commission shall determine whether public interest payphones, which are provided in the interest of public health, safety, and welfare, in locations where there would otherwise not be a payphone,

should be maintained, and if so, ensure that such public interest payphones are supported fairly and equitably.

(3) Existing contracts

Nothing in this section shall affect any existing contracts between location providers and payphone service providers or interLATA or intraLATA carriers that are in force and effect as of February 8, 1996.

(c) State preemption

To the extent that any State requirements are inconsistent with the Commission's regulations, the Commission's regulations on such matters shall preempt such State requirements.

(d) Definition

As used in this section, the term "payphone service" means the provision of public or semi-public pay telephones, the provision of inmate telephone service in correctional institutions, and any ancillary services.

§ 543. Regulation of rates

* * * *

(b) Establishment of basic service tier rate regulations

(1) Commission obligation to subscribers

The Commission shall, by regulation, ensure that the rates for the basic service tier are reasonable. Such regulations shall be designed to achieve the goal of protecting subscribers of any cable system that is not subject to effective competition from rates for the basic service tier that exceed the rates that would be charged for the basic service tier if such cable system were subject to effective competition.

(2) Commission regulations

Within 180 days after October 5, 1992, the Commission shall prescribe, and periodically thereafter revise, regulations to carry out its obligations under paragraph (1). In prescribing such regulations, the Commission—

(A) shall seek to reduce the administrative burdens on subscribers, cable operators, franchising authorities, and the Commission;

(B) may adopt formulas or other mechanisms and procedures in complying with the requirements of subparagraph (A); and

(C) shall take into account the following factors:

(i) the rates for cable systems, if any, that are subject to effective competition;

(ii) the direct costs (if any) of obtaining, transmitting, and otherwise providing signals carried on the basic service tier, including signals and services carried on the

basic service tier pursuant to paragraph (7)(B), and changes in such costs;

(iii) only such portion of the joint and common costs (if any) of obtaining, transmitting, and otherwise providing such signals as is determined, in accordance with regulations prescribed by the Commission, to be reasonably and properly allocable to the basic service tier, and changes in such costs;

(iv) the revenues (if any) received by a cable operator from advertising from programming that is carried as part of the basic service tier or from other consideration obtained in connection with the basic service tier;

(v) the reasonably and properly allocable portion of any amount assessed as a franchise fee, tax, or charge of any kind imposed by any State or local authority on the transactions between cable operators and cable subscribers or any other fee, tax, or assessment of general applicability imposed by a governmental entity applied against cable operators or cable subscribers;

(vi) any amount required, in accordance with paragraph (4), to satisfy franchise requirements to support public, educational, or governmental channels or the use of such channels or any other services required under the franchise; and

(vii) a reasonable profit, as defined by the Commission consistent with the Commission's obligations to subscribers under paragraph (1).

(3) Equipment

The regulations prescribed by the Commission under this subsection shall include standards to establish, on the basis of actual cost, the price or rate for—

(A) installation and lease of the equipment used by subscribers to receive the basic service tier, including a converter box and a remote control unit and, if requested by the subscriber, such addressable converter box or other equipment as is required to access programming described in paragraph (8); and

(B) installation and monthly use of connections for additional television receivers.

(4) Costs of franchise requirements

The regulations prescribed by the Commission under this subsection shall include standards to identify costs attributable to satisfying franchise requirements to support public, educational, and governmental channels or the use of such channels or any other services required under the franchise.

(5) Implementation and enforcement

The regulations prescribed by the Commission under this subsection shall include additional standards, guidelines, and procedures concerning the implementation and enforcement of such regulations, which shall include—

(A) procedures by which cable operators may implement and franchising authorities may enforce the regulations prescribed by the Commission under this subsection;

(B) procedures for the expeditious resolution of disputes between cable operators and franchising authorities concerning the administration of such regulations;

(C) standards and procedures to prevent unreasonable charges for changes in the subscriber's selection of services or equipment subject to regulation under this section, which standards shall require that charges for changing the service tier selected shall be based on the cost of such change and shall not exceed nominal amounts when the system's configuration permits changes in service tier selection to be effected solely by coded entry on a computer terminal or by other similarly simple method; and

(D) standards and procedures to assure that subscribers receive notice of the availability of the basic service tier required under this section.

(6) Notice

The procedures prescribed by the Commission pursuant to paragraph (5)(A) shall require a cable operator to provide 30 days' advance notice to a franchising authority of any increase proposed in the price to be charged for the basic service tier.

(7) Components of basic tier subject to rate regulation

(A) Minimum contents

Each cable operator of a cable system shall provide its subscribers a separately available basic service tier to which subscription is required for access to any other tier of service. Such basic service tier shall, at a minimum, consist of the following:

(i) All signals carried in fulfillment of the requirements of sections 534 and 535 of this title.

(ii) Any public, educational, and governmental access programming required by

the franchise of the cable system to be provided to subscribers.

(iii) Any signal of any television broadcast station that is provided by the cable operator to any subscriber, except a signal which is secondarily transmitted by a satellite carrier beyond the local service area of such station.

(B) Permitted additions to basic tier

A cable operator may add additional video programming signals or services to the basic service tier. Any such additional signals or services provided on the basic service tier shall be provided by subscribers at rates determined under the regulations prescribed by the Commission under this subsection.

(8) Buy-through of other tiers prohibited

(A) Prohibition

A cable operator may not require the subscription to any tier other than the basic service tier required by paragraph (7) as a condition of access to video programming offered on a per channel or per program basis. A cable operator may not discriminate between subscribers to the basic service tier and other subscribers with regard to the rates charged for video programming offered on a per channel or per program basis.

(B) Exception; limitation

The prohibition in subparagraph (A) shall not apply to a cable system that, by reason of the lack of addressable converter boxes or other technological limitations, does not permit the operator to offer programming on a per channel

or per program basis in the same manner required by subparagraph (A). This subparagraph shall not be available to any cable operator after—

(i) the technology utilized by the cable system is modified or improved in a way that eliminates such technological limitation; or

(ii) 10 years after October 5, 1992, subject to subparagraph (C).

(C) Waiver

If, in any proceeding initiated at the request of any cable operator, the Commission determines that compliance with the requirements of subparagraph (A) would require the cable operator to increase its rates, the Commission may, to the extent consistent with the public interest, grant such cable operator a waiver from such requirements for such specified period as the Commission determines reasonable and appropriate.

(c) Regulation of unreasonable rates

(1) Commission regulations

Within 180 days after October 5, 1992, the Commission shall, by regulation, establish the following:

(A) criteria prescribed in accordance with paragraph (2) for identifying, in individual cases, rates for cable programming services that are unreasonable;

(B) fair and expeditious procedures for the receipt, consideration, and resolution of complaints from any franchising authority (in accordance with paragraph (3)) alleging that a rate for

cable programming services charged by a cable operator violates the criteria prescribed under subparagraph (A), which procedures shall include the minimum showing that shall be required for a complaint to obtain Commission consideration and resolution of whether the rate in question is unreasonable; and

(C) the procedures to be used to reduce rates for cable programming services that are determined by the Commission to be unreasonable and to refund such portion of the rates or charges that were paid by subscribers after the filing of the first complaint filed with the franchising authority under paragraph (3) and that are determined to be unreasonable.

(2) Factors to be considered

In establishing the criteria for determining in individual cases whether rates for cable programming services are unreasonable under paragraph (1)(A), the Commission shall consider, among other factors—

(A) the rates for similarly situated cable systems offering comparable cable programming services, taking into account similarities in facilities, regulatory and governmental costs, the number of subscribers, and other relevant factors;

(B) the rates for cable systems, if any, that are subject to effective competition;

(C) the history of the rates for cable programming services of the system, including the relationship of such rates to changes in general consumer prices;

(D) the rates, as a whole, for all the cable programming, cable equipment, and cable services provided by the system, other than program-

ming provided on a per channel or per program basis;

(E) capital and operating costs of the cable system, including the quality and costs of the customer service provided by the cable system; and

(F) the revenues (if any) received by a cable operator from advertising from programming that is carried as part of the service for which a rate is being established, and changes in such revenues, or from other consideration obtained in connection with the cable programming services concerned.

(3) Review of rate changes

The Commission shall review any complaint submitted by a franchising authority after February 8, 1996, concerning an increase in rates for cable programming services and issue a final order within 90 days after it receives such a complaint, unless the parties agree to extend the period for such review. A franchising authority may not file a complaint under this paragraph unless, within 90 days after such increase becomes effective it receives subscriber complaints.

(4) Sunset of upper tier rate regulation

This subsection shall not apply to cable programming services provided after March 31, 1999.

PUBLIC LAW 104-104; February 8, 1996

TELECOMMUNICATIONS ACT OF 1996

* * * *

TITLE VI—EFFECT ON OTHER LAWS

§ 601. Applicability of Consent Decrees and Other Law.

* * * *

(c) Federal, State, and local law.—

(1) No implied effect.—This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments.

Nos. 97-826, 97-829, 97-830, 97-831, 97-1075,
97-1087, 97-1099 and 97-1141

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

AT&T CORP., *et al.*,
Petitioners,

v.

IOWA UTILITIES BOARD, *et al.*,
Respondents.

U S WEST, INC., *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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OPENING BRIEF OF RESPONDENT/CROSS-PETITIONER U S WEST, INC.

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May 18, 1998

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether the FCC violated the Communications Act of 1934, as amended by the Telecommunications Act of 1996 ("Act"), by requiring incumbent telephone companies to sell network services and capabilities as unbundled network elements under section 251(c)(3), even where an incumbent's competitors have no need to obtain those services and capabilities from the incumbent because equivalents are readily available from sources other than the incumbent.

2. Whether the FCC violated the Act by concluding that the term "network elements" encompasses not only physical facilities used in the delivery of calls, but virtually every productive asset of an incumbent telephone company's business, including human operators, software used for business functions such as billing, and services.

3. Whether the FCC violated the Act, and in particular its express distinction between resale and unbundled network elements, by requiring incumbent telephone companies to sell as unbundled network elements under section 251(c)(3) finished retail services such as caller I.D. and call forwarding, when the same services must be made available for resale under section 251(c)(4).

4. Whether the FCC violated the Act by requiring incumbent telephone companies to sell to competitors who possess no facilities of their own access to *all* the network elements associated with a particular retail service, not at the statute's discounted rate for resale, but at the cost-based rate reserved for competitors who purchase access to individual network elements to combine with their own facilities.

5. Whether the FCC violated the Act's requirement that incumbents provide their competitors with unbundled

network elements "in a manner that allows *requesting carriers* to combine such elements," 47 U.S.C. § 251 (c)(3) (emphasis added), by mandating that incumbents do the work of combining elements purchased by requesting carriers.

6. Whether the FCC violated the Act by permitting new entrants to "pick and choose" individual terms from an incumbent's past and future interconnection agreements without accepting all of the contractual tradeoffs that originally accompanied those terms.

7. Whether the FCC violated the Act by asserting jurisdiction to regulate the rates and certain other terms of local interconnection arrangements despite the fact that Congress gave states authority to "establish" and "determin[e]" the rates for local interconnection arrangements (47 U.S.C. §§ 252(c), (d)) and provided that "nothing in this Act shall be construed . . . to give the [FCC] jurisdiction" with respect to intrastate matters (*id.* § 152(b)).

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, U S WEST, Inc. advises the Court that it has no parent companies. U S WEST, Inc. has the following non-wholly owned subsidiaries having outstanding securities in the hands of the public: Financial Security Holding, Ltd. and TeleWest PLC.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

Nos. 97-826, 97-829, 97-830, 97-831, 97-1075, 97-1087, 97-1099 and 97-1141

AT&T CORP., *et al.*,

Petitioners,

v.

IOWA UTILITIES BOARD, *et al.*,

Respondents.

U S WEST, INC., *et al.*,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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OPENING BRIEF OF RESPONDENT/CROSS-PETITIONER U S WEST, INC.

STATUTORY PROVISIONS INVOLVED

Relevant portions of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, appear at Pet. App. 93a-130a [1] and in the appendix to this brief.

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[1] "Pet. App." refers to the appendix to the petition for a writ of certiorari in *AT&T Corp. v. Iowa Utils. Bd., cert. granted*, No. 97-826 (Jan. 26, 1998), which has been consolidated with this case.

STATEMENT OF THE CASE

Providing a functioning local telephone service to consumers requires the coordinated use of a variety of facilities, equipment, and personnel. Some aspects of the business—for example, taking orders and sending bills—use readily available inputs such as computers and programmers, and thus are within the easy grasp of anyone with sound business skills and the necessary capital. The business also requires a network of specialized equipment, such as the switches that route calls and the wires that actually transmit the calls from one point to another.

Until the 1990s, it was widely assumed that each local market would support only one such network and that it would be uneconomical to build alternative facilities. In adopting the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 ("Act" or "1996 Act"), Congress reversed that assumption: It determined that deploying alternative networks to provide local services was no longer infeasible and that facilities-based competition therefore should be permitted and encouraged.

Underlying Congress' decision was the belief that potential new providers are now, or soon will be, able to build or acquire most of the components needed to provide local telephone service. To the extent that some facilities cannot be reasonably duplicated, Congress required incumbent carriers to share them with new entrants until the newcomers are able to obtain such equipment in the marketplace. In this way, Congress aimed to open the market for local telephone service to full and vigorous competition more quickly than if each new entrant had to complete its own network before offering service.

This case requires the Court to consider whether the FCC in its First Report and Order[2] fundamentally distorted Congress' scheme by rejecting the view that the

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[2] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 F.C.C.R. 15499 (1996) ("Order" or "First Report and Order").

deployment of alternative facilities-based networks by competing local telephone service providers is now feasible and desirable. Specifically, the FCC required established carriers to share with their competitors not only facilities that remain difficult to duplicate, but *all* of their facilities, up to and including the entire network, and even new facilities that the carrier constructs in the future. The FCC also required the sharing of business functions that are not physical parts of the telephone network at all. And the FCC required incumbent carriers to perform the work of assembling their facilities into finished services on behalf of new competitors. These requirements collapse two distinct provisions of the 1996 Act, create opportunities for regulatory arbitrage that Congress plainly did not intend, and transform a regime designed to share facilities that are economically necessary for competition into one that grants virtually unlimited access to an incumbent carrier's entire business. In these and other respects, the FCC's Order is inconsistent with the 1996 Act.

A. Pre-1996 Regulatory Background

Before the 1990s, local telephone service was widely understood to be a natural monopoly. As explained in a leading treatise, "[t]he high cost of fixed plant, the steadily declining average cost of service, and the need for all customers to interconnect with one another made it seem both sensible and inevitable to have a single monopoly provider." Michael K. Kellogg, John Thorne, and Peter W. Huber, *Federal Telecommunications Law* 1 (1992). Regulation of the industry was "premised on the belief that service could be provided at the lowest cost to the maximum number of consumers through a regulated monopoly network." Pet. App. 131a (Order ¶ 1). Most states therefore granted an exclusive franchise in each local telephone service area. *See id.*; H.R. Rep. No. 104-204, at 49-50 (1995). The exclusive franchisees were known as "local exchange carriers" or "LECs."

Because there were no alternatives to the network facilities operated by LECs, regulatory authorities treated the facilities as quasi-public assets. LECs were regulated as "common carriers," meaning that they had to provide service to all requesting customers on a nondiscriminatory basis. As telecommunications technology became a crucial component of computer and information services, the FCC took steps to ensure for all potential competitors "nondiscriminatory access to and use of common carrier transmission facilities" that were "essential to the competitive provision" of such services. *Computer and Bus. Equip. Mfrs. Ass'n*, Report and Order, 93 F.C.C. 2d 1226, 1236 ¶ 32 (1983).

Similarly, the breakup of AT&T in the early 1980s was designed to put an end to alleged anticompetitive practices made possible by AT&T's "control over the local exchange facilities" that "were and are needed for interconnection purposes by AT&T's competitors." *United States v. AT&T*, 552 F. Supp. 131, 162 (D.D.C. 1982).[3] The theory was that long distance service was potentially competitive, but that the ability to compete depended on access to noncompetitive local facilities controlled by AT&T. To prevent AT&T from discriminating against its long distance competitors, AT&T was required to spin off its local exchange facilities to independent Bell Operating Companies, which in turn were required to provide access to all long distance and information service providers on a nondiscriminatory basis. *See id.* at 196. In short, the monopoly local exchange network could be used by everyone, and LECs were required to provide their essential service in a manner that would not favor one user over another.

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[3] *See also MCI Communications Corp. v. AT&T*, 708 F.2d 1081, 1133 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983) (concluding that "AT&T had complete control over the local distribution facilities that . . . were essential for MCI to offer [competing long distance] service" and that "[t]he facilities in question met the criteria of 'essential facilities' in that . . . [i]t would not be economically feasible for MCI to duplicate [AT&T's] local distribution facilities").

In addition, states closely regulated the prices for local telephone service. State rate regulation established what was in essence a regulatory compact with each LEC. The LEC would effectuate state policies designed to promote "universal service"—that is, to make basic telephone service available to all customers at affordable rates. *See, e.g.*, H.R. Rep. No. 104-204, at 49-50 (1995). In return, state regulators would protect the LEC's opportunity to earn a reasonable rate of return on its investments. *See* Kellogg, et al., *supra*, at 429-31 (describing traditional "rate-of-return" regulation).

The result of this compact was a state-mandated rate structure in which prices for particular local telephone services were based more on policy considerations than on ordinary economic and market factors. Prices for some services—specifically, residential service and service in rural areas—were set artificially low, and prices for other services were set correspondingly high. For example, business customers generally paid substantially higher rates than residential customers, even though the costs of providing the two types of service are roughly the same. *See Federal-State Joint Board on Universal Service*, Report and Order, 12 F.C.C. Rcd 8776, 8784 ¶¶ 10-11 (1997). Because LECs were required to serve all customers and competing service providers were not permitted at all, there was no risk of a carrier disrupting this cross-subsidy pricing structure by serving only the most profitable customers. The system worked well, and residential customers received rates that were often substantially below cost.

The states conducted detailed periodic ratemaking proceedings designed to ensure that these rate structures continued to produce overall revenues sufficient to enable LECs to achieve reasonable rates of return. The opportunity to earn such a return, in addition to avoiding possible constitutional concerns, enabled the LECs to attract the capital needed to fund investments in their networks. *See Duquesne Light Co. v. Barasch*, 488 U.S. 299, 310

(1989) (utility must be permitted a rate that will allow it to " 'maintain its financial integrity, to attract capital, and to compensate its investors for the risk [they have] assumed' " (quoting *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 605 (1944))). Thus, the rate structures preserved the incentive and ability of LECs to invest in maintaining and improving their networks and services, which served the public interest in having a high quality and widely accessible telecommunications network.

B. The Telecommunications Act of 1996

In adopting the Telecommunications Act of 1996, Congress decided to end the monopoly in local telephone service and open up local markets to competition. Underlying this decision was Congress' rejection of the old assumption that local telephone service is a natural monopoly—that is, that it is inefficient to have more than one network to provide local service. Congress determined that, given the current state of technology, real competition among multiple providers of local telephone service with separate networks is possible and will benefit consumers. And Congress did not simply endorse the goal of competitive local service markets and leave to the FCC the task of managing the transition. Rather, the 1996 Act provides a detailed road map for reform.

The Act adopts specific measures designed to promote investment and innovation in telecommunications infrastructure by new entrants and incumbent LECs alike, resulting in vigorous facilities-based competition. But Congress also understood that developing alternatives to some network facilities controlled by incumbent LECs may be difficult, at least in the near term, and that as a result access to such facilities still may be essential to the effective provision of service by competitors. For that reason, Congress imposed a duty on incumbent LECs to share such facilities with other carriers so long as the facilities remain essential to the ability to compete and newcomers remain unable reasonably to build or acquire

them from alternative sources. Congress also permitted carriers that wished to compete without any facilities of their own to purchase the complete services of incumbent LECs and to resell them, but under a separate provision of the Act and subject to different pricing standards. Finally, to ensure that the onset of competition would neither undermine nor be undermined by universal service policies, Congress launched a process to reform the measures used to support universal service.

1. *The Act's Structure for Promoting Competition*

The Act opens the door to competition by expressly preempting state and local barriers to entry in all segments of the telecommunications services market, intrastate as well as interstate. 47 U.S.C. § 253. As a result, states may no longer grant exclusive franchises to provide local telephone service or otherwise arbitrarily limit participation in the market. Other carriers now have the legal right to build and operate local telephone networks in competition with incumbent LECs.

Because a customer is unlikely to subscribe to a new carrier's service unless he can call and be called by users of the incumbent LEC's network, the Act requires incumbent LECs to interconnect their networks with those of "any requesting telecommunications carrier." 47 U.S.C. § 251(c)(2). With interconnection, a carrier can build a network covering a small area—say, a single neighborhood—and rely on the incumbent to carry traffic to and from points outside that network. Thus, interconnection enables a new entrant to launch itself as a facilities-based competitor on a limited scale and then expand its operation over time. Incumbents may charge for providing interconnection, but their rates must be "based on the cost" of the service and "nondiscriminatory." 47 U.S.C. §252(d)(1)(A). The Act specifies that these cost-based rates "may include a reasonable profit." 47 U.S.C. § 252(d)(1)(B).

Congress wanted and expected that the removal of entry barriers and the right to interconnect with the incumbent's network at cost-based prices would generate effective facilities-based competition for local service. The Act's procompetitive framework was intended to "accelerate rapidly private sector deployment of advanced telecommunications and information technologies." H.R. Conf. Rep. No. 104-458, at 1 (1996) ("Conference Report"). That goal plainly envisions new carriers deploying their own advanced technology in competition with incumbent LECs. The Conference Report expressly endorsed the view that "meaningful facilities-based competition is possible." *Id.* at 148.[4] Thus, Congress' intention was to encourage robust competition among providers with separate networks, not competition in which all participants are dependent on a single network operated by a single carrier.

However, Congress also recognized that erecting a fully functional local exchange network is a substantial task. The Act therefore provides two distinct routes through which a carrier may begin to offer a competing local service without constructing a complete network of its own. One route is to obtain access to selected individual pieces of the incumbent LEC's network, called "unbundled network elements," which the new entrant may

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[4] *See also Communications Law Reform: Hearings Before the Subcomm. on Telecommunications and Finance of the House Comm. on Commerce*, 104th Cong. 9 (1995) (statement of Rep. Schaefer) ("[The Act's approach to reform] rightly stresses a need for facilities-based competitors to lead the way in providing a true alternative to today's monopoly in the local exchange service. In fact, it is no exaggeration to say that the entire bill is premised on the existence of robust facilities-based competitors."); 141 Cong. Rec. H8465 (daily ed. Aug. 4, 1995) (statement of Rep. Goodlatte) ("[The telecommunications legislation] gives new entrants the incentive to build their own local facilities-based networks, rather than simply repackaging and reselling the local services of the local telephone company. This is important if the information superhighway is to be truly competitive.").

use to fill in gaps in its own unfinished network. 47 U.S.C. § 251(c)(3). The other is to purchase complete services from the incumbent LEC and resell them to end users, thus enabling the new entrant to compete without constructing any new network facilities at all. *Id.* § 251(c)(4).

a. The Unbundled Access Provisions of Section 251 (c)(3). Some of the specialized telephone equipment that was once expensive to duplicate is now, thanks to technological advances, not particularly difficult to build or acquire. (Switching increasingly falls in this category.) However, the provision of local exchange service also requires some facilities that the incumbent LEC has had in place for many years and that still may be difficult for competitors to duplicate in the short run. For example, developing widely available alternatives to the incumbents' "local loops," the wires running into each individual household, may be a gradual and expensive process. Congress recognized that, as a result, incumbent LECs may retain dominant control over some such bottleneck facilities for some time to come, at least in areas that are relatively costly to serve.[6]

Section 251(c)(3) seeks to address this issue and facilitate entry by new facilities-based competitors by enabling a competitor to lease selected "network elements" from the incumbent and to combine those elements with its own facilities in order to provide service. 47 U.S.C. § 251(c)(3).

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[6] Alternatives are being developed even to the incumbent LECs' local loops. *See, e.g.*, "Section 706: An Opportunity for Broadband Competition Policy," Remarks of Gloria Tristani before the U S WEST Regional Oversight Committee (Apr. 27, 1998) (available at www.fcc.gov/commissioners/tristani/gtsspeech.html) ("Fixed wireless technology may someday provide a cost effective and reliable loop substitute. And cable lines are being upgraded to permit telecommunications and Internet access.") The difficulty of duplicating particular facilities has tended to decline over time as technology advances. The practicality of duplicating a facility also may vary with geographic location, depending on such factors as population density and terrain.

The statute requires an incumbent LEC to provide a requesting carrier with access to network elements "on an unbundled basis," "at any technically feasible point," and "in a manner that allows requesting carriers to combine such elements in order to provide . . . telecommunications service." *Id.* As the Conference Report explains, this provision means that new local carriers assembling their own networks, instead of needing a "fully redundant network in place when they initially offer local service," may begin to provide service using "[*s*]*ome* facilities and capabilities . . . obtained from the incumbent local exchange carrier as network elements." Conference Report at 148 (emphasis added). In other words, a competitor using unbundled network elements configures and operates its own network —it merely uses some parts obtained from the incumbent.

Not every network facility must be unbundled and provided to competing carriers under section 251(c)(3). The Act limits the scope of the unbundling requirement by charging the FCC with the task of "determining what network elements should be made available" under section 251(c)(3). 47 U.S.C. § 251(d)(2). Congress prescribed specific criteria for the FCC to use in making this determination: The FCC must consider at a minimum whether lack of access to the element in question would "impair the ability" of a competitor to provide telephone service or, in the case of a network element that is "proprietary in nature," whether access is "necessary" for the competitor to provide service. 47 U.S.C. §§ 251(d)(2)(A), (B). Thus, an incumbent LEC's unbundling duty is limited to those network facilities that, according to the FCC, need to be available *from the incumbent* to enable the requesting carrier to compete effectively.

In addition, the Act defines a network element, not broadly as *any asset* owned by an incumbent LEC, but more narrowly as a "facility or equipment used in the provision of a telecommunications service" or the "features, functions, and capabilities" provided by such a phys-

ical component of the network. 47 U.S.C. § 153(29). Thus, network elements are individual, physical *pieces* of the network that the incumbent LEC uses to route and deliver calls. A carrier using unbundled elements purchases these pieces individually and combines them with its own facilities to create its own network. *See* 47 U.S.C. § 251(c)(3) ("An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.").

To ensure that an incumbent LEC's essential facilities would be available to new entrants on economically reasonable terms, Congress made network elements subject to the same cost-based pricing standard as interconnection: Prices for unbundled elements must be based on the cost to the incumbent LEC of providing them, must be nondiscriminatory, and may include a reasonable profit for the incumbent. 47 U.S.C. § 252(d)(1). The Act expressly requires that such cost-based prices be determined "without reference" to state ratemaking proceedings. 47 U.S.C. § 252(d)(1)(A)(i). The practical result has been that prices for unbundled elements, unlike state-mandated prices for complete services, have not reflected cross-subsidies designed to promote universal service.

b. The Resale Provisions of Section 251(c)(4). To enable a new local carrier to enter the market on a virtually immediate basis, the Act also provides carriers with a distinct entry strategy that permits them to begin competing without deploying *any* physical facilities of their own or taking any responsibility for configuring a network. Section 251(c)(4) allows a carrier to buy complete local exchange telecommunications services from an incumbent LEC at wholesale prices and then resell those services to customers in competition with the incumbent.

This resale option provides a quick and easy initial gambit for carriers seeking to enter the local telephone market. However, the scope of a reseller's competitive

activity is quite narrow. Since a carrier competing through resale buys entire finished services from the incumbent, *see* 47 U.S.C. § 251(c)(4)(A), its role is basically limited to marketing, billing, and collection. The work of actually carrying the customer's calls, as well as designing, investing in, and maintaining the network that will carry the calls, is handled exclusively by the incumbent LEC. In this regard, section 251(c)(4) provides a very different market entry strategy from section 251(c)(3).

Congress also subjected resale to an entirely different pricing standard than unbundled network elements—a "wholesale" standard that starts with the retail price and subtracts the marketing costs avoided by the incumbent LEC in selling at wholesale, thus maintaining intact any universal service cross-subsidies. *See* 47 U.S.C. § 252 (d)(3). By basing wholesale prices on retail prices, the Act ensures that the wholesale price for a service will reflect the same implicit contribution to support universal service (or receipt of such support) as the retail price for the service.[6] For example, if a state has set the retail price of a particular service two dollars above cost (including a reasonable profit) to help subsidize rates for other services, the wholesale price for that service will include the same two-dollar subsidy component. *See* H.R. Rep. No. 104-204, at 72 (1995) ("[I]n determining the resale rate, it is the Committee's intent that there be a recognition of pricing structures for telephone exchange service in the State. . . . The rate should reflect whether, and to what extent, the local dialtone service is subsidized by other services.").

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[6] The subsidy component is "implicit" because state regulators generally do not specify the precise amount by which particular services cross-subsidize or receive cross-subsidies from other services.

2. *Implementation through Negotiations and State Arbitration*

Consistent with its view that relations between market participants should be governed as far as possible by market forces rather than regulatory mandates, *see, e.g.*, Conference Report at 113 (describing the Act as creating a "de-regulatory national policy framework"), Congress created a system in which private negotiations between incumbent LECs and their competitors are the preferred method for implementing the Act's local competition provisions. Section 251(c)(1) imposes on incumbent LECs and competing carriers "[t]he duty to negotiate in good faith in accordance with section 252 the particular terms and conditions of agreements to fulfill the duties" described in section 251. 47 U.S.C. § 251(c)(1). Therefore, where a carrier wants to purchase interconnection, unbundled elements, or wholesale services for resale from an incumbent LEC, the first step is to negotiate a "binding agreement" with the incumbent for the purchase. 47 U.S.C. § 252(a)(1). Congress expressly directed that this voluntary negotiation process take precedence over regulatory mandates: Section 252(a)(1) provides that an incumbent LEC may negotiate an agreement with a competing carrier "without regard" to any of the pricing, technical, and quality standards set out in the Act. *Id.* The backstop to these private negotiations is the possibility of action by state public utility commissions. Either party to a negotiation may ask the relevant state commission to mediate or arbitrate unresolved issues. *Id.* §§ 252(a)(2), (b)(1).

3. *Preservation and Reform of Universal Service*

While the Act embraces competition and market forces, it also makes clear that support for universal service must not be impaired. The Act requires that support continue to be provided at levels that are "sufficient" to "preserve and advance" universal service. 47 U.S.C. §§ 254(b)(5), (d), (e). Since full-fledged competition will make implicit

cross-subsidies through service prices unsustainable in the long run, the Act requires the FCC to establish new mechanisms to support universal service that are "explicit" and "nondiscriminatory." 47 U.S.C. §§ 254(b)(4), (e), (f). The FCC must meet specific deadlines in carrying out its responsibilities for universal service reform, but state action to reform local rate structures is not subject to any timetable. *See* 47 U.S.C. §§ 254(a), (f).

C. The FCC's First Report and Order

On August 8, 1996, the FCC released its First Report and Order purporting to implement the Act's local competition provisions. The Order adopted rules concerning the scope of incumbent LECs' unbundled access obligations and a "pick-and-choose" rule giving competing carriers a trump card in their negotiations and agreements with incumbent LECs. As discussed in other briefs in this case, the Order also displaced state authority over local prices for interconnection and unbundled elements with a complex and sweeping set of federal pricing rules.

1. *The FCC's Unbundled Access Rules*

The Order established a series of rules specifying the FCC's interpretation of an incumbent LEC's unbundled access obligations under section 251(c)(3) of the Act. The rules required the unbundling of practically every aspect of an incumbent's business. Their cumulative effect was to enable an incumbent LEC's competitors to obtain complete, end-to-end service supplied entirely by the incumbent at the cost-based prices reserved for network elements.

First, the FCC ruled that, in carrying out its responsibility under section 251(d)(2) to consider whether lack of access to a particular unbundled element would "impair" the ability of a competitor to offer service or whether access to such an element is "necessary," the agency will not even consider the availability of substitutes from

sources other than the incumbent LEC. *See* Joint Appendix ("J.A.") 51-52, 54-55 (Order ¶¶ 283, 287). The FCC stated that the availability of elements from other sources should be ignored "because, in theory, any new entrant could provide all of the elements in the incumbents' networks." *Id.* at 54-55 (Order ¶ 287). Apparently rejecting Congress' determination that facilities-based competition is possible and desirable, the FCC also asserted that limiting the scope of unbundling to elements not readily available from other sources would require competing carriers to "duplicate unnecessarily" parts of the incumbent's network and thus "generate delay and higher costs for new entrants." *Id.* at 51-52 (Order ¶ 283); *see also id.* at 54-55 (Order ¶ 287). The agency therefore extended the unbundling obligations to "*all* network elements [of an incumbent LEC] for which it is *technically feasible* to provide access," including elements that are readily available from other sources at reasonable prices. *Id.* at 49, 53-54 (Order ¶¶ 278, 286) (emphasis added). In short, the FCC held that the "impair" and "necessary" standards are satisfied by virtually *any* potentially useful incumbent LEC facility, regardless of how commonplace or easy to duplicate. It declined to require any real showing of need. *See id.* at 53-54 (Order ¶ 286) ("We conclude that the statute does not require us to interpret the 'impairment' standard in a way that would significantly diminish the obligation imposed by section 251(c)(3).").

The FCC further interpreted the term "network element" to include items that are neither discrete physical parts of the network nor functions of such discrete physical parts. The FCC determined that services provided via personnel and equipment entirely separate from the telephone network itself could nonetheless be network elements. In particular, the Order classified as network elements such nonnetwork items as back-office support systems (for example, systems used to take orders from retail customers) and operator services using human operators.

Id. at 116-17, 126-27 (Order ¶¶ 516, 536). The FCC further ruled that services such as caller I.D., call forwarding, and call waiting are included in the "local switching element" despite the fact that they constitute complete retail telecommunications services available to end user customers and to the incumbent LEC's competitors under the Act's resale provisions. *Id.* at 87-89 & n.917 (Order ¶¶ 413-14 & n.917).

The FCC not only made virtually every aspect of an incumbent LEC's business available to new entrants under section 251(c)(3), it also ruled that a new entrant may obtain from the incumbent LEC the *full set* of network elements necessary to provide a finished service. Pet. App. 242a-49a (¶¶ 328-41). The agency further mandated that the incumbent LEC provide the requested elements on a *combined* basis: The FCC's rules both required an incumbent LEC to combine elements on its competitors' behalf and forbade an incumbent to separate any elements that it has already combined in its own network. 47 C.F.R. §§ 51.315(b)-(f).[7] As a result, an incumbent's competitors could obtain a fully assembled combination of all the elements needed to provide service, the so-called "UNE platform." Access to this "platform" enables a competitor effectively to buy and resell the incumbent's finished local exchange services, without making any investment in network facilities of its own and without undertaking any of the tasks involved in configuring and operating a network. Such a competitor need not even determine which particular facilities will be used to carry its customers' traffic; it can force the incumbent to do that for it as well.

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[7] The FCC's rules further obligated an incumbent LEC to combine network elements at the direction of a competitor to create even services not offered by the incumbent itself. *See* 47 C.F.R. § 51.315(c) (requiring an incumbent LEC to "perform the functions necessary to combine unbundled network elements in any manner, even if those elements are not ordinarily combined in the incumbent LEC's network").

In short, these rules together allowed a competitor of an incumbent LEC to purchase as unbundled network elements virtually any functions the incumbent performs as part of its business and order the incumbent to combine those elements and use them to provide service on behalf of the competitor. The competitor effectively could obtain, at the cost-based prices reserved for network elements, *any* service that the incumbent provides or is capable of providing, for the competitor to resell to customers under its own brand name—all without making the slightest investment in facilities or systems of its own.

Moreover, the FCC ordered that, except for a limited, temporary, and now-expired exemption, the cost-based prices for unbundled network elements may not include any part of the costs of supporting universal service (that is, the costs of subsidizing residential and rural service). *See* J.A. 153, 155-59 (Order ¶¶ 712, 715-20).[8] As a result, a competitor taking advantage of the FCC's rules to offer service entirely through unbundled network elements could avoid contributing to the universal service subsidies built into state-mandated rate systems. For services priced above cost—for example, business services—the carrier naturally would opt to buy the service as a collection of combined elements, and thus pay a cost-based rate, as opposed to buying it under the resale provision at the higher wholesale rate that includes support for universal service subsidies. In this way, the carrier could engage in regulatory arbitrage by taking advan-

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[8] More generally, the FCC distorted the statute's requirement of cost-based rates by, among other things, ordering that rates be based not on the *actual* cost of providing service, but rather on the cost of providing service using a hypothetical, ideally efficient network. *See* 47 C.F.R. § 51.505(b)(1) (prices must be "based on the use of the most efficient telecommunications technology currently available and the lowest cost network configuration"). The substantive validity of this and other pricing rules is not before the Court because the court of appeals vacated them on jurisdictional grounds.

tage of the difference between state-mandated retail prices and unbundled element prices.

In addition to giving competitors cost-based, subsidy-free access to any combination of an incumbent LEC's existing business assets, the FCC required the incumbent LEC to make available network elements "superior in quality to that which the incumbent LEC provides to itself." 47 C.F.R. § 51.311(c). As a result, a competitor wanting something new, instead of investing itself in an improved facility, could require the incumbent LEC to make the necessary investment on its behalf.

The cumulative effect of the FCC's unbundling rules was to broaden greatly the opportunity and incentive of new competitors to rely on the incumbent LEC's network instead of investing in facilities of their own. Any new investment by the incumbent, no matter how easily available from other sources, had to be made available at cost-based rates and combined by the incumbent LEC at the behest of the competitor. In the FCC's view, this dramatic action was necessary to permit all competitors to share whatever competitive advantage the incumbent LEC might have—thus entirely depriving the incumbent of any such advantage irrespective of whether access to the facilities involved is truly necessary for the advancement of competition.

2. *The FCC's "Pick-and-Choose" Rule*

Section 252(i) of the Act requires an incumbent LEC to offer a competing carrier any "interconnection, service, or network element" that the incumbent has provided to another carrier under a prior interconnection agreement, on the "same terms and conditions" as in the prior agreement. 47 U.S.C. § 252(i). The FCC invoked this nondiscrimination requirement as the basis for a quite different rule that permits a competitor to pick and choose isolated provisions from previous interconnection agree-

ments and to take advantage of those provisions without any obligation to accept terms and conditions that may have been part of the quid pro quo for those provisions in the original agreements. Pet. App. 261a-64a (Order ¶¶ 1310, 1314-15). The FCC's rule further creates a unilateral right of competing carriers to change the terms of previously concluded, purportedly "binding" interconnection agreements. Specifically, the FCC decreed that a competing carrier may at any time reopen a final, validly negotiated or arbitrated interconnection agreement to incorporate any isolated term or condition found in a subsequent interconnection agreement between the incumbent LEC and another carrier. *Id.* at 264a-65a (Order ¶ 1316).

The FCC dismissed the concern that this "pick-and-choose" rule would undermine the Act's regime by rendering it irrational for incumbent LECs to make concessions in negotiated agreements. The FCC's response focused solely on whether the rule would benefit the incumbent LEC's competitors: "[W]e observe that new entrants, who stand to lose the most if negotiations are delayed, generally do not argue that concern over slow negotiations would outweigh the benefits they would derive from being able to choose among terms of publicly filed agreements." *Id.* at 263a (Order ¶ 1313).

3. *The FCC's Assertion of Jurisdiction over Pricing*

Despite Congress' decision to implement the requirements of section 251 primarily through private negotiations backed up by the possibility of state-level mediation or arbitration, the FCC promulgated a sweeping set of detailed nationwide pricing rules. The lawfulness of the FCC's assertion of jurisdiction over the pricing of interconnection and unbundled elements is a major focus of other briefs in this case, and this brief does not discuss it.

D. The Appeal to the Eighth Circuit

Incumbent LECs and state utility commissions sought judicial review of the FCC's First Report and Order, and the cases were consolidated in the U.S. Court of Appeals for the Eighth Circuit. The appeals focused on the FCC's rules concerning the scope of an incumbent LEC's duty to provide unbundled access to network elements; the "pick-and-choose" rule; and the FCC's assertion of jurisdiction over pricing. Many of the petitioners also requested a stay of the Order, in whole or in part, pending the outcome of the appeal. On October 15, 1996, the court of appeals stayed the FCC's pricing and "pick-and-choose" rules. J.A. 224-42. This Court declined to vacate the stay. *FCC v. Iowa Utils. Bd.*, 117 S. Ct. 429 (1996).

After consideration on the merits, the court of appeals issued a decision on July 18, 1997 invalidating a number of the pertinent FCC rules, but upholding others. Pet. App. 1a-67a. It upheld the FCC's conclusion that the "impair" and "necessary" standards in section 251(d)(2) do not require the agency to be selective in determining what elements must be unbundled. In particular, the court held that those standards "do not require an inquiry into whether a competing carrier could obtain the element from another source." *Id.* at 47a-48a. The court reasoned that requiring such an inquiry would severely narrow the scope of an incumbent's unbundling obligation because "many network elements could theoretically be duplicated eventually." *Id.* at 48a. The court also upheld the FCC's determination that nonnetwork items such as back-office support systems and end-user services such as caller I.D. can qualify as "network elements." *Id.* at 41a-45a.

However, the court of appeals rejected the FCC's extension of the unbundled access obligation to all elements for which unbundling is "technically feasible." The court held that section 251(c)(3) requires unbundled access

"at any technically feasible point" in order to establish *where* access may occur, not *which* elements must be unbundled. *Id.* at 45a. The court likewise rejected the FCC's rules requiring an incumbent LEC to provide unbundled elements and interconnection of superior quality to that which it provides to itself. *Id.* at 50a-52a.

The court also vacated the rules requiring incumbent LECs to combine elements on behalf of their competitors. The court explained that, "[w]hile the Act requires incumbent LECs to provide elements in a manner that enables the competing carriers to combine them, unlike the Commission, we do not believe that this language can be read to levy a duty on the incumbent LECs to do the actual combining of elements." *Id.* at 53a. "[T]he plain meaning of the Act," the court continued, "indicates that the requesting carriers will combine the unbundled elements themselves; the Act does not require the incumbent LECs to do *all* of the work." *Id.* However, the court did not address section 51.315(b) of the FCC's rules, the provision that prohibited incumbent LECs from separating elements that were already combined in their networks.

The court upheld the FCC's determination that carriers with no facilities of their own may provide local service entirely through unbundled elements, but also accepted the premise, critical for the preservation of universal service, that Congress did not intend unbundled access and resale to be interchangeable. The court upheld the rule precisely because it believed that "unbundled access has several disadvantages that preserve resale as a meaningful alternative." *Id.* at 56a. Specifically, the court stated that, in light of its ruling on the combination of elements, a competitor providing service entirely through unbundled elements is different from a reseller because it "expend[s] valuable time and resources recombining unbundled network elements." *Id.* at 56a-57a. The court also noted that the competitor using network elements bears "greater risks" in attempting to "match its supply with its demand."

Id. at 56a. In other words, such a competitor is subject to the ordinary expenses and business risks associated with configuring and operating a local telephone network.

The court reaffirmed its rejection in its stay decision of the FCC's "pick-and-choose" and pricing rules. The court explained that the "pick-and-choose" rule "would thwart the negotiation process" required by the Act, because, "[d]uring a negotiation, an incumbent LEC would be very reluctant to make a concession on one term in exchange for a benefit on another term when faced with the prospect that a subsequent competing carrier will be able to receive the concession without having to grant the incumbent the corresponding benefit." *Id.* at 26a. The court also observed that the "pick-and-choose" rule conflicts with the Act's requirement that negotiated agreements be binding, "because, according to the FCC, an entrant who is an original party to an agreement may unilaterally incorporate more advantageous provisions contained in subsequent agreements negotiated by other carriers." *Id.* With respect to the FCC's pricing rules, the court held that "the FCC exceeded its jurisdiction in promulgating the pricing rules regarding local telephone service." *Id.* at 8a.

Following the court of appeals' decision, a number of incumbent LECs filed petitions for rehearing urging the court to vacate 47 C.F.R. § 51.315(b), the rule that forbade incumbents from separating elements that are currently combined in their networks. The petitions noted that carriers such as AT&T and MCI had seized on the court's silence about rule 51.315(b) to argue to state commissions that those carriers were still entitled to get the fully combined "platform" of network elements where those elements are already combined in the incumbent's network.[9] On October 14, 1997, the court of appeals

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[9] *See* Petition for Rehearing of GTE entities, SBC Communications, Inc., BellSouth Corporation, and U S WEST, Inc., *Iowa*

granted the rehearing petitions and amended its opinion to strike down rule 51.315(b) as contrary to the Act. Reinforcing its earlier decision regarding network element combinations, the court explained that "Section 251(c)(3) requires an incumbent LEC to provide access to the elements of its network only on an unbundled (as opposed to a combined) basis," and "does not permit a new entrant to purchase the incumbent LEC's assembled platform(s) of combined network elements (or any lesser existing combination of two or more elements)." Pet. App. 71a. The court stressed that "[t]o permit such an acquisition of already combined elements at cost based rates for unbundled access would obliterate the careful distinction Congress has drawn in subsections 251(c)(3) and (4)" between access to unbundled elements and the purchase of services for resale. *Id.*

E. Certiorari Proceedings

The FCC, MCI, AT&T, and other parties filed petitions for certiorari seeking review of the court of appeals' decision to vacate the FCC's pricing rules, the "pick-and-choose" rule, and rule 51.315(b). Incumbent LECs submitted conditional cross-petitions arguing that, if the Court decided to review the court of appeals' rejection of rule 51.315(b), it should consider the lower court's holdings on the other unbundled access issues as well. On January 26, 1998 the Court granted certiorari on all of the issues raised in the petitions and cross-petitions.

SUMMARY OF ARGUMENT

Through the unbundling and resale provisions in sections 251 and 252 of the Act, Congress devised a structure that would promote a number of different goals—increased competition, greater investment and innovation, the preser-

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Utilities Board v. FCC (No. 96-3321 and consolidated cases, 8th Cir.) at 2.

vation of universal service, and ultimately enhanced consumer welfare. Congress sought to foster an environment in which new entrants have the incentive to build their own physical facilities to compete with the incumbents' networks because it understood that such independent facilities are vital to creating a vigorous competitive market in local telephony. At the same time, Congress recognized that not every potential competitor could immediately construct a complete alternative network. To encourage the eventual development of facilities-based competition, Congress granted newcomers the option to buy some unbundled physical inputs from the incumbents to combine with their own incomplete sets of facilities until they were able to assemble complete networks capable of providing finished services. Congress also permitted competitors that wished to enter without investing in any facilities to buy and resell incumbents' own finished services.

In structuring these alternative avenues of entry, Congress struck a balance designed to give new entrants access to incumbents' networks and services where necessary to enable them to begin to compete, while preserving newcomers' incentives to build their own facilities. That is, Congress sought to ensure that the use of incumbents' unbundled facilities would not become so economically attractive as to stifle any incentive for new entrants to engage in facilities-based competition. In accordance with this goal, the Act provides that incumbents can be required to unbundle only in cases where new entrants truly need such elements to enter the marketplace, much as antitrust law requires monopolists to provide access only to those facilities that are *essential* to competitors. This limitation is reinforced by the statute's definition of "network elements," which includes only those parts of an incumbent's network that might not be reasonably available to new entrants in the competitive marketplace —the physical elements and their associated features and functions.

Consistent with this concept of unbundling, the statute also requires that incumbents provide the discrete, physical facilities to new entrants "in a manner that allows requesting carriers to combine such elements" to provide service. 47 U.S.C. § 251(c)(3). The statute thus makes clear that the purchaser of elements is expected to design and create a network of its own by combining the unbundled, "essential" elements it obtains from an incumbent with its own facilities. For a new competitor that wants to rely solely on an incumbent's network and have no facilities of its own, the statute provides the alternative option of purchasing and reselling an incumbent's retail *services*. However, a competitor that engages in resale must buy services from the incumbent at prices based on retail rates, rather than the cost-based prices for unbundled network elements. By basing resale prices on retail rates, Congress ensured that incumbents would not be deprived of the universal service subsidies implicit in their rates.

In its Order, the FCC destroyed the statute's careful balance by focusing on helping new competitors without regard to the statutory language or to the overall effects of its actions on Congress' goals. Indeed, the FCC's decisions reflect a rejection of Congress' intent to promote facilities-based competition in favor of transforming the incumbent's network into a wholesale platform for competitors, at the expense of true competition, innovation and investment, universal service, and ultimately the welfare of consumers. The FCC unlawfully expanded the Act's unbundling duty in four distinct but related ways:

First, the FCC effectively nullified Congress' directive that the agency consider "at a minimum" whether denial of access to network elements would "impair" service or, in the case of proprietary elements, whether access was in fact "necessary." In particular, the FCC refused even to consider whether an entrant can procure a particular element from a source other than an incumbent, effectively guaranteeing that an incumbent must provide every "net-

work element" to its competitors, rather than merely those bottleneck local exchange facilities a competitor needs but cannot reasonably duplicate. *Second*, the FCC compounded this error by redefining "network element" to include not only physical facilities and their accompanying features and functions, but virtually every part of an incumbent's business, from its personnel to billing software, even though such assets are not part of an incumbent's network.

Through these two errors, the FCC transformed the unbundling requirement from a limited right to obtain "essential facilities" into a right to obtain virtually every part of the incumbent's business as a network element at a price dictated by the FCC. And, far from backtracking from this transformation, the FCC embraced it in two additional parts of its Order. In its *third* unlawful expansion of the unbundling obligation, the FCC determined that a competitor could buy *all* the network elements needed to provide service under the pretense of buying them as individual pieces, so that the competitor could rely exclusively on unbundled network elements from an incumbent to provide finished services without having any facilities of its own. *Finally*, the FCC completed its work by deciding that competitors were entitled to acquire all of these pieces from the incumbent in precombined form as a fully assembled network.

In addition to defeating Congress' purposes in the Act's unbundling and resale provisions, the FCC further undermined the statutory structure by taking the straightforward nondiscrimination requirement in section 252(i) of the Act—under which an entrant can take for itself a prior interconnection agreement if it is willing to accept all the terms of that agreement—and reconstructing it as an extraordinary right of an entrant to "pick and choose" any individual term from the incumbent's past and future agreements with other carriers, even *after* the entrant has signed an agreement with the incumbent. In other words,

the entrant may at any time have the full commercial benefit of any isolated provision in any other agreement, entirely uncoupled from the balance of that agreement. In requiring this, the FCC made a mockery of the commercial negotiations that are central to the implementation scheme of section 252 and contradicted the statute's directive that interconnection agreements are to be "binding."

Each of these decisions by the FCC is contrary to the language, structure, and purposes of the 1996 Act. More significantly, the combined effect of these decisions is to undermine entirely the balanced regime Congress created. The agency's rules defeat the goal of promoting facilities-based competition by collapsing the statutory distinction between unbundled network elements and resale and creating an economically irrational model in which competitors have no reason to invest in their own facilities, incumbents have no incentive to innovate, and traditional universal service support is undermined.

ARGUMENT [10]

I. THE FCC'S UNBUNDLING RULES COLLAPSE THE CAREFUL STRUCTURE OF THE ACT AND DEFEAT THE GOALS CONGRESS SOUGHT TO ACHIEVE.

In the Telecommunications Act of 1996, Congress did not simply declare that local communications markets should be opened to competition and leave to the FCC the question of how best to reach that goal. To the contrary, Congress mapped out in detail the ways in which new entrants could use incumbents' facilities and services in entering local exchange markets, a map that it expected

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[10] U S WEST incorporates by reference the argument made in the brief for Bell Atlantic Corp., BellSouth Corp., and SBC Communications, Inc. concerning the court of appeals' ruling that the FCC exceeded its jurisdiction with respect to pricing. *See* Opening Brief of Respondents/Cross-Petitioners Bell Atlantic Corp., BellSouth Corp., and SBC Communications, Inc. (May 18, 1998).

the FCC to follow. This case is about the FCC's refusal to heed Congress' will.

Despite the FCC's attempts to cloak itself in the protective mantle of *Chevron*, its unbundling rules are contrary to the plain meaning of the 1996 Act, as evident from its language, structure, and legislative history. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 & n.9 (1984) (if by "employing traditional tools of statutory construction" the Court finds Congress' intent to be clear, then "that is the end of the matter"). The FCC's attempt to have this Court review each of its individual decisions in isolation and to claim deference as to each of these discrete issues ignores this Court's oft-repeated admonition that, "in ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, *as well as the language and design of the statute as a whole.*" *Sullivan v. Everhart*, 494 U.S. 83, 89 (1990) (emphasis added).

While each individual deviation from the Act is important by itself, the cumulative effect of the FCC's errors is utterly inconsistent with the design of the 1996 Act as a whole. The FCC disregarded Congress' intention that incumbents be required to provide only those network elements that their competitors truly need, extended the definition of network element to encompass virtually every part of an incumbent's business, and permitted entrants to procure all the elements needed to provide a service on a precombined basis. By these decisions, the FCC abrogated Congress' careful distinction between unbundled network elements and resale and undermined the development of facilities-based competition, discouraged innovation, and put at risk universal service support. The court below, while failing to correct all of these errors, mitigated their cumulative effect by vacating the FCC's rules requiring incumbents to provide network elements as precombined, assembled network platforms. Even so, the court below

did not go far enough. The FCC's " 'construction[] of [the] statute . . . [is] inconsistent with the statutory mandate [and] frustrate[s] the policy that Congress sought to implement' " and therefore must be rejected. *Securities Indus. Ass'n v. Board of Governors of the Fed. Reserve Sys.*, 468 U.S. 137, 143 (1984) (quoting *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 32 (1981)).

A. The FCC Unlawfully Nullified the Act's Standards for What Network Elements Must Be Unbundled.

The Act draws clear limits around what "network elements" must be unbundled. Section 251(d)(2) charges the FCC with the task of "determining what network elements should be made available" under section 251(c)(3). 47 U.S.C. § 251(d)(2). Congress prescribed that the FCC "*shall* consider, at a minimum," whether the failure to provide access to particular network elements would "impair" the ability of the requesting carriers to provide service and whether access to proprietary network elements is "necessary." 47 U.S.C. § 251(d)(2) (emphasis added). These statutory commands reflect Congress' recognition that access to an unbundled element of the incumbent's network is economically justified only when a new entrant genuinely needs the element in order to compete and the element is not readily available in the marketplace. As AT&T explained in its opening brief, the goal of these provisions was to "allow new entrants to obtain *essential facilities* that a LEC controls." AT&T Br. at 2 (emphasis added). And determining whether an incumbent's facility is essential or needed by a competitor requires examining whether and how easily it can duplicate the equivalent facility itself.

By mandating an evaluation of need—under the "impair" and "necessary" standards—Congress sought to encourage new entrants to rely on nonincumbent facilities where possible, in order to promote facilities-based competition and encourage innovation. *See, e.g.*, H.R. Conf.

Rep. No. 104-458, at 1 (1996) (passage of the Act would "accelerate rapidly private sector deployment of advanced telecommunications and information technologies") ("Conference Report"); *In the Matter of Amendment of the Commission's Rules to Establish Competitive Service Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Services*, Notice of Proposed Rulemaking, Order on Remand, and Waiver Order, 11 F.C.C.R. 16639, 16678-79 ¶ 80 (1996) ("The interconnection provisions of the Act, Section[s] 251 and 252, are designed to promote facilities-based local exchange competition.").[11]

After all, it is precisely where the new entrant can provide or acquire its own competitive facilities that the potential to increase the choices available to consumers is greatest: "[C]ompetition [is] increased by encouraging [firms] to [develop rival facilities], rather than taking the easier and less competitive course of obtaining access to another's facilities." 3A Philip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 773b1 (1996). A competitor that depends on an incumbent's network cannot compete on the basis of operational efficiency or upgrade the network, and it has limited ability to create new services. A facilities-based competitor, on the other hand, is a rival to the incumbent at *every* level of operation and has incentives to invest in the creation of innovative technologies and services and to achieve operational economies.

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[11] *See also Communications Law Reform: Hearings Before the Subcomm. on Telecommunications and Finance of the House Comm. on Commerce*, 104th Cong. 9 (1995) (the Act "rightly stresses a need for facilities-based competitors to lead the way in providing a true alternative to today's monopoly in the local exchange service. In fact, it is no exaggeration to say that the entire bill is premised on the existence of robust facilities-based competitors") (statement of Rep. Schaefer); 141 Cong. Rec. H8465 (Aug. 4, 1995) (the Act is intended to "give[] new entrants the incentive to build their own local facilities-based networks, rather than simply repackaging and reselling the local services of the local telephone company") (statement of Rep. Goodlatte).

In its zeal to aid competitors without regard to the effects on facilities-based competition, the FCC adopted rules that unlawfully thwarted Congress' intent. *See generally* Hon. Stephen G. Breyer, "Antitrust, Deregulation, and the Newly Liberated Marketplace," 75 Calif. L. Rev. 1005, 1018 (1987) ("A . . . special policy risk of deregulation is that government policymakers will protect [new] competitors instead of protecting competition."). As the court below explained, the FCC determined that the "impair" and "necessary" standards did "not require an evaluation of whether a requesting carrier could obtain the desired elements from an alternative source," but instead authorized the FCC to consider solely the other elements that the new entrant could obtain *from the incumbent LEC's own network*. Pet. App. 47a. Rather than constituting a meaningful evaluation of whether the facilities in question are truly needed by a competitor, the FCC's reading of the Act renders irrelevant even readily available alternatives outside the incumbent LEC's network that could enable the newcomer to provide service equal in quality and cost to what is achievable using the incumbent's facilities. Thus, the FCC guaranteed each competitor the ability to acquire from incumbents every network element it desires to provide service no matter how easily the competitor could obtain a substitute elsewhere.

That approach defies the plain meaning of the Act. Failure to obtain an element from an incumbent cannot "impair" a new entrant's ability to provide service, and access to a proprietary element from an incumbent cannot be "necessary," if an equivalent element is readily available from a source other than the incumbent. When Congress directed the FCC to consider the "impair" and "necessary" standards in deciding whether to require unbundling of a particular element, it obviously intended that there be some showing of need before the incumbent could be required to unbundle any particular element, not that a competitor could commandeer any of an incumbent's facili-

ties whenever convenient. Even the FCC concedes that the unbundling provisions authorize competitors to obtain access to "elements they need (and not elements they do not need)." FCC Br. at 5. Whatever the degree of need that must be shown, the competitor's need to obtain the element from the incumbent cannot be evaluated without at least considering what the competitor can procure elsewhere.[12]

The FCC's primary justification for ignoring all sources outside the incumbent's network was its assertion that any consideration of nonincumbent sources might require new entrants to "duplicate unnecessarily even a part of the incumbent's network." J.A. 51-52, 54-55 (Order ¶¶ 283, 287). But this justification merely illustrates the FCC's transformation of Congress' objective—facilities-based competition—into a pejorative. Facilities-based competition by definition involves duplication of facilities. The FCC disagrees with this goal, apparently preferring to perpetuate markets in which incumbent LECs own the only facilities used for telecommunications services and are forced to share those facilities with competitors under regulatory supervision. But the FCC is bound by Congress' contrary choice: "[R]apid[] private sector deployment of advanced telecommunications and information technologies," Conference Report at 1, requires building new facilities.

The FCC also sought to rationalize its decision to disregard what is available from sources other than the incumbent on the theory that "ultimately" every facility can be replicated and thus consideration of outside sources

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[12] Indeed, by so severing the relationship between the incumbent's obligation to provide its facilities to a competitor and the competitor's true economic need for the facilities, the FCC threatens to run afoul of this Court's repeated statement that "one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid." *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 240 (1984) (quoting *Thompson v. Consolidated Gas Corp.*, 300 U.S. 55, 80 (1937)).

would mean that none of the incumbent's facilities would be made available. J.A. 54-55 (Order ¶ 287). Or, as the court below put it, considering outside sources might limit the availability of unbundled network elements "because many network elements could theoretically be duplicated eventually." Pet. App. 48a. But the fact that availability is a matter of degree or that it may change over time merely means that the FCC must inquire into actual market conditions to determine where to draw a line as to the degree of availability that will warrant a finding of lack of "impairment" and that such a line might change over time. The FCC's reading of the statute simply bypasses these issues by making an alternative facility irrelevant even if it is readily available today at the same or lower price than the incumbent's.

The FCC's refusal even to consider the availability of facilities outside an incumbent's network is inconsistent with not only the terms of the statute but also basic economic principles. When the government "order[s] the [monopolist] to provide the facility and regulat[es] the price to competitive levels, then the [prospective entrant's] incentive to build an alternative facility is destroyed altogether. . . . [Loss of incentive to build] could be extremely serious . . . in the case where either the [entrant] or some other rival could enter the market by some alternative not requiring the sharing of the [monopolist's] facility." 3A Areeda & Hovenkamp, *supra*, ¶ 771b.

Not surprisingly then, in the closely analogous context of the "essential facilities" doctrine, under which monopolists are required to provide prospective competitors with access to their essential facilities to aid the development of competition, a facility must be turned over for use by competitors *only* if it is not "available from another source or capable of being duplicated by the [competitor] or others." *Id.* ¶ 773b.[13] The lower courts are unanimous in

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[13] *See also* ABA Section of Antitrust Law, *Antitrust Law Developments* 280 (4th ed. 1997) ("It is insufficient, however, for a

holding that a prerequisite to requiring a monopolist to turn over an essential facility is "a competitor's inability practically or reasonably to duplicate" the facility. *MCI Communications Corp. v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1132-33 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983).[14] The FCC's refusal even to consider whether or how easily an element could be obtained from a source other than the incumbent cannot be reconciled with the statutory language or these underlying principles.[15]

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plaintiff to allege that access to one facility is simply 'more economical' than other alternatives . . . ."); William Blumenthal, "Three Vexing Issues Under the Essential Facilities Doctrine: ATM Networks as Illustration," 58 Antitrust L.J. 855, 860 (1989) ("In light of the potentially perverse competitive incentives created by the opportunity for compulsory access, a plaintiff should not be granted access in an essential facilities case unless alternatives to the facility are extraordinarily difficult for anyone to put in place." (citations omitted)); Panel Discussion, "Exclusionary Conduct," 57 Antitrust L.J. 723, 742 (1989) ("There is a great danger in . . . the notion that it somehow is easy to let competitors have access without impairing the facility.") (comments by William Baxter).

[14] *See also Twin Labs. Inc. v. Weider Health & Fitness*, 900 F.2d 566, 568 (2d Cir. 1990); *Ideal Dairy Farms, Inc. v. John Labatt, Ltd.*, 90 F.3d 737, 748 (3d Cir. 1996); *Laurel Sand & Gravel, Inc. v. CSX Transp., Inc.*, 924 F.2d 539, 544 (4th Cir.), *cert. denied*, 502 U.S. 814 (1991); *City of Malden v. Union Elec. Co.*, 887 F.2d 157, 159 (8th Cir. 1989); *City of Anaheim v. Southern Calif. Edison Co.*, 955 F.2d 1373, 1380 (9th Cir. 1992); *McKenzie v. Mercy Hosp.*, 854 F.2d 365, 369 (10th Cir. 1988), *overruled on other grounds by SystemCare, Inc. v. Wang Labs. Corp.*, 117 F.3d 1137 (10th Cir. 1997).

[15] The FCC's seeming blindness to the relationship between network elements and the concept of "essential facilities" is particularly perplexing in light of its recognition elsewhere that Congress' focus in the 1996 Act was the control of essential facilities: "[T]he structural and nondiscrimination requirements [of section 272] taken together were intended by Congress to effectuate the goal of preventing anticompetitive abuses by BOCs that *control essential local facilities* and seek to enter competitive markets that require these facilities as an input." *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of*

The FCC's evisceration of the statutory "impair" and "necessary" standards also means that a new entrant's entitlement to particular network elements will not change as the marketplace evolves. Even if lack of access to a particular element will impair service (or the element is necessary) at one point in time, the availability of a new technology or another change in the marketplace may over time eliminate the need to acquire that element from the incumbent. For example, even if lack of access to the local loop would impair an entrant's ability to provide service today, that effect might disappear once cable television, wireless, or other technologies offer equivalent access to the home in the future.[16] Similarly, as a competitor establishes itself in the marketplace, it may capture a sufficient number of customers to generate the economies of scale that would allow it to build particular facilities that were not feasible for it to build on initial entry. *See* AT&T Br. at 14 (Congress intended unbundled elements to allow "new entrants to share in whatever economies of scale inhere in particular LEC facilities"). Such developments clearly would affect whether lack of access to the incumbent's facility would "impair" the newcomer's ability to compete under any common sense meaning of the term—yet under the FCC's construction of the Act such developments are to be ignored entirely.

The FCC's rule makes even less sense in the context of proprietary elements—those in which an incumbent holds an intellectual property interest. Congress required the FCC to apply the even stricter "necessary" standard to the unbundling of such elements, because it no doubt understood that an incumbent LEC will not invest in research and development if its innovations must automatically be turned over to rivals. *See, e.g., Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 480 (1974) (right of

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1934, as Amended, Second Order on Reconsideration, 12 F.C.C.R. 8653, 8658 (1997) (emphasis added).

[16] *See, e.g., supra* note 5.

exclusivity provides "an incentive to inventors to risk the often enormous costs in terms of time, research, and development").[17] Nevertheless, the FCC decided that, where an incumbent invests in developing a new proprietary service or feature, the incumbent can be forced immediately to turn that service or feature over to its competitors at cost regardless of whether the competitors can obtain its equivalent elsewhere.

The only situation in which the FCC did not require an incumbent to turn over a proprietary element is if a nonproprietary element *in the incumbent's own network* can perform the same function equally well at the same or lower price. J.A. 51-52 (Order ¶ 283). Of course, the incumbent would have had no reason to develop the proprietary element in the first place if it already had other elements capable of performing the same function equally well. Congress wanted the Act to spur innovation, not retard it. However, the effect of the FCC's nullification of the necessary standard, as even the FCC admitted in its order, *id.* at 50-51 (Order ¶ 282), will be to reduce incumbents' incentives to innovate in direct contravention of Congress' intent.

B. The FCC Unlawfully Expanded the Act's Definition of "Network Element."

The FCC not only ignored the Act's express limitations on the availability of "network elements" to an incumbent's competitors. It compounded the anticompetitive effect of that decision by rejecting the statutory limitations in the definition of "network element" itself. The FCC expanded the definition to encompass not just certain physical elements of an incumbent's network, but essentially all of the incumbent's productive assets and services,

[17] *See also* Hon. Stephen G. Breyer, "Antitrust, Deregulation, and the Newly Liberated Marketplace," 75 Calif. L. Rev. 1005, 1034 (1987) (because "requiring an inventor . . . to give his secrets away to his competitors discourages innovation," courts have required bottleneck facilities to be turned over to competitors only in rare instances).

even those involving ordinary business skills and personnel that a competitor readily could provide for itself or hire from others.

The Act defines "network element" as a "facility or equipment," together with "features, functions, and capabilities that are provided *by means of such facility or equipment.*" 47 U.S.C. § 153(29) (emphasis added.) Thus, the concept of network elements under the Act is rooted in the discrete *physical* equipment that carriers use in providing local exchange service. Indeed, the very term "*network* element" reinforces this meaning. After all, an incumbent's "network" is made up of the wires and switches that carry telephone calls. Moreover, a facility can only be a "network element" if it is "used in the transmission, routing, or other provision of a telecommunications service." *Id.* Through its use of terms such as "transmission" and "routing," Congress made clear that "network elements" refer to those pieces of equipment that the carrier uses for call delivery.[18]

This straightforward definition of "network element" reinforces the effect of the "impair" and "necessary" limitations in section 251(d): to give new entrants access to those of the incumbent LECs' physical assets they need to provide telecommunications service but cannot reasonably duplicate (at least in short term). "Network element" does not encompass aspects of an incumbent's business that Congress had no reason to believe posed an entry barrier, such as backroom functions that any new competitor could reasonably perform for itself.

The FCC, however, construed "network element" so broadly that it effectively permits an incumbent's competitors to demand access on an unbundled basis to every part—both physical and nonphysical—of an incumbent's

[18] Congress' use of the term "other provision" in the definition does not, under the principle of *ejusdem generis*, expand network elements to include nonphysical aspects of an incumbent's business. *See infra* at 40.

business. Under the FCC's Order, "network element" includes not just facilities and equipment that are used to deliver calls, but also systems and functions that have no role in transmitting or routing a call over the network. For example, the Order requires incumbent LECs to unbundle their "operational support systems." 47 C.F.R. § 51.319(f). These are computers and software used in an incumbent's customer service operations, not facilities or features that are used to route or transmit telephone calls. As their name suggests, they are *support* systems that an incumbent uses to run its business: to process orders, dispatch repairmen, and keep track of customer service requests. Requiring an incumbent to make these support functions available to competitors has nothing to do with unbundling the pieces of the network that the incumbent uses to deliver calls. And it has nothing to do with essential facilities—an incumbent's competitor can write or buy computer software as easily as the incumbent can. As a result, neither the plain terms nor the purposes of the definition of "network element" in the Act reach these software systems.

Indeed, the FCC does not even attempt to characterize these support systems as part of the equipment used to carry a call. To the contrary, the FCC declares that its objective in requiring incumbents to provide these support systems to their competitors is to ensure that the competitors will be able to perform business functions such as "pre-ordering, ordering, . . . and billing," J.A. 118 (Order ¶ 518), and "basic service functions [such] as scheduling customer appointments," *id.* at 118-20 (Order ¶ 519), in "substantially the same time and manner that an incumbent can for itself," *id.* at 118 (Order ¶ 518). But nothing in Congress' definition of network elements suggests that the incumbents' *business skills*—especially those that are not at all unique to the telecommunications business—must be turned over to competitors.

The FCC again disregarded the text of the statute in deciding that *services* offered by incumbent LECs, such as operator services and directory assistance, should be treated as "elements" subject to unbundling. *See id.* at 125-29 (Order ¶¶ 534-40). The FCC requires incumbents to make available to competitors the resources that incumbents use in providing these services, including their own staffs (that is, the operators themselves). *See* 47 C.F.R. § 51.5 (defining the operator services subject to unbundling as including "live assistance" to customers and "operator-assisted directory assistance"). But such services (not to mention people) are not even remotely within the definition of "network element." They are not "facilities" or "equipment" in the network. Nor are they "features, functions or capabilities . . . provided by means of" such facilities. And incumbents are not uniquely able to assemble staffs of operators. In fact, although the unbundling provision of the House bill originally applied to "*services*, elements, features, functions, and capabilities," the Conference Committee chose to delete the term "services" when it defined the scope of unbundling. *Compare* H.R. 1555, 104th Cong., 1st Sess. § 242(a)(2) (1995) (emphasis added) *with* 47 U.S.C. § 251(c)(3). The FCC has simply reversed Congress' decision.

The defect in the FCC's interpretation is further highlighted by its conclusion that "vertical services" such as call forwarding and call waiting are network elements. Vertical services are complete telecommunications services —not facilities—that incumbents sell at retail and thus must allow their competitors to buy at *wholesale rates* and then resell under section 251(c)(4). But the FCC's rules entitle competitors to obtain access to these same vertical services as network elements *at cost-based rates.* Thus, the FCC requires incumbents to make identical services available to competitors at two different prices. Doing so collapses the Act's two distinct means of accelerated entry for competitors—resale of service purchased

at wholesale discounts and access to unbundled network elements obtained at the incumbent's cost—through the sleight of hand of labeling vertical services as network elements. This result is particularly irrational because states typically set retail prices for vertical services above cost to support universal service, and allowing competitors to purchase vertical services at cost-based rates invites them to engage in regulatory arbitrage that undermines universal service. Congress intended no such result—it expressly deleted "services" from the definition of network element and defined an element as a "facility or equipment . . . *used* in the transmission, routing, or other provision of telecommunications service," not as such a service itself.

The FCC claimed its expansive view of network elements was justified in part by the definition's statement that elements include "*information* . . . used in the transmission, routing, or *other provision* of a telecommunications service." 47 U.S.C. § 153(29) (emphasis added). The FCC asserted that the term "other provision" expands the category of network elements beyond the physical delivery of telephone calls to virtually any information used for any purpose. J.A. 40 (Order ¶ 261). However, the general term "other provision" is limited by the more specific terms that precede it in the list. *See, e.g., Hughey v. United States*, 495 U.S. 411, 418 (1990); *United States v. Salen*, 235 U.S. 237, 244 (1914) (principle of *ejusdem generis*). Here, the other items in the list—"transmission" and "routing"—are functions of equipment used in the delivery of calls, and nothing in the statute suggests that the reference to "other provision" expands the definition beyond that type of function to encompass every aspect of operating a telephone company. To the contrary, that reference simply acknowledges that other technical functions of an incumbent's network, such as switching, also are involved in delivering a phone call. Nor can the reference to "telecommunications serv-

ice"—the "offering of telecommunications for a fee directly to the public," 47 U.S.C. § 153(46)—somehow unmoor the definition of "network element" from the core textual requirement that an element be a facility or equipment (or features and functions provided by means of such facility or equipment). The FCC's expansion of the category of network elements thus finds no support in the text of the Act.

The FCC's expansion of the definition to include support systems, retail services, and other parts of an incumbent's business beyond facilities used in call delivery is equally contrary to the purposes of the unbundling requirements. Most resources or assets of this kind, such as operator staffs to provide directory assistance, can readily be developed or acquired from sources other than an incumbent and are therefore beyond the scope of what a competitor would need from an incumbent in order to compete. By nevertheless requiring incumbents to provide these nonessential facilities and services, the FCC has stripped away any incentive new entrants would have to invest in the personnel and the development of skills required to run a local telephone business. Congress never envisioned such a result when it gave new entrants the option of using some of an incumbent's network elements as substitutes for the limited facilities entrants might not readily obtain elsewhere.

C. The FCC's Expansion of Incumbents' Unbundling Obligations Undermines the Structure of the Act by Permitting Competitors To Rely Exclusively on Unbundled Elements To Provide Service and Thereby Evade the Statutory Restrictions on Resale.

Under the FCC's decision, virtually every part of an incumbent's business is a "network element" and virtually every "network element" must be turned over to an incumbent's competitors. The FCC has taken the limited right that Congress granted competitors—to obtain from

incumbents physical facilities that are essential to compete but are not reasonably available from other sources—and has transformed that right into an almost unqualified entitlement to use every productive asset of an incumbent's business. As a result, as even the FCC explicitly acknowledged, Pet. App. 242a-44a (Order ¶¶ 328-32), an incumbent's competitors can rely exclusively on unbundled network elements from an incumbent to recreate and then resell finished retail services—and be supported by the incumbent's personnel and support functions.

This opportunity to engage in "sham unbundling" cannot be reconciled with the structure of the Act. The statute expressly creates two distinct entry options short of full facilities-based competition. A competitor that wants to utilize an incumbent's entire network without any facilities of its own can compete on the basis of marketing ability by buying the incumbent's finished services at wholesale rates and reselling them, as permitted under section 251(c)(4). Alternatively, section 251(c)(3) gives the competitor the option of obtaining at cost-based rates the individual "elements" that are reasonably available only from the incumbent's network and then combining those elements with the competitor's own facilities. Unlike a reseller, which obtains use of the same configuration of network facilities that the incumbent uses, a competitor using network elements leased from the incumbent must still design and configure its own network and identify which particular facilities will carry its customers' traffic.

What Congress did not intend is that the FCC would read the Act's provisions on unbundled elements so broadly that a competitor can procure as network elements from an incumbent *all* the facilities and other aspects of a local exchange business required to provide finished services, thereby totally duplicating local exchange service at a price different from that specified in

section 251(c)(4). Rather, Congress expected competitors to use at least some of their own facilities in constructing their networks or to pay the wholesale price for resale of services. Indeed, for that very reason, Congress directed incumbents to provide "physical collocation of equipment necessary for . . . access to unbundled network elements at the premises of the local exchange carrier" so that competitors would have places at which to connect their facilities with the network elements they purchase from incumbents. 47 U.S.C. § 251(c)(6). Congress recognized that a competitor might not be expected to have a full network in place when it begins offering local service and therefore that "[*s*]*ome* facilities and capabilities (e.g., central office switching) will likely *need* to be obtained from the incumbent local exchange carrier as network elements pursuant to new section 251." Conference Report at 148 (emphasis added). Unbundled access was intended to ensure "the interoperability of *both carriers' networks.*" S. Rep. No. 104-23, at 20 (1995) (emphasis added). By contrast, if a competitor wants to use an incumbent's entire network to offer service, the Act provides the option of resale, which permits "*non-facilities-based carriers* to have an opportunity to compete." H.R. Rep. No. 104-204, at 72 (1995) ("House Rep.") (emphasis added). The FCC's unbundling rules, however, allow a non-facilities-based carrier to use unbundled network elements as a substitute for resale at the price reserved for network elements.

The chance to exploit such sham unbundling directly contravenes Congress' goal of encouraging facilities-based competition. Because the FCC's rules give competitors the right to use, at cost-based prices, all of an incumbent's equipment, personnel, and other business assets necessary to run a local telephone business, competitors have little incentive to build their own facilities. It is far easier and less risky for competitors to force the incumbent to build and maintain its network for them, particularly when the opportunity for regulatory arbitrage allows the competitors

to siphon away the incumbent's profitable customers with no risk or investment. Indeed, the ability of new competitors to engage in regulatory arbitrage and gain a free-ride hurts not only incumbents, but also other new entrants that have chosen to engage in actual facilities-based competition.

The FCC's Order also frustrates the purposes of the Act by creating an opportunity for regulatory arbitrage, enabling new entrants to provide the same services as incumbents at lower prices that are the result not of any efficiencies but simply the evasion of universal service support obligations. Congress provided different pricing structures for the alternative competitive strategies of unbundled network elements and resale because of universal service concerns. While incumbents must offer unbundled network elements to rivals at cost—which the FCC has ruled cannot include universal service subsidies, *see* J.A. 153, 155-59 (Order ¶¶ 712, 715-20)—incumbents offer services for resale at prices discounted from retail rates, which do include such implicit subsidies. Congress legislated this difference in order to minimize arbitrage that would simply exploit these regulatory price differentials. *See* House Rep. at 72 ("The [resale] rate should reflect whether, and to what extent, the local dialtone service is subsidized by other services."). Congress was well aware that the traditional means of support for universal service was for states to require incumbent LECs to charge well above cost for some services (such as business services) in order to support below-cost prices for others (such as basic residential service to rural users). As Congress recognized, if resellers could purchase the former services at cost rather than at prices pegged to retail rates, they could lure away the incumbent's high-margin customers by charging less than the incumbent must charge to recoup the cost of serving subsidized customers.

The FCC's rules enable competitors to engage in precisely such arbitrage by allowing them to acquire at cost-

based prices all the network elements required to provide a service, thereby collapsing the distinction between unbundled network elements and resale. By obtaining an incumbent's finished service entirely through the incumbent's network elements at cost-based rates, competitors can undercut above-cost prices and deprive the incumbent of the subsidies that undergird universal service, while avoiding their own obligation to support universal service. At the same time, because competitors can obtain subsidized services at a discount from the below-cost rates incumbents must charge, competitors can resell them at comparably below-cost prices without needing to find subsidies to make up the difference between the actual cost and the price, as the incumbent would.

By creating a regime in which competitors will have every opportunity and incentive to undercut the above-cost prices on which incumbents must rely to support universal service, the FCC has assured through government regulation that incumbents will not, in the aggregate, be able to charge rates that recover their costs. Incumbents will continue to be forced by regulatory mandate to charge below-cost prices for some services. At the same time, because of the FCC's evisceration of the distinction between unbundling and resale, incumbents will not be compensated for providing these below-cost services—as they were previously—by having the ability to charge above-cost rates for other services. Such a reading of the Act threatens confiscation of incumbents' property and turns on its head the usual rule of statutory interpretation that statutes must be construed to minimize their potential constitutional infirmities. *See Edward J. DeBartolo Corp. v. Florida Gulf Coast Trades Council*, 485 U.S. 568, 575 (1988) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.").

MCI dismisses this opportunity for new entrants such as itself to engage in arbitrage because the existing implicit subsidies might someday end. MCI Br. at 25. But Congress clearly intended to prevent such arbitrage, no matter how long the opportunity for arbitrage might last —that is precisely why it provided two different pricing standards for unbundled network elements and resale. If Congress believed, as MCI asserts, that arbitrage was not a problem because retail "prices are set by market forces," MCI Br. at 25, then Congress would not have specified that wholesale prices were to be discounted from retail rates rather than based on cost as it required for network elements, interconnection, transport, and termination. Congress specifically chose to rely on discounted retail rates because such rates would "reflect whether, and to what extent, the local dialtone service is subsidized by other services." House Rep. at 72. Moreover, the Act sets no timetable for states to eliminate implicit subsidies, and, more than two years after passage of the Act, no state has abandoned such subsidies or even begun a proceeding to do so.[19]

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[19] The FCC's elimination of the unbundling/resale distinction also subverts the statutory scheme by permitting competitors to evade the Act's express restriction on the joint marketing of resold local services. Congress sought to create a competitive balance by preventing large long distance carriers from jointly marketing their services with local service acquired from an incumbent Bell operating company under the statutory resale provision *until* that incumbent is authorized to provide long distance service in its home region. *See* 47 U.S.C. § 271(e)(1). This section is intended "to provide parity between the Bell operating companies and other telecommunications carriers in their ability to offer 'one stop shopping' for telecommunications services." S. Rep. No. 104-23, at 43 (1995). But, as even the FCC concedes, an entity providing service through the use of unbundled network elements will not be subject to the joint marketing restriction (presumably because Congress expected such an entity to be engaging in a degree of facilities-based competition rather than simply reselling by another name). Pet. App. 246a (Order ¶ 335). In this respect as well, the FCC's elimination of the limitations on unbundled network elements undermines the statutory structure Congress created.

D. The Combination Rules Invalidated by the Court of Appeals Were Contrary to the Terms of the Act and Were the Final Step in Eliminating Any Distinction between Unbundled Network Elements and Resale.

Even after the FCC had expanded the scope of network elements and rejected any consideration of whether a competitor truly needed to obtain such elements from the incumbent, one difference between the use of unbundled network elements and resale should have remained: With resale, a competitor acquires use of an incumbent's network as a single, assembled service, whereas with unbundling competitors are entitled only to individual elements and must assemble those elements into a functioning network and business themselves. But the FCC did away with this distinction as well. Consistent with its unswerving determination to favor competitors over incumbents in every manner, the agency decreed that incumbents must provide "unbundled" network elements in a prepackaged, combined form whenever a competitor requests. 47 C.F.R. §§ 51.315(b)-(f). Coupled with the FCC's removal of any limits on what pieces of an incumbent's business must be provided as network elements, these combination rules would permit competitors to buy use of an incumbent's *entire* network as a preassembled and preconfigured "UNE platform," under the cloak of unbundled network elements.

The court of appeals rejected this result. As it explained, "[t]o permit [the] acquisition of already combined elements at cost based rates for unbundled access would obliterate the careful distinctions Congress has drawn in subsections 251(c)(3) and (4) between access to unbundled network elements on the one hand and the purchase at wholesale rates of an incumbent's telecommunications retail services for resale on the other." Pet. App. 71a. Under the FCC's rules, new entrants could provide exactly the same services through either unbundled network elements or resale, depending on which price would be most advantageous to them.

The lower court's ruling was compelled by the plain text of section 251, which requires incumbents to provide "*unbundled* network elements in a manner that allows *requesting carriers to combine* such elements in order to provide a telecommunications service." 47 U.S.C. § 251 (c)(3) (emphasis added). This statutory language is entirely consistent with the role that Congress expected unbundled network elements to play. Because Congress intended that incumbents be required to unbundle only the limited number of bottleneck facilities that competitors themselves could not reasonably duplicate, it fully expected that competitors would have to take those individual elements and "combine" them with their own facilities in order to design and construct their own networks. The FCC, having already removed other limits on the nature and use of network elements, disregarded this statutory directive as well and required incumbents to provide network elements to competitors on a precombined basis.

The court of appeals' invalidation of the FCC's combination rule provides a bulwark against the total elimination of Congress' distinction between unbundled elements and resale. Requiring competitors to combine elements, as the statute commands, helps to preserve resale as a distinct option despite its often less advantageous pricing: By choosing resale, a competing carrier can avoid spending the resources and taking the risks that inhere in designing and constructing a network through the combination of individual facilities. Allowing competitors effectively to obtain an incumbent's entire, already-combined network in the guise of unbundled network elements would absolve competitors of the risks associated with selecting and paying in advance for particular facilities and designating the "points" on the incumbent's network where they require access.

Petitioners try to sidestep the clear statutory language of section 251(c)(3) by contending that "unbundled"

means merely offered at separate prices. *See, e.g.*, FCC Br. at 44-45; AT&T Br. at 38-42; MCI Br. at 18-20. And they claim the statutory language assigning an incumbent's competitors the responsibility to "combine" elements simply requires that incumbents not restrict competitors from combining elements obtained from incumbents with other elements. *See, e.g.*, MCI Br. at 22. Thus, Petitioners effectively assert that Congress meant sham unbundling to be a lower-priced version of resale and intended no meaningful distinction between sections 251(c)(3) and (c)(4) of the Act.

Even taken on its own terms, this argument fails to make sense of the FCC's rules. Normally, the sum of the prices for individual pieces of a package is at least equal to (if not greater than, because of lost efficiencies) the price for the package as a whole. Indeed, if that were not the case, a purchaser would never have any reason to buy the package. But the FCC has given new entrants not only the right to obtain pieces of an incumbent's network at separate prices, but the right to obtain *all* the pieces of the network at a total price that will often be far *less* than the price that Congress designated for the whole. Congress dictated that the price for use of the entire network must be based on retail rates, which includes support for universal service subsidies. Under the FCC's vision of unbundling, competitors can obtain use of the same network—on a preassembled basis—at a price equal to the sum of the cost-based rates for each element, which do not include any universal service subsidies. That is obviously not what Congress intended.

Indeed, even under their own definition, petitioners truly seek to turn the concept of "unbundling" on its head. Requiring incumbents "to offer [unbundled] elements for *individual* leasing at *individual* prices," FCC Br. at 44 (emphasis added), protects new entrants by preventing an incumbent from forcing an entrant to take the whole

network or a package of elements, rather than only the individual pieces the entrant needs. Petitioners utterly pervert this justification by insisting that the "unbundling" provisions give them the right to obtain an incumbent's *entire* network as a preassembled whole.

In any event, taking petitioners' argument on its own terms is too generous, because it cannot be squared with the language that Congress used. Although "unbundled" can mean in part "separately priced," the language and structure of the statute as a whole demonstrate that Congress intended "unbundled" also to mean "physically separated." Petitioners improperly ask the Court to consider the term "unbundled" in isolation from the remainder of the statute. *See Bailey v. United States*, 516 U.S. 137, 145 (1995) (a court must "consider not only the bare meaning of the word but also its placement and purpose in the statutory scheme"). In particular, petitioners ignore or deny any connection between the term "unbundled" and the use of the word "combine" in the same sentence of the same subsection. *See, e.g.*, FCC Br. at 44-45; AT&T Br. at 38-42; MCI Br. at 21-22. But section 251(c)(3) requires that an incumbent *"shall provide* such unbundled network elements *in a manner* that allows requesting carriers *to combine"* the elements. That statement necessarily presupposes that the provided elements are not already combined. It would make no sense to say that the incumbent's duty is to provide network elements in a manner that allows entrants to combine them unless Congress intended the entrants to have the responsibility to do the combining. Congress expressly understood "unbundled" to require not only separate prices, but physical disconnection.

Indeed, until it resorted in its brief to this post hoc rationalization that is "entitled to little deference," the FCC itself had always understood that unbundling has a physical component. *See Securities Indus. Ass'n v. Board of Governors of the Fed. Reserve Sys.*, 468 U.S. 137, 143 (1982). In its Order, the FCC explained that " 'access' to network elements 'on an unbundled basis' means that incumbent LECs must provide the facility or functionality of a particular element to requesting carriers, *separate from the facility or functionality of other elements, for a separate fee*." Pet. App. 226a (Order ¶ 268) (emphasis added). In other words, unbundling involves not simply a "separate fee," but separation from "the facility . . . of other elements." Similarly, in discussing the feasibility of unbundling loops that were delivered in an aggregated form by an integrated digital loop carrier ("IDLC"), the FCC stated that "[*o*]*ne way to unbundle* an individual loop from an IDLC is to use a demultiplexer *to separate the unbundled loop(s)* prior to connecting the remaining loops to the switch. Commenters identify a number of other methods for separating out individual loops from IDLC facilities . . . ." J.A. 73 (Order ¶ 384) (emphasis added); *see also id.* at 247-48 (Third Order on Reconsideration ¶ 44) ("Although we conclude that shared transport is *physically severable* from switching, incumbent LECs may not unbundle switching and transport facilities that are already combined, except upon request by a requesting carrier." (emphasis added)).

Petitioners' own comments on the proposal that led to the FCC's Order reflected the same understanding. The Department of Justice, for example, noted that, "[i]n jurisdictions which have begun to open up local markets by requiring the *unbundling* of the local network into the loop, . . . local switching, and interoffice transport elements, a variety of problems have developed in *separating* a customer's loop . . . from the local switch." Reply Comments of the Department of Justice, CC Docket No. 96-98, at 28 n.33 (May 30, 1996) (emphasis added); *see also* Comments of MCI Corp., CC Docket No. 96-98, at 13 (May 16, 1996) ("To the extent an ILEC itself has the ability to separate its network into elements and sub-

elements . . . this demonstrates the technical feasibility of providing those unbundled elements or subelements.").

Petitioners' remaining arguments as to why the Court should ignore Congress' clear directive that "requesting carriers [are] to combine" unbundled network elements are equally unavailing. Petitioners contend that incumbents must provide competitors with network elements in a combined form when those elements are already combined in an incumbent's network in order to ensure "nondiscriminatory access." *See, e.g.*, FCC Br. at 46; AT&T Br. at 35-36; MCI Br. at 20-21. But this argument treats incumbents as though they merely stumbled on their networks already constructed and combined. Of course, it was the incumbent that did the work and spent the money to design a network and combine the individual elements that comprise it. Accordingly, requiring incumbents to hand those preassembled networks over to their competitors is the rule that violates the standard of nondiscrimination. Such a rule discriminates in favor of the competitors by relieving them of the need to combine elements in a network of their own design—the very tasks that the incumbents had to complete before they could provide service.

Finally, Petitioners engage in word games by suggesting that the court below somehow transformed the incumbents' "duty" to provide access to unbundled network elements into a "right . . . to disconnect those elements." *See, e.g.*, FCC Br. at 45-46. The court of appeals' interpretation simply defines the scope of the incumbents' duty: They must provide access to individual, disconnected network elements. The FCC is simply wrong in suggesting that the "grammatical implication of the Eighth Circuit's construction . . . is that incumbent LECs *must* provide access to network elements . . . *only* on a *disconnected* basis." *Id.* at 46 (emphasis in original). Although incumbents' duty is limited to providing access to

individual, unbundled elements, they obviously may go beyond their duty and provide combinations of elements if they so choose.

* * * *

Taken together, the FCC's unbundling rules create a regime entirely foreign to the statutory language, structure, and purposes. In its eagerness to help competitors instead of promoting meaningful competition, the agency rejected Congress' vision of unbundling as a limited option to obtain physical network elements that new entrants need to compete and cannot reasonably build or acquire elsewhere. In its place, the FCC substituted a broad right of cost-based access to virtually every part of an incumbent's business on a precombined basis. The FCC's regime discourages the development of facilities-based competition by eliminating any incentive for a new entrant to invest in rival facilities. It also undermines the foundation of universal service support by encouraging new entrants to engage in regulatory arbitrage and depriving incumbents of the revenues needed to support below-cost prices that they still are required to offer for some services. Petitioners' reliance on *Chevron* thus rings hollow. In determining whether an agency is entitled to deference, courts must "look to the provisions of the whole law, and to its object and policy." *John Hancock Mut. Life Ins. Co. v. Harris Trust and Sav. Bank*, 510 U.S. 86, 94-95 (1993). By that measure, the FCC's unbundling regime cannot stand.

II. THE FCC'S "PICK-AND-CHOOSE" RULE FURTHER ERODES THE ACT'S RELIANCE ON BASIC MARKET PRINCIPLES IN FAVOR OF REGULATORY FIAT.

As the court of appeals recognized, the FCC's "pick-and-choose" rule—under which a competitor can pick for itself at any time (even after it signs an agreement with the incumbent) any term from any of an incumbent's prior or subsequent interconnection agreements—further undermines the statutory structure Congress created. The

rule again exemplifies the FCC's determination to aid new entrants even if the results are contrary to the structure of the Act.

Section 252 is designed to encourage carrers to set the terms and conditions of interconnection and the purchase of network elements and wholesale services through private commercial negotiations. On receiving a request under the provisions of section 251, "an incumbent local exchange carrier may negotiate and enter into a *binding agreement* with the requesting telecommunications carrier" that governs the rates, terms, and conditions of the requesting carrier's purchase. 47 U.S.C. § 252(a)(1) (emphasis added). Both an incumbent LEC and an interconnecting competitor have an explicit duty to negotiate in good faith. 47 U.S.C. § 251(c)(1). They may bargain "without regard" to the Act's pricing, technical, and quality requirements, and a state must approve a negotiated agreement even if it departs from those requirements as long as the agreement is nondiscriminatory and consistent with the public interest. 47 U.S.C. §§ 252 (a)(1), 252(e)(2)(A).

The broad freedom of incumbents and competitors alike to settle voluntarily on the terms and conditions of their interconnection is "[c]onsistent with [Congress'] intent that carriers be encouraged to negotiate and resolve interconnection issues" and reflects Congress' recognition that, in order to reach commercially acceptable agreements, parties must have the flexibility to make tradeoffs and tailor agreements to their particular circumstances. S. Rep. No. 104-23, at 20 (1995). The statutory scheme is "intend[ed] to encourage private negotiation of interconnection agreements." *Id.* at 19. Bilateral negotiations can take into account the economic and other conditions that differ widely from place to place and between pairs of parties, enabling interconnecting carriers to reach arrangements that serve them most efficiently and, under competitive conditions, serve the public interest as well.

The FCC's Order effectively wipes out this statutory scheme. It precludes meaningful negotiation of binding agreements by allowing new entrants "to choose among individual provisions contained in publicly filed interconnection agreements" that incumbent LECs have reached with other carriers. Pet. App. 254a (Order ¶ 1298). Competitors may poach "any individual interconnection, service, or network element arrangement contained in any agreement to which [the incumbent] is a party." 47 C.F.R. § 51.809(a). What is more, a competitor may demand any such term for itself at *any* time, even after it has already signed a contract with an incumbent agreeing to a full package of terms and conditions. *See* Pet. App. 264a-65a (Order ¶ 1316). The competitor need not enter into renegotiations that would give the incumbent a chance to rebalance the relationship to take account of the terms imported from other agreements. Rather, the Order lets the competitor bypass the statutory negotiations *entirely* and demand that a state regulator award it any term agreed to by others. *Id.* at 267a (Order ¶ 1321).

This "pick-and-choose" regulation cannot be reconciled with a statutory scheme that relies on bilateral commercial negotiations to establish "binding agreement[s]," 47 U.S.C. § 252(a)(1), and emphasizes reliance on private negotiations. Bargaining is impossible if one party remains free to avoid its promises by selecting new contract terms at will, and the other party cannot know the extent of its commitments because it cannot know to whom else it will be forced to extend each isolated concession that it makes. And any agreements that are concluded under the "pick-and-choose" rule are not binding. A contract that gives one party unfettered discretion "to deny or change the effect of the promise, is an absurdity." *United States Trust Co. v. New Jersey*, 431 U.S. 1, 25 n.23 (1977).

"Pick and choose" distorts the content of interconnection arrangements as well. A complex commercial agreement is an integrated whole whose terms reflect the give

and take of bargaining. Generally, each party makes concessions in some areas in exchange for benefits in others, reflecting the particular needs and priorities of the parties. A party might, for example, agree to a higher price for one service in exchange for a lower price for another. But "pick and choose" allows one side (the new entrant) to demand the *quid* (the lower price on the first service) without having to take the *quo* with which it was originally paired (the higher price on the other)—regardless of differences in context or in the commercial assumptions on which each bilateral arrangement is based.[20] Given this prospect, an incumbent simply cannot afford to make tradeoffs, and a negotiated agreement that would benefit the negotiating parties will not be reached. The individualized, negotiated agreements Congress envisioned are replaced by "one size fits all" agreements similar to the tariffs that have long pervaded telecommunications regulation.

This preclusion of meaningful negotiations is exacerbated because competitors may pick and choose even from agreements negotiated before the 1996 Act was passed—which most frequently were agreements of convenience between neighboring incumbent LECs under which they handed off calls to each other at the borders of their contiguous territories, often at no charge. *See* Pet. App. 267a-68a (Order ¶ 1322); J.A. 23-24 (Order ¶ 162). By creating a regime in which one party at the bargaining

[20] The FCC did provide incumbents with the option of grouping terms it could "prove" were "legitimately related to the purchase of the individual element being sought." Pet. App. 264a (Order ¶ 1315). But such compartmentalization ignores the reality that a complex commercial agreement involving multiple elements and services must be viewed as a whole—one party may accept a tradeoff that it believes to be somewhat disadvantageous on one element because a tradeoff for another element that is a subject of the same agreement is particularly advantageous. And forcing an incumbent to disclose this type of detailed analysis during negotiations in order to be able to prove later that such a link is "legitimate" or that particular terms were "expressly" linked, AT&T Br. at 50, would have its own chilling effect on negotiations.

table can force the other to comply with terms designed for entirely different circumstances, including even no-charge terms from previous agreements of convenience, the FCC has corrupted Congress' design and ignored its decision to rely on and give maximum effect to private commercial negotiations among carriers.

The FCC tries to ground the "pick-and-choose" rule on section 252(i) of the Act, which provides that a "local exchange carrier shall make available any interconnection, service, or network element provided under an agreement . . . to which it is a party to any other requesting telecommunications carrier *upon the same terms and conditions* as those provided in the agreement." 47 U.S.C. § 252(i) (emphasis added). But the "terms and conditions" of an interconnection contract include all the terms and tradeoffs in the agreement, not separate subsets of terms. Section 252(i) means only that prior interconnection agreements must be made available *as integrated wholes*, so that a second entrant can step entirely into the shoes of an earlier one.[21] The FCC's contrary reading would negate the negotiation scheme established in the remainder of the statute and is therefore not entitled to *Chevron* deference.[22] *See Chevron*, 467 U.S. at 843 n.9;

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[21] The FCC's suggestion that such a rule would encourage incumbents to lard an interconnection agreement with unrelated terms, FCC Br. at 49-50, ignores the fact that any agreement must be approved by a state commission under a broad public interest standard. 47 U.S.C. § 252(e). Accordingly, any attempt to include unrelated terms in an interconnection agreement would subject it to rejection by the state commission.

[22] The FCC's construction of section 252(i) is also a reversal from how it has previously interpreted similar nondiscrimination obligations, which provides further reason to accord it little deference. *See, e.g., INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987). For example, the FCC has long required AT&T to serve any requesting customer under a filed interstate tariff, so that AT&T cannot discriminate among customers. In the 1980s, when AT&T sought to offer certain large customers individually tailored packages of interstate services, the FCC allowed AT&T to file a special tariff

NationsBank v. Variable Annuity Life Ins. Co., 513 U.S. 251, 256 (1995) (agency interpretation must be "reasonable in light of the legislature's revealed design").

CONCLUSION

For these reasons, the FCC's unbundling rules and its "pick-and-choose" rule should be vacated in their entirety.

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May 18, 1998

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listing each tailored package as a separate tariff option. The FCC required AT&T to allow other customers to buy its services under this tariff, but only if the customer would purchase the entire integrated bundle of services offered under the option; the customer could not just pick and choose individual terms. The FCC ruled at that time—in direct contrast to what it concluded here—that integrated packages of services necessarily involve tradeoffs and cannot be pulled apart, and that making these bundles available to all comers *as integrated wholes* is the proper way to satisfy the Communications Act's nondiscrimination requirements. *See AT&T Communications Revisions to Tariff F.C.C. No. 12*, 7 F.C.C.R. 7039, 7040-42, 7044, 7048-49 (Nov. 22, 1991), *aff'd*, *Competitive Telecom. Ass'n v. FCC*, 998 F.2d 1058, 1062-64 (D.C. Cir. 1993); 47 U.S.C. § 202(a).

APPENDIX

47 U.S.C. § 153. Definitions

* * * *

(29) Network element—The term "network element" means a facility or equipment used in the provision of a telecommunications service. Such term also includes features, functions, and capabilities that are provided by means of such facility or equipment, including subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service.

* * * *

(43) Telecommunications—The term "telecommunications" means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.

* * * *

(46) Telecommunications service—The term "telecommunications service" means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.

47 U.S.C. § 271. Bell Operating Company Entry into InterLATA Services

* * * *

(e) Limitations—

(1) Joint marketing of local and long distance services—Until a Bell operating company is authorized pursuant to subsection (d) of this section to provide interLATA services in an in-region State, or until 36 months have passed since February 8, 1996, whichever is earlier, a telecommunications carrier that

serves greater than 5 percent of the Nation's presubscribed access lines may not jointly market in such State telephone exchange service obtained from such company pursuant to section 251(c)(4) of this title with interLATA services offered by that telecommunications carrier.

* * * *

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Nos. 97-826, 97-829, 97-830, 97-831,
97-1075, 97-1087, 97-1099 and 97-1141

In the Supreme Court of the United States

OCTOBER TERM, 1997

AT&T CORP., ET AL.,

Petitioners,

v.

IOWA UTILITIES BOARD, ET AL.,

Respondents.

AT&T CORP., ET AL.,

Petitioners,

v.

CALIFORNIA, ET AL.,

Respondents.

AND RELATED PETITIONS

On Writs Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

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BRIEF FOR CALIFORNIA

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QUESTIONS PRESENTED

1. Whether the Federal Communications Commission ("FCC") correctly concluded that in enacting the Telecommunications Act of 1996, Congress intended to grant the FCC exclusive jurisdiction to dictate to the States a prescribed methodology for determining the intrastate component of the prices that an incumbent local exchange carrier ("LEC") may charge competing LECs for access to the incumbent LEC's network, as well as other terms and conditions for the provision of such access.

2. Whether the FCC correctly concluded that in enacting the Telecommunications Act of 1996, Congress intended to grant the FCC exclusive jurisdiction to dictate to the States prescribed rules governing the provision of intraLATA dialing parity, a matter which is almost entirely intrastate in nature.

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STATEMENT OF CALIFORNIA

The People of the State of California and the Public Utilities Commission of the State of California (hereinafter collectively "California" or "CPUC") are the sole State parties that challenged both the FCC's *First Report and Order*[1] and its *Second Report and Order*[2] and hence are the sole State respondents who prevailed in both cases below. California, which initiated its transition to local telephone competition in 1993, has an immense interest in bringing fair and effective local competition to its 32 million citizens as soon as possible. With the support of the other participating States and the National Association of Regulatory Utility Commissioners, California files this separate brief on the merits in both cases because of its unique interest and perspective.

STATEMENT OF THE CASE

I. Background

A. The Communications Act of 1934 and the Dual Jurisdictional Scheme

Even before the enactment of the Communications Act of 1934, 47 U.S.C. § 151, *et seq.*, it was well established that the States had exclusive jurisdiction over intrastate telecommunications. In *Smith v. Illinois Bell Telephone Co.*, 282 U.S. 133. 148-149 (1930), for example, this Court made clear that the provision of telephone service is a matter having both intrastate and interstate components and that the intrastate component, a matter of primarily local concern, was subject to

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[1] 11 FCC Rcd 15499 (1996); J.A. 403-1160.

[2] 11 FCC Rcd 19392 (1996); J.A. 1161-1357.

exclusive State regulation. This had long been the rule with respect to matters subject in part to interstate regulation under the Interstate Commerce Act. *See, e.g., Minnesota Rate Cases*, 230 U.S. 352, 420, 423 (1912).

Thereafter, in 1934, when Congress enacted the Communications Act and transferred telephone regulation from the Interstate Commerce Commission to the newly created Federal Communications Commission, it was careful to ensure that the dual jurisdictional principle of *Smith v. Illinois* applied. Congress created a system of dual regulation through § 2 of the Act, 47 U.S.C. § 152, which granted the FCC jurisdiction over interstate communications, *see* § 2(a) of the Act, 47 U.S.C. § 152(a),[3] while leaving the States exclusive jurisdiction over intrastate matters, *see* § 2(b) of the Act, 47 U.S.C. § 152(b), App. A1.[4]

Section 2(b) provides in relevant part: "[N]othing in this chapter shall be construed to apply or to give the [FCC] jurisdiction with respect to charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier." By § 2(b)'s express terms, neither the FCC's general jurisdiction over interstate communications, 47 U.S.C.

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[3] The FCC's jurisdiction over "interstate" matters did not extend to communications crossing State lines if the communications were "between points . . . in the same State" and "regulated by a State commission." 47 U.S.C. § 153(22), App. A2. Nor did the FCC's jurisdiction extend to *local* calls crossing State lines if regulated "by a State commission." 47 U.S.C. § 221(b), App. A3.

[4] As herein used "J.A." refers to the deferred joint appendix, "Pet. App." refers to the petitioners' appendix, and "App." refers to the appendix to this brief.

§ 152(a), nor its general responsibility for ensuring an efficient national communications system, 47 U.S.C. § 151, may be used to override the jurisdiction over intrastate communications reserved to the States by Congress. *See Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 369-70 (1986).

In addition, to facilitate the FCC's compliance with § 2(b), the 1934 Act authorized (and, under the *Smith* doctrine, *required*) the FCC to engage in the jurisdictional separation of the interstate and intrastate components of the cost of wire telephone toll service by enacting 47 U.S.C. § 221(c), App. A4.[5] Ch. 652, Title II, § 221, 48 Stat. 1080 (June 19, 1934). Thereafter, in 1971, Congress amended the 1934 Act by adding 47 U.S.C. § 410(c), App. A13, Pub. L. 92-131, § 2, 85 Stat. 363 (Sept. 30, 1971), establishing a Federal-State Joint Board procedure to further facilitate the jurisdictional separation of common carrier property and expenses between interstate and intrastate operations in order to facilitate interstate and intrastate ratemaking. The dual jurisdictional scheme and the separations process facilitating it have continuously remained in effect to the present day. *See, e.g., Louisiana*, 476 U.S. at 375-376; *Crockett Telephone Co. v. FCC*, 963 F.2d 1564, 1566-67, 1571 (D.C. Cir. 1992); *NARUC v. FCC*, 737 F.2d 1095, 1103-05 (D.C. Cir. 1984).

B. The AT&T Divestiture

By the early 1970s, regulatory policy in the field of telecommunications had begun to shift, in large part because

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[5] As noted, jurisdiction over *local* service, whether intrastate or interstate, was assigned exclusively to the States under § 221(b), App. A3-A4.

regulators recognized that evolving technologies had created opportunities to harness the benefits of competition for consumers. In 1982, the United States Department of Justice and AT&T entered into a consent decree under which AT&T was required to divest itself of the 22 then-existent Bell Operating Companies ("BOCs"). *United States v. AT&T*, 552 F.Supp. 131 (D.D.C. 1982), *aff'd mem.*, 460 U.S. 1001 (1983); *see also* 47 U.S.C. §§ 153(3), 153(4). Under the decree, which was known as the "Modification of Final Judgment" or "MFJ," seven regional holding companies, known as the "RBOCs," were formed.

The MFJ created a new geographic unit for the provision of local telephone service, the "Local Access and Transport Area" or "LATA." *See generally* 47 U.S.C. § 153(25), App. A2; *United States v. Western Electric Co.*, 569 F.Supp. 990 (D.D.C. 1983). Under the MFJ, a BOC was allowed to transport calls between telephones within a single LATA – which was called "intraLATA" service – but not between telephones in two different LATAs – which was called "interLATA" service. 47 U.S.C. § 153(21), App. A2. Only an interexchange carrier – and not a BOC – was permitted to carry calls across LATA boundaries. There are now 163 LATAs nationally, and the vast majority of them are situated within the boundaries of a single State.

Virtually all intraLATA calls originating in California and in the United States are intrastate calls and hence subject to exclusive State jurisdiction. The percentage of intraLATA calls originating in California that cross State lines is "miniscule and so small as not to be statistically significant." *California v. FCC*, Eighth Cir. No. 96-3519, California Brief, at 6 n. 2. Nationally, the percentage of intraLATA calls that are interstate is similarly miniscule: "a small fraction of one per

cent" and "so inconsequential as to be *de minimis*." *Id.*, at 7 n. 3; *California v. FCC*, Eighth Cir. No. 96-3519, California Reply Brief, at 3 n. 5. Petitioners have never disputed these statements. *Id.* Nor have they disputed California's representations at oral argument before the Eighth Circuit and in its Brief in Opposition in this Court that only two out of every thousand (.002) intraLATA calls made in the United States are interstate calls. *See, e.g.*, California Brief in Opp., at 3 n. 7. Furthermore, to the extent there *are* intraLATA, interstate telephone calls made in this country, most of *those* calls fall within the jurisdiction of the originating State in any event under 47 U.S.C. § 221(b), App. A3-A4.

Because the percentage of intraLATA calls that are interstate is so small, the FCC does not bother to break down its statistics for intraLATA calls into intrastate and interstate components, although it does so for interLATA calls. *See Statistics of Communications Common Carriers*, Table 2.6, p. 24 (FCC, 1996). Moreover, the FCC has acknowledged as recently as 1994 that most intraLATA calls "are intrastate and not within our purview." *Notice of Proposed Rulemaking* ("*NPRM*"), *Administration of the North American Numbering Plan*, 9 FCC Rcd 2068, 2077 n. 93 (1994).[6]

It is also notable that in other contexts, the FCC has ruled under its jurisdictional separations procedures, 47 U.S.C.

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[6] It is also notable that some 92 per cent of *all* telephone calls originating in California are intrastate in nature. *Statistics of Communications Common Carriers* (FCC, 1996), at 24. Remarkably, in 1995 there were significantly more intrastate telephone calls made in California (70+ billion) than there were interstate telephone calls made in the entire United States (50+ billion)! *Id.* Thus the FCC's usurping State authority over intrastate telecommunications leaves a very thin interstate tail wagging a very substantial intrastate dog.

§§ 221(c) and 410(c), App. A4, A13, that the federal interest in regulating service which involves less than 10 per cent interstate traffic is *de minimis* and not subject to FCC authority. *See Decision and Order, In the Matter of MTS and WATS Market Structure*, 4 FCC Rcd 5660 (1989), *adopting Recommended Decision and Order*, 4 FCC Rcd 1352 (1989).

IntraLATA telephone calls can be either "local" calls or "toll" calls. IntraLATA calls that remain within the caller's local calling area – the area in which local exchange calls are made without additional charge beyond the flat monthly rate – are "local" calls. IntraLATA calls that are completed outside the caller's local calling area, and for which a premium charge is assessed, are "toll" calls. 47 U.S.C. § 153(48), App. A3. However, neither the AT&T divestiture nor the creation of LATAs under the MFJ in any way affected the dual jurisdictional scheme established by Congress. Indeed, the MFJ court repeatedly acknowledged that under the decree, the States retained authority over both intraLATA and intrastate service. *United States v. Western Electric Co., supra*, 569 F.Supp. at 1005; *see also United States v. Western Electric Co.*, 569 F.Supp. 1057, 1109 (D.D.C.), *aff'd mem. sub nom. California v. United States*, 464 U.S. 1013 (1983). Since the AT&T divestiture, the States have continued to regulate intrastate service – whether the *intrastate* calls involved are intraLATA local calls, intraLATA toll calls or interLATA toll calls – while the FCC has continued to regulate interstate interLATA (long distance) service, as well as the miniscule realm of interstate intraLATA toll service. 47 U.S.C. §§ 152, 153(22), 221(b), App. A1, A2, A3-A4.

Following the AT&T divestiture, most States granted an exclusive monopoly franchise to a single carrier in each local

exchange area for the provision of local and intrastate intra-LATA toll service. These companies are called local exchange carriers or "LECs." 47 U.S.C. § 153(26), App. A3. While not required to do so, a number of States have in recent years chosen to introduce competition into the provision of intrastate telephone service. California is among those States. *See, e.g., Decision 94-09-065, Re Alternative Regulatory Frameworks for Local Exchange Carriers*, 56 Cal.P.U.C.2d 117, 141 (1994).

C. The Telecommunications Act of 1996

In 1996, Congress enacted the Telecommunications Act of 1996[7] to open all telecommunications markets, including local markets, to competition. The Act established a set of duties with which incumbent LECs were required to comply and identified the functions, features and services that incumbent LECs were required to make available to competing LECs, as well as the mutual duties of carriers to each other. 47 U.S.C. § 251, App. A4-A9.[8] The duties imposed upon the incumbent LECs included the duties to interconnect with competitors (47 U.S.C. § 251(c)(2), App. A6) and to provide access to unbundled network elements (47 U.S.C. § 251(c)(3), App. A6) at "just and reasonable" rates "based on . . . cost" as determined by a State commission (47 U.S.C. § 252(d)(1), App. A10), and the duty to resell telecommunications services

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[7] Pub. L. No. 104-104, 110 Stat. 56 (Feb. 8, 1996), *codified in part at and amending* the Communications Act of 1934, 47 U.S.C. §§ 151, *et seq.*

[8] Unless otherwise specified, statutory references are to the 1934 Act, as amended by the 1996 Act.

(47 U.S.C. § 251(c)(4), App. A7) at wholesale rates as determined by a State commission (47 U.S.C. § 252(d)(3), App. A11).

The Act authorized carriers to negotiate agreements relating to the terms and conditions upon which interconnection, the purchase of unbundled network elements and resale would occur in order to allow a competing carrier access to the incumbent's network. 47 U.S.C. § 252. To the extent that such negotiations were unsuccessful, it authorized State commissions to arbitrate and resolve disputes, and it permitted aggrieved carriers to appeal State commission determinations to Federal district courts. *Id.* Only if a State commission failed to carry out its responsibility under § 252 was the FCC empowered to "assume the responsibility of the State commission. . . . " 47 U.S.C. § 252(e)(5).

The duties imposed on incumbent LECs also included the duty "to provide dialing parity to competing providers of telephone exchange service and telephone toll service." 47 U.S.C. § 251(b)(3), App. A5. The term "dialing parity" means that a competitor of a LEC can provide telecommunications services in a way that allows the caller to route the call automatically, without dialing extra digits, to the designated carrier of the caller's choice from among 2 or more carriers (including the LEC). *See* 47 U.S.C. § 153(15), App. A1.

By its terms, § 251(b)(3) addresses the duty of carriers to provide *intraLATA* dialing parity, not *interLATA* dialing parity. The provision of interLATA, or long distance, dialing parity was accomplished pursuant to rules established and enforced more than a decade ago following the AT&T divestiture by the MFJ court, the FCC and the States. In 1984, the MFJ required dialing parity for interLATA calls by requiring

that customers of the BOCs be permitted to preselect a competing interexchange carrier to carry their interLATA calls and to route calls to that carrier's network simply by dialing "1" plus the called party's telephone number. *United States v. AT&T*, *supra*, 552 F.Supp. at 233. GTE, a large LEC that was not one of the BOCs, was subject to a similar dialing parity or "equal access" requirement imposed by consent decree. *United States v. GTE Corp.*, 603 F.Supp. 730 (D.D.C. 1984). And other LECs have generally been required to follow this dialing parity model for interLATA calls by the States and the FCC. *See, e.g., NPRM, Administration of the North American Numbering Plan*, *supra*, 9 FCC Rcd at 2077, ¶ 55. Since dialing parity issues related to interLATA calls were long ago resolved under the so-called "1 plus" framework, the dialing parity issue in this case is whether the FCC's establishment of dialing parity standards and related requirements for intraLATA calls in the *Second Report and Order* impermissibly intrudes on legitimate State authority over intrastate telecommunications. As above noted, virtually all intraLATA calls made in California and across the nation are intrastate calls. Moreover, dialing parity only involves the *origination* of telephone calls, not the receipt or termination of calls, and hence as a practical matter only implicates the regulatory regime applicable in the originating State.

A few narrow provisions of the Act expressly gave the FCC authority over matters having intrastate aspects (*see, e.g.*, 47 U.S.C. § 251(b)(2), App. A5, granting the FCC jurisdiction over number portability and numbering administration), while other provisions arguably gave the States jurisdiction over matters having interstate aspects (*see, e.g.*, 47 U.S.C. § 251(b)(4), App. A5, granting the States jurisdiction over access to poles, ducts, conduits and rights-of-way). By

and large, however, the 1996 Act did not fundamentally alter the dual State/Federal jurisdictional scheme established by Section 2(b) of the 1934 Act, 47 U.S.C. § 152(b), App. A1. By leaving § 2(b) intact when it passed the 1996 Act (with narrow and limited exceptions), Congress preserved the FCC's broad authority over "interstate" matters but also continued to fence off from FCC reach and regulation "intrastate" matters which fall within the exclusive authority of the States. Indeed, early versions of the Act would have excepted the local competition portions of the Act from the reach of § 2(b), but the final version of the Act omitted the exception. As the Court has noted: "Where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended." *Russello v. United States*, 464 U.S. 16, 23-24 (1983).

Moreover, Congress further reinforced § 2(b) and the dual jurisdictional scheme by enacting the savings provision of § 601(c)(1) of the 1996 Act, App. A14, Pub. L. 104-104, Title VI, § 601(c)(1), 110 Stat. 143 (Feb. 8, 1996) (enacted but not codified), which clarified that neither § 2(b) nor any provision of State law was altered by the Act unless the Act did so *expressly*. Section 601(c)(1) states:

> (c) Federal, State and Local Law. –
>
> (1) No implied effect. – This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments.

II. The Decisions Below

A. The First Report and Order and Pricing

With the enactment of the new law, the FCC saw opportunity. It issued its epic *First Report and Order* and implementing regulations which tore asunder the dual jurisdictional scheme wrought by Congress by asserting FCC jurisdiction over intrastate matters which Congress reserved to the States, dictated a single methodology for the intrastate pricing of local competition services nationally which it required the States to employ,[9] deputized the States to carry out its policies, and appointed itself the court of review of all State actions.[10]

The FCC took these actions despite provisions in the 1996 Act which plainly gave authority over pricing determinations to the States. For example, § 252(d), entitled "Pricing standards," provides that "[d]eterminations *by a State commission* of the just and reasonable rate" for interconnection and for network elements shall be based on cost (emphasis added). App. A10-A11. Similarly, § 252(c)(2) provides: "In resolving by arbitration . . . any open issues and imposing conditions upon the parties to the agreement, *a State commission* shall . . . establish any rates for interconnection, services, or network elements . . . " (emphasis added). App. A10. And § 252(d)(3) provides that "*a State commission* shall determine wholesale rates on the basis of retail rates . . . "

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[9] It did so despite significant differences in evolving local markets and network investment, and in derogation of proceedings in numerous States, including California, which had begun the process of transitioning to local telephone competition years before the 1996 Act was conceived.

[10] *First Report and Order*, ¶¶ 126-128; J.A. 468-469.

(emphasis added). App. A11. These provisions manifestly confer pricing authority on the States, not the FCC, subject only to the standards set forth in the Act.

The FCC's exercise of jurisdiction over intrastate matters was also taken in derogation of § 2(b) and the dual jurisdictional scheme, *see Louisiana*, *supra*, 476 U.S. at 370, even though the FCC candidly acknowledged in its order that the pricing provisions of §§ 251 and 252 "do not contain an explicit grant of intrastate authority to the Commission" – the necessary predicate to override § 2(b). *First Report and Order*, ¶ 84; J.A. 448.

B. The Second Report and Order and Dialing Parity

On the same day it issued the *First Report and Order*, the FCC issued its similarly lengthy *Second Report and Order* which arrogated to itself the power to dictate to the States the rules and standards for intraLATA dialing parity, even though almost every telephone call in the United States which is subject to those rules and standards is intrastate in nature.[11] In the *Second Report and Order*, the FCC asserted jurisdiction over policies and regulations relating to the provision by LECs of intrastate dialing parity. In making that jurisdictional

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[11] The rules for interLATA or long distance dialing parity were established more than a decade ago following the AT&T divestiture, leaving the sole question the appropriate dialing parity rules for intraLATA calls (both local and toll). It was undisputed below that *no* measurable percentage of intraLATA calls (local and toll) associated with California LATAs is interstate in nature, and that nationally .002, or approximately 2 out of every 1000 intraLATA calls (local and toll), are interstate in nature. Moreover, a scant two per cent of intraLATA *toll* calls are interstate in nature.

determination and adopting regulations to implement intrastate dialing parity under 47 U.S.C. § 251(b)(3), App. A5, the FCC merely *assumed* it possessed such authority and failed to address § 2(b) and the several provisions of the 1996 Act which confirm that the States retain jurisdiction over intrastate dialing parity.

More specifically, the FCC purported to "delegate" a modicum of authority to the States over intrastate dialing parity for the time being. Nevertheless, it dictated a "minimum" presubscription standard for intraLATA or intrastate toll dialing parity – the so-called "full 2-PIC method"[12] – which according to the *Second Report and Order* is the *only* permissible method of presubscription that is currently technically feasible. *Second Report and Order*, ¶¶ 5, 37, 49, J.A. 1169, 1183, 1188; 47 C.F.R. § 51.209, Pet. App. 348a. The FCC therefore effectively dictated that States adopt the "full 2-PIC method" *only*, even though the so-called "modified 2-PIC method," which they prohibit, satisfies the definition of "dialing parity" contained in the 1996 Act. 47 U.S.C. § 153(15), App. A1.

The FCC also prohibited a State from establishing an interim default mechanism by which a LEC could assign itself as the intraLATA toll service provider of a new LEC customer who does not affirmatively choose an intraLATA toll service provider, thus requiring the customer to dial a carrier access code for each intraLATA toll call or intrastate toll call until

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[12] The "full 2-PIC method" requires that a customer be allowed to select two presubscribed carriers (in addition to its LEC), one for intraLATA toll calls and another for interLATA calls. A "modified 2-PIC method" would permit the customer to choose an intraLATA toll service provider from among the LEC and the interLATA service provider.

the customer makes a permanent, affirmative selection. *Second Report and Order*, ¶ 78, J.A. 1203; 47 C.F.R. § 51.209(c), Pet. App. 349a. It required carriers to develop and submit detailed implementation plans and imposed on States and carriers an implementation schedule, the violation of which would purportedly result in the FCC's taking control from the States of the entire intrastate and intraLATA dialing parity implementation process. *Second Report and Order*, ¶¶ 38, 59, J.A. 1183-1184, 1193; 47 C.F.R. §§ 51.211, 51.213, Pet. App. 349a-353a.

While the FCC considered implementing local dialing parity requirements and methodologies, *see Second Report and Order*, ¶¶ 64-75, J.A. 1196-1202, it concluded that "local dialing parity will be achieved upon implementation of the number portability and interconnection requirements of section 251" and therefore "decline[d] to prescribe now any additional guidelines addressing the methods that LECs may use to accomplish local dialing parity." *Id.* at ¶ 71, J.A. 1199. However, its discussion of local dialing parity did not preclude it from imposing local dialing parity requirements at some future date nor did it address the fact that the Act leaves local calls, whether intrastate or interstate, subject to exclusive State jurisdiction. 47 U.S.C. § 221(b), App. A3-A4. Finally, the FCC established "national" rules for a LEC's recovering the costs incurred in implementing the dialing parity requirements. *Second Report and Order*, ¶¶ 92-95, J.A. 1209-1211; 47 C.F.R. § 51.215, Pet. App. 353a.

In exercising jurisdiction over intraLATA and intrastate dialing parity, the FCC nevertheless expressly acknowledged that the regulation of dialing parity is separable into intraLATA and interLATA components or, alternatively, into intrastate and interstate components. *Second Report and Order*,

¶ 37, J.A. 1183. The FCC also acknowledged that § 251(g), App. A9, which preserves the equal access obligations of the BOCs under the MFJ, has nothing to do with the FCC's dialing parity requirements imposed under § 251(b)(3), App. A3-A4. The FCC said: "That section [251(g)] contains no reference or cross reference to dialing parity or to section 251(b)(3). Section 251(g) preserves the equal access obligations already imposed on the BOCs and GTE, but does not exempt them from the toll dialing parity requirements." *Second Report and Order*, ¶ 29, J.A. 1178-1179. And, as above noted, the equal access obligations of the BOCs under the MFJ do not include intraLATA dialing parity. *United States v. Western Electric Co.*, *supra*, 569 F.Supp. at 1005; *United States v. Western Electric Co.*, *supra*, 569 F.Supp. at 1109.

C. The Eighth Circuit's Decisions

The FCC's actions spawned a flurry of petitions for review from State commissions and carriers. All told, thirty-three States,[13] along with many other parties, challenged the FCC's opportunistic seizure of pricing authority in the United States Court of Appeals for the Eighth Circuit. Some sought a partial stay of the FCC's pricing rules pending decision on the merits, and the Eighth Circuit granted the stay. *Iowa Utils. Bd. v. FCC*, 109 F.3d 418 (8th Cir. 1996), J.A. 224-242. On motions to vacate the stay filed by the petitioners herein, this Court unanimously declined to disturb the ruling, rejecting petitioners' claims that there was a "reasonable probability"

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[13] This number includes State parties who participated in the motion to enforce the Eighth Circuit's mandate following its *Iowa Utils. Bd.* decision.

that four members of the Court would vote to grant certiorari, a "significant possibility" of reversal of the Eighth Circuit's decision and "a likelihood" of irreparable harm arising from the decision. *See FCC v. Iowa Utils. Bd.*, 117 S. Ct. 378 (No. A-299 Oct. 31, 1996) (Thomas, J., in chambers), 117 S. Ct. 429 (No. A-299 Nov. 12, 1996) (per curiam). In addition, California and several carriers, along with a host of supporting intervenors, challenged the FCC's opportunistic seizure of intraLATA dialing parity jurisdiction.

After full briefing and argument, the Eighth Circuit rendered its final decision in the pricing case, fully consistent with its earlier stay ruling, vacating the pricing regulations contained in the *First Report and Order* and associated FCC regulations. *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), Pet. App. 1a-67a. The Eighth Circuit also rendered its final decision in the dialing parity jurisdiction case, vacating the dialing parity regulations contained in the *Second Report and Order* and associated FCC regulations. *California v. FCC*, 124 F.3d 934 (8th Cir. 1997), Pet. App. 73a-91a.

These proceedings on writs of certiorari follow.

SUMMARY OF ARGUMENT

In enacting the Telecommunications Act of 1996, Congress did not grant the FCC exclusive jurisdiction to dictate to the States a prescribed methodology for determining the prices that an incumbent LEC may charge competing LECs for access to the incumbent LEC's network. Nor did it grant the FCC exclusive jurisdiction to dictate other terms and conditions for the provision of such access. Instead, Congress straightforwardly and unambiguously assigned to the States exclusive authority, subject only to the standards contained in

the Act itself, to determine the prices and pricing methodologies, and the other terms and conditions, under which an incumbent LEC must provide a competing LEC with access to the incumbent LEC's local network. *See* 47 U.S.C. §§ 252(c)(2), 252(d) and 252(d)(3), App. A10-A11. Section 251(d)(1) of the Act, the primary provision relied on by the FCC, is merely a procedural statute and does not constitute a straightforward and unambiguous grant of authority to the FCC to implement the matters addressed in § 251. Nor does the FCC derive support for its position from §§ 154(i), 201(b), 251(d)(2), 251(d)(3) or 303(r), none of which unambiguously grants the FCC the authority it seeks.

In addition, § 2(b) of the Act, 47 U.S.C. § 152(b), App. A1, fences off from FCC reach and regulation intrastate matters. *Louisiana*, *supra*, 476 U.S. at 370. Since Congress expressed no clear intent to grant the FCC authority over pricing and the other terms and conditions under which a LEC provides competitors with access to its local network – a fact the FCC concedes – the dual jurisdictional scheme remains intact with respect to such matters. Moreover, both the legislative history of the 1996 Act and the savings clause of § 601(c)(1) of the Act, App. A14, make manifest that Congress intended § 2(b) to apply to pricing and related matters. Accordingly, the States, not the FCC, have jurisdiction over the intrastate aspects of those matters.

The principle of *Chevron* deference (*Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984)), is inapplicable to this case. If the 1996 Act *expressly* grants either the States or the FCC exclusive jurisdiction over pricing and related matters, the principle of *Chevron* deference is inapplicable because "the intent of Congress is clear." *Chevron*, 467 U.S. at 842. If, however, the 1996 Act does not *expressly* grant exclusive

jurisdiction over pricing and related matters either to the States or to the FCC, *Chevron* is still inapplicable because the two mandatory rules of statutory construction contained in §§ 2(b) and 601(c)(1) of the Act, App. A1, A14, supersede the judge-made principle of *Chevron* in the circumstances presented.

Those provisions also preclude the construction of the statute advocated by the FCC. The FCC concedes as much when it acknowledges that §§ 251 and 252 "do not contain an explicit grant of intrastate authority to the Commission." *First Report and Order*, ¶ 84; J.A. 448. This Court has held that under § 2(b), the absence of such an explicit grant of authority precludes Federal preemption. *Louisiana*, *supra*, 476 U.S. at 368-69, 377. Moreover, in addition to §§ 2(b) and 601(c)(1), Congress left intact the jurisdictional separations requirements of 47 U.S.C. §§ 221(c) and 410(c), App. A4, A13, thereby further demonstrating its intent that the dual jurisdictional scheme be applicable to the amended statute. *Id.* at 375-376.

The FCC's argument that § 2(b) "cannot logically be construed to mean that [it] limits the scope of the Commission's authority *more* than it limits the substantive reach of federal telecommunications law" is similarly without merit. *See* FCC Brief, at 34. That argument is contrary to the plain language of § 2(b) and the purpose of § 2(b) as articulated by this Court – to "fence off from FCC reach or regulation intrastate matters – indeed, including matters 'in connection with' intrastate service." *Louisiana*, *supra*, 476 U.S. at 370. The argument is also inconsistent with the canons of construction that statutory terms connected by a disjunctive be given separate meanings and that a statute not be construed to render a portion of its text mere surplusage.

The FCC's argument that "[s]ection 2(b) . . . [was] intended to bar the Commission from exercising its 'ancillary' jurisdiction . . . over intrastate matters . . . to which the Act itself does not clearly extend" is unpersuasive. FCC Brief, at 34, *citing Louisiana* and *Houston, E. & W. Texas Ry. v. United States*, 234 U.S. 342 (1914) (*Shreveport Rate Case*). *Louisiana* nowhere refers to the FCC's ancillary jurisdiction and broadly refutes the argument that § 2(b) is subject to a narrowing construction because one of Congress' purposes in enacting § 2(b) was to legislatively overrule *Shreveport*. 476 U.S. at 370, 372-373. Congress' affirmative retention of § 2(b) and the broad construction of that section in *Louisiana*, of which Congress must be presumed to have been aware, strongly suggests the contrary. Finally, the FCC's construction would create a slippery slope, leaving the States without any role at all in the transition to local competition.

The FCC's reliance on the so-called "impossibility" exception to § 2(b), *see Louisiana*, 476 U.S. at 375-376 n. 4, is also misplaced. Not only was that doctrine *not* a stated basis for the FCC's decisions below, *see SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1943), but it is flatly refuted by the other FCC and court decisions which have found that the dual jurisdictional scheme applies to the prices or rates charged by LECs for "access," "unbundled access" and "interconnection" to the local network. *MTS & WATS Market Structure: Third Report and Order*, 93 F.C.C.2d 241, 260-265 (1983), *aff'd, NARUC v. FCC, supra*, 737 F.2d 1095, 1114, 1115 (LEC intrastate access charges to interexchange carriers subject to dual jurisdictional scheme); *ONA Reconsideration Order*, 5 FCC Rcd 3084, 3088-3090, 3100 n. 111 (1990), *reversed on other grounds, California v. FCC*, 4 F.3d 1505 (9th Cir. 1993) (LEC unbundled basic service element charges to enhanced

service providers subject to dual jurisdictional scheme); *In the Matter of the Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services*, 2 FCC Rcd 2910 (1987) (LEC interconnection charges to cellular carriers subject to dual jurisdictional scheme). In addition, the FCC cannot implicate the exception by simply abdicating its statutory responsibility and refusing to engage in the jurisdictional separations process. *Smith v. Illinois*, *supra*, 282 U.S. at 148-149; *Crockett Telephone Co. v. FCC*, *supra*, 963 F.2d at 1571.

The FCC's argument that jurisdiction must be found to repose in the FCC in order to expedite appellate review and hence the finality of agency determinations (FCC Brief, at 40) must be rejected because it asks the Court to *legislate*. Congress chose to give the States responsibility to make the initial determination of pricing and related matters, with appellate review through the Federal court system, in order to accord at least some degree of respect to local and regional differences in markets and competitive conditions and the ability of State regulators to address those differences. As in *Louisiana*, it is not for the FCC or this Court to effectuate a legislative approach which Congress consciously rejected.

Nor does the Act permit the FCC to dictate to the States nationwide policies and rules governing a LEC's provision of intraLATA dialing parity to competing service providers.[14] This brief addresses intraLATA dialing parity, rather than

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[14] If the Court concludes that the Act grants the States *express* authority over pricing and related matters, as found by the Eighth Circuit, then dialing parity, with its unique factual setting, will be the *only* jurisdictional issue which requires the Court to address a § 2(b) analysis.

intrastate dialing parity, for three reasons: (1) the establishment of dialing parity requirements for the *interLATA*, or *long distance*, market occurred more than a decade ago with the imposition of the "1 plus" presubscription methodology under the supervision of the MFJ court, the FCC and the States, and is therefore irrelevant to the issue before the Court, (2) since virtually all intraLATA calls are intrastate calls which, under § 2(b), fall within exclusive State jurisdiction, § 2(b) leaves the matter of intraLATA dialing parity to the States, and (3) the § 251(b)(3) duty of LECs "to provide dialing parity to competing providers of telephone exchange service and telephone toll service" appears to address only intraLATA dialing parity, in part because the BOCs, which provide the overwhelming majority of LEC service nationally, are not yet permitted to compete in the interLATA, or long distance, market.

In enacting the 1996 Act, Congress expressed no clear intent to preclude § 2(b)'s applicability to the dialing parity duty placed on carriers by § 251(b)(3). Indeed, as noted, the FCC has conceded that § 251 does not contain "an explicit grant of intrastate authority to the Commission." *First Report and Order*, ¶ 84, J.A. 448. Hence the dual jurisdictional scheme remains intact with respect to § 251(b)(3). Moreover, both the legislative history of the 1996 Act and the savings clause of § 601(c)(1) make manifest that Congress intended § 2(b) to apply to dialing parity and related matters. Accordingly, the States, not the FCC, have jurisdiction over intraLATA dialing parity.

Other provisions of the 1996 Act also demonstrate that the FCC exceeded its authority in purporting to adopt standards and rules governing intrastate and intraLATA dialing parity. Several subdivisions of § 251 – §§ 251(b)(2) and

251(e)(1), App. A5, A8-A9 – expressly grant the FCC *authority* over number portability and numbering administration, but § 251(b)(3), App. A5, which involves dialing parity, contains no such affirmative grant of jurisdiction. Moreover, § 251(e)(2), App. A9, grants the FCC authority over cost recovery relating to number portability and numbering administration, but contains no such affirmative grant of jurisdiction with respect to dialing parity cost recovery.

In addition, Congress directly addressed "intraLATA toll dialing parity" in § 271(e)(2)(B), App. A12-A13, twice referring to *State* authority to implement such dialing parity. And in the "competitive checklist" for BOCs seeking to provide interLATA service, Congress characterized number portability, but not dialing parity, as a matter on which the FCC "issues regulations pursuant to section 251." 47 U.S.C. §§ 271(c)(2)(B)(xi), 271(c)(2)(B)(xii), App. A12. Finally, the FCC's heavy reliance on § 251(g), App. A9, is apparently abandoned in this Court. By the FCC's own admission, § 251(g) is inapplicable to the dialing parity requirements imposed by § 251(b)(3). *Second Report and Order*, ¶ 29, J.A. 1178.

ARGUMENT

I. THE FIRST REPORT AND ORDER MUST BE VACATED BECAUSE THE 1996 ACT EXPRESSLY GRANTS THE STATES' EXCLUSIVE AUTHORITY OVER THE PRICING OF ACCESS TO AN INCUMBENT LOCAL EXCHANGE CARRIER'S NETWORK

The Eighth Circuit correctly determined that Congress straightforwardly and unambiguously assigned to the States exclusive authority, subject only to the standards contained in

the Act itself, to determine the prices and pricing methodologies, and the other terms and conditions, under which an incumbent LEC must provide a competing LEC with access to the incumbent LEC's local network. For example, § 252(d), entitled "Pricing standards," provides that "[d]eterminations *by a State commission* of the just and reasonable rate for the interconnection of facilities and . . . for network elements . . . shall be . . . based on the cost . . . of providing the interconnection or network element . . . " 47 U.S.C. § 252(d)(1), App. A10 (emphasis added). Similarly, § 252(c)(2) provides: "In resolving by arbitration . . . any open issues . . . , *a State commission* shall . . . establish any rates for interconnection, services, or network elements . . . " (emphasis added). And § 252(d)(3), App. A11, provides that "*a State commission* shall determine wholesale rates on the basis of retail rates . . . " (emphasis added). These provisions manifestly confer exclusive pricing authority on the States, not the FCC.

The FCC nevertheless argues that Congress gave it the authority to prescribe pricing methodologies, and other terms and conditions of local competition, to the States by providing in § 251(d)(1) that "[w]ithin 6 months after February 8, 1996, the Commission shall complete all actions necessary to establish regulations to implement the requirements of this section." App. A10. The flawed assumption upon which this argument rests is that Congress' requiring the FCC to "establish regulations to implement the requirements of this section" is an unambiguous grant of jurisdiction to the FCC over all matters comprehended in § 251. To the contrary, in view of the numerous matters addressed in § 251 but expressly assigned to the States by § 252 and other provisions of the Act, § 251(d)(1) is properly read as merely requiring the FCC

to assure that there are no gaps in the procedural rules for implementation of the Act, not to dictate substantive methodologies which render a State's statutorily-assigned pricing determinations largely ministerial. The reading suggested by the FCC would allow it to usurp the States' clear authority to determine whether rates are "based on . . . cost," "just and reasonable" and based on "retail rates." 47 U.S.C. §§ 252(d)(1), 252(d)(3), App. A10, A11. Contrary to the FCC's argument, § 251(d)(1) does not authorize the FCC to override the substantive determinations which the Act otherwise expressly assigns to the States.

Nor do §§ 251(d)(2) and 251(d)(3), App. A8, aid the FCC. Section 251(d)(2) merely clarifies that the FCC has authority to determine, at least in part, "what network elements should be made available" pursuant to § 251(c)(3) – a matter no one has disputed. And § 251(d)(3), by its terms, is intended to *preserve* State access regulations, not preempt them. While the language of § 251(d)(3)(C), App. A8, may suggest some narrow FCC authority to preclude enforcement of a particular State commission regulation which "substantially prevent[s] implementation of the requirements of this section *and* the purposes of this part," it hardly authorizes the FCC to override substantive determinations which the Act expressly assigns to State commissions. Moreover, § 251(d)(3)(B), App. A8, suggests that State determinations under 251 are to be "consistent with the requirements of this section," not the pronouncements of the FCC.[15]

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[15] Nor do the other provisions on which the FCC relies for a grant of intrastate jurisdiction – 47 U.S.C. §§ 154(i), 201(b) and 303(r) – support its argument. Reliance on these provisions is largely undermined by the FCC's acknowledgments that §§ 251 and 252 "do not contain an explicit grant of

As the 1996 Act gives the States unambiguous authority to establish the "just and reasonable" prices "based on . . . cost" and "wholesale rates" based on "retail rates" under which an incumbent LEC provides a competing LEC with access to its network, subject only to the pricing standards articulated in the Act itself, the FCC's pricing regulations are *ultra vires* and were properly vacated by the Eighth Circuit.

II. THE FIRST REPORT AND ORDER MUST BE VACATED BECAUSE THE 1996 ACT PRESERVED THE DUAL JURISDICTIONAL SCHEME

The Court, however, need not reach the foregoing argument to resolve these cases in favor of the States. Under the familiar dual jurisdictional framework established by § 2(b) of the Act, and reaffirmed by the Court in *Louisiana*, the FCC's attempt to regulate the intrastate component of pricing and related matters is plainly beyond its statutory authority.

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intrastate authority" and that "sections 251 and 252 do not alter the jurisdictional division of authority with respect to matters falling outside the scope of these provisions." *First Report and Order*, 70, 84; J.A. 440, 448; footnote omitted. Beyond this, § 154(i) merely authorizes FCC actions "not inconsistent with this chapter." Section 201(b) relates back to § 201(a) which by its terms is limited to "interstate or foreign communication by wire or radio." And § 303(r) authorizes rulemaking "not inconsistent with law, as may be necessary to carry out the provisions of this chapter." None of these provisions provides the "unambiguous" and "straightforward" grant of authority over intrastate matters required by *Louisiana*, 476 U.S. at 377, and each of them is subject to the limitation on FCC jurisdiction over intrastate matters engendered in § 2(b), 47 U.S.C. § 152(b). *Id.*

A. The Principle of Chevron Deference is Inapplicable to this Case

Contrary to the assertions in the FCC's brief (at pp. 17, 42), the principle of *Chevron* deference[16] is inapplicable to this case. If the States are correct that the 1996 Act *expressly* grants them exclusive jurisdiction over pricing and related matters, *see* Argument I, *supra*, or if the FCC is correct that the Act *expressly* grants *it* exclusive jurisdiction over such matters, then the principle of *Chevron* deference is inapplicable because "the intent of Congress is clear." *Chevron*, 467 U.S. at 842.

If, however, the Court concludes that the 1996 Act does not *expressly* grant exclusive jurisdiction over pricing and related matters either to the States or to the FCC, *Chevron* is still inapplicable. That is so because Congress included in the Act two mandatory rules of statutory construction, both applicable to the jurisdictional questions here, which supersede the judge-made principle of *Chevron* in the circumstances presented. First, in § 2(b) of the 1934 Act, as amended, 47 U.S.C. § 152(b), Congress stated that "*nothing* in this chapter *shall be construed* to apply or to give the Commission jurisdiction with respect to . . . charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier." Emphasis added. Under § 2(b), no statutory provision cited by the FCC can be found to give the FCC jurisdiction over intrastate matters unless that provision contains an *express* grant of authority over intrastate matters to the FCC. *Louisiana*, *supra*, 476 U.S. at 377.

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[16] *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984).

Congress intentionally retained § 2(b) in the 1996 Act and made it applicable to §§ 251 and 252. Early drafts of the Act expressly excepted Title II (including §§ 251 and 252) from the coverage of § 2(b) but the final version of the Act omitted the exception. *First Report and Order*, ¶¶ 80, 94, J.A. 446, 452. As this Court stated in *Russello*, *supra*, 464 U.S. at 23-24: "Where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended." Section 2(b) is a legislatively prescribed rule of statutory construction which displaces the judge-made rule of deference articulated in *Chevron*. *See Louisiana*, *supra*, 476 U.S. at 377.

Congress further reinforced § 2(b) and the dual jurisdictional scheme by enacting the rule of statutory construction contained in the savings provision of § 601(c)(1) of the 1996 Act, Pub. L. 104-104, Title VI, § 601(c)(1), 110 Stat. 143 (Feb. 8, 1996) (enacted but not codified), App. A14. Section 601(c)(1) commands that "[t]his Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments." This provision, which clarifies that neither § 2(b) nor any provision of State law is altered by the Act unless the Act does so *expressly*, constitutes another legislatively prescribed rule of statutory construction which displaces the rule of *Chevron*.

Otherwise stated, the Act itself precludes as "impermissible" under *Chevron* any construction of its text which is inconsistent with the mandatory rules of statutory construction it contains. Because the Act requires that a grant of authority to the FCC over intrastate matters be made "expressly," any claim of authority which fails to meet the "express" standard must be rejected. That was precisely the

situation in *Louisiana*, 476 U.S. at 374-375, where *Chevron* deference was *not* accorded to the FCC.

Beyond this, where a dual jurisdictional scheme is involved, *Chevron* deference is inappropriate because the agency receiving the deference may use it to upset the statutory balance established by Congress. *See, e.g., Northwest Central Pipeline Corp. v. Kansas Corp. Comm'n*, 489 U.S. 493, 512, 515-516 n. 12 (1989); *Altamont Gas Transmission Co. v. FERC*, 92 F.3d 1239, 1246-1248 (D.C. Cir. 1996), *cert. denied sub nom. Indicated Expansion Shippers v. FERC*, 117 S. Ct. 1568 (1997); *Clark v. Alexander*, 85 F.3d 146, 152 (4th Cir. 1996); *but see Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 380-381 (1988) (Scalia, J., concurring in the judgment) (suggesting that *Chevron* deference should extend to an agency's determination of the scope of its own authority). Stated another way, by retaining § 2(b) in the Act, Congress legislatively determined that *Chevron* deference should not be accorded to an FCC determination expanding the agency's authority into the intrastate realm which Congress reserved to the States.

B. Section 2(b) Prohibits the FCC From Adopting Standards and Rules Governing Intrastate Pricing and Related Matters

The plain language of § 2(b) and the principles of *Louisiana* compel the conclusion that the FCC's regulation of matters pertaining to the intrastate component of interconnection, unbundled element and resale pricing is beyond its statutory authority. Section 2(b) provides that "nothing in this Act shall be construed to apply or to give the [FCC] jurisdiction with

respect to charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier." In characterizing § 2(b), the Court has said: "By its terms, this provision fences off from FCC reach or regulation intrastate matters – indeed, including matters 'in connection with' intrastate service. Moreover, the language with which it does so is certainly as sweeping as the wording of the provision declaring the purposes of the Act and the role of the FCC." *Louisiana, supra*, 476 U.S. at 370. In addition, the rule of construction established by § 2(b) makes clear that every other provision of the Act which is susceptible of construction, including the provisions added by the 1996 Act, must be construed to find State authority over intrastate matters. *Louisiana, supra*, 476 U.S. at 373.

The FCC properly concedes that § 2(b) remains effective as to all matters falling outside §§ 251 and 252 of the 1996 Act. *First Report and Order*, ¶ 70, J.A. 440. The FCC nonetheless concludes that "section 251 authorizes the FCC to establish regulations regarding both interstate and intrastate aspects of interconnection, services, and access to unbundled elements" and that "the regulations the Commission establishes pursuant to section 251 are binding upon states and carriers and section 2(b) does not limit the Commission's authority to establish regulations governing intrastate matters pursuant to section 251." *Id.*, ¶ 84, J.A. 448.

However, the FCC's arrogating to itself the authority to dictate standards, methodologies and rules for intrastate pricing is refuted by the Act itself. The FCC concedes as much when it acknowledges that §§ 251 and 252 "do not contain an explicit grant of intrastate authority to the Commission." *First Report and Order*, ¶ 84, J.A. 448. The absence of such an

explicit grant of authority is fatal to its claim, for if *Louisiana* means anything, it means that Congress' intent to preempt state regulation of intrastate matters must be clear. *Louisiana*, *supra*, 476 U.S. at 368-69, 377; *see also Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977), and many cases there cited. As no such clear expression appears here, the FCC's determinations with respect to intrastate pricing must be vacated.

In *Louisiana*, the FCC had concluded that State regulation of depreciation charges for local ratemaking purposes was thwarting Federal objectives and thus imperiling the economic well-being of the telecommunications industry. The FCC claimed that deference to the States was inappropriate where an important Federal policy, that of nurturing competition, was at stake. The FCC therefore established its own depreciation rules and declared that the States were required to follow those rules in setting intrastate depreciation rates. The Court, in the introduction to its decision rejecting the FCC's claim, stated: "[W]e do not assess the wisdom of the asserted federal policy of encouraging competition within the telecommunications industry. Nor do [w]e consider whether the FCC should have the authority to enforce, as it sees fit, practices which it believes would best effectuate this purpose. Important as these issues may be, our task is simply to determine where Congress *has* placed the responsibility. . . ." 476 U.S. at 359 (emphasis in original). The same inquiry is applicable here.

The Court in *Louisiana* went on to reject the FCC's unduly narrow construction of § 2(b). The Court stated: "[G]iven the breadth of the language of section 152(b), and the fact that it contains not only a substantive jurisdiction limitation of the FCC's power, but also a rule of statutory

construction . . . , we decline to accept the narrow view urged by respondents, and hold instead that it denied the FCC the power to preempt state regulation of depreciation for intrastate ratemaking purposes." *Id.* at 372-373. Here, as in *Louisiana*, the FCC has overridden an express Congressional limitation on its power.[17]

The legislative history of the 1996 Act also supports this view. Early drafts of the 1996 Act would have expressly excepted Part II of Title II and thus §§ 251 and 252 from the applicability of § 2(b), but the final version of the 1996 Act omitted that express exception to § 2(b). *First Report and Order*, ¶¶ 80, 94, J.A. 446, 452. The only reasonable inference to be drawn is that, apart from the narrow areas where it expressly provided to the contrary, Congress consciously chose to leave §§ 251 and 252 subject to § 2(b). As explained by the Court in *Russello*, *supra*, 464 U.S. at 23-24: "Where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended."

Mead Corp. v. Tilley, 490 U.S. 714, 723 (1989), relied on by the FCC, is not to the contrary. There the Court chose not to "attach decisive significance to the unexplained disappearance of one word from an unenacted bill because 'mute

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[17] In cases following *Louisiana*, the FCC and the courts have reached the same conclusion. Thus in *California v. FCC*, 905 F.2d 1217, 1239 (9th Cir. 1990), "[t]he FCC concede[d] that § 2(b)(1) reserves to the States the sole authority to regulate intrastate basic telephone service." Similarly, in *NARUC v. FCC*, 880 F.2d 422, 429 (D.C. Cir. 1989), the court of appeals stated that "the *only* limit that this Court has recognized on a state's authority over intrastate telephone service occurs when the state's exercise of that authority negates the exercise by the FCC of its own lawful authority over interstate communication" (emphasis in original).

intermediate legislative maneuvers' are not reliable indicators of congressional intent." *First Report and Order*, ¶ 95 n. 155, J.A. 452. Here, however, the Joint Conference affirmatively removed from the legislation a significant exception to a broad, repeatedly litigated and universally understood reservation of State authority that has existed under the statute for more than 60 years and under federal common law for nearly a century. Under these circumstances, it is nonsensical to suppose that the omission of the exception was unintentional.

Moreover, in addition to § 2(b), Congress left intact the jurisdictional separations requirements and procedures of 47 U.S.C. §§ 221(c) and 410(c), App. A3-A4, A13, to permit dual ratemaking, thereby further demonstrating its intent that the dual jurisdictional scheme for regulating "charges, classifications, practices, services, facilities, or regulations" be applicable to the amended statute. *See Louisiana*, *supra*, 476 U.S. at 375-376. There can be little doubt that the statutory phrase "charges, classifications, practices, services, facilities, or regulations" includes the pricing and pricing methodologies for access, unbundled network elements, resale and the like. In *Louisiana*, the FCC's narrowing construction of the phrase was emphatically rejected by the Court. 476 U.S. at 372-73.[18] Indeed, the Court in *Louisiana* made clear that the broad statutory language could not be read to simply "forb[id] the FCC to establish specific rates for certain intrastate services." *Id.* at 373. "[H]ad this been the intention, it would hardly have been necessary to deny the FCC the

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[18] Indeed, the FCC's dissection of pricing into methodology (over which the FCC has authority) and rates and charges between carriers (over which the States have authority) finds no textual support in the Act and the FCC points to none.

jurisdiction over 'charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service. . . . ' " *Id.*

Finally, § 601(c)(1) of the 1996 Act, App. A14, clarifies that neither § 2(b) nor any provision of State law is altered or overridden by the Act unless the Act does so *expressly.* In sum, § 2(b) of the 1934 Act, as amended, precludes the FCC's assertion and exercise of authority over intrastate pricing and related matters without an *express* grant of jurisdiction over such matters.

In this connection, the FCC criticizes the court of appeals' determination of Congressional intent because the court of appeals considered, among other things, whether particular provisions of the 1996 Act make "mention" of the FCC. FCC Brief, at 12, 13, 15, 18, 38. Contrary to the FCC's argument, however, the court of appeals, having been charged with the duty of ascertaining whether FCC authority over intrastate matters was *express*, was perfectly justified in giving significance to the fact that certain provisions of the Act did not reference the FCC when other provisions of the Act clearly did so. Express reference to the FCC in a statutory provision is a legitimate factor to be taken into consideration in determining whether Congress expressly granted jurisdiction to the FCC.

The FCC also presses a strained and implausible construction of § 2(b) itself. It cites the portion of the statute which creates two separate limitations – separated by the disjunctive word "or" – on the manner in which the Act may be construed: " 'nothing in this [chapter] shall be construed to apply *or* to give the Commission jurisdiction with respect to' intrastate matters." FCC Brief, at 34; emphasis in original. It

then argues that the section "cannot logically be construed to mean that [it] limits the scope of the Commission's authority *more* than it limits the substantive reach of federal telecommunications law." *Id.*

This argument is patently without merit for at least three reasons. First, it is contrary to the plain language of § 2(b), which compels the conclusion that these two distinct limitations on the manner in which the statute may be construed should be treated separately. That is particularly so when the construction advocated by the FCC is flatly inconsistent with the purpose of § 2(b) as articulated by this Court – to "fence off from FCC reach or regulation intrastate matters – indeed, including matters 'in connection with' intrastate service." *Louisiana*, *supra*, 476 U.S. at 370.

Second, in addressing the use of the disjunctive in statutory drafting, the Court has often invoked the rule that "[c]anons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings, unless the context dictates otherwise." *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 229 (1993), *quoting Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979). Third, the FCC's suggestion that the scope of the Act and the scope of FCC jurisdiction must be treated as equivalent terms runs afoul of the well established canon that a statute should not be construed to render a portion of its text mere surplusage. *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 698 (1995); *Colautti v. Franklin*, 439 U.S. 379, 392 (1979); *United States v. Menasche*, 348 U.S. 528, 538-539 (1955).

The FCC nevertheless argues that "[s]ection 2(b) refers to the Commission's authority as well as to the applicability

of federal law . . . because Congress intended to bar the Commission from exercising its 'ancillary' jurisdiction . . . over intrastate matters . . . to which the Act itself does not clearly extend." FCC Brief, at 34, *citing Louisiana* and *Houston, E. & W. Texas Ry. v. United States*, 234 U.S. 342 (1914) (*Shreveport Rate Case*). This revisionist theory of the meaning of *Louisiana* is at best implausible. *Louisiana* nowhere refers to ancillary jurisdiction in broadly concluding that the purpose of § 2(b) was to "fence off from FCC reach or regulation intrastate matters." 476 U.S. at 370. Indeed, in *Louisiana* the Court pointed out that "the language with which it does so is certainly as sweeping as the wording of the provision declaring the purpose of the Act and the role of the FCC." *Id.* Moreover, it rejects the applicability of the *Shreveport Rate Case*, concluding that the breadth of the language in § 2(b) refutes the argument that the section is subject to a narrowing construction because one Congressional purpose in enacting § 2(b) was to legislatively overrule *Shreveport*. *Id.* at 372-373.

Furthermore, the FCC cites no persuasive authority suggesting that in affirmatively choosing to eliminate the statutory language excepting Title II from § 2(b), Congress effectively performed an idle act because § 2(b) had no applicability to Title II in any event. The gravamen of the FCC's argument is that it is only intrastate matters *not covered by the Act* that § 2(b) precludes the FCC from regulating. However, there is simply no evidence at all that Congress had that view when it enacted the 1996 Act. Indeed, Congress' retention of § 2(b) and the broad construction of that section in *Louisiana*, of which Congress must be presumed to have been aware, are strong indicators to the contrary. Finally, the FCC's argument would create a slippery slope: if there is

nothing addressed by the 1996 Act that is not subject to the FCC's exclusive superintendence, then the States would be left without any role whatsoever in the transition to local competition. Clearly, this was not Congress' intention.

The FCC also argues that the so-called "impossibility" exception to § 2(b), *see Louisiana*, 476 U.S. at 375-376 n. 4, precludes the applicability of § 2(b) to the local competition provisions of the Act. This argument is similarly without merit. Not only was it *not* a stated basis for the FCC's decisions below, *see SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1943); *Burlington Truck Lines v. United States*, 371 U.S. 156, 168-169 (1962), but it is flatly refuted by the FCC's *ONA Reconsideration Order*, 5 FCC Rcd 3084 (1990), *reversed on other grounds sub nom. California v. FCC*, 4 F.3d 1505 (9th Cir. 1993), in which the FCC required, and the Ninth Circuit upheld, dual Federal/State tariffing of basic network elements, the very sort of unbundled network elements at issue in this case. 4 F.3d at 1513, 1515. Indeed, as noted by the court of appeals below, ratemaking is inherently severable. Pet. App. 20a. This Court has of course agreed. *Louisiana*, 476 U.S. at 375.

Finally, the FCC's impossibility claim ignores that the exception to § 2(b) is "a limited one." *California v. FCC*, 905 F.2d 1217, 1243 (9th Cir. 1990). Where such a claim is properly asserted, the FCC bears the burden, plainly not satisfied here, "of justifying its *entire* preemption order by demonstrating that the order is narrowly tailored to preempt *only* such state regulations as would negate valid FCC regulatory goals." *Id.* (emphasis in original); *accord, California v. FCC*, 75 F.3d 1350, 1359 (9th Cir.), *cert. denied*, 116 S. Ct. 1841 (1996) (FCC bears burden of demonstrating negation); *NARUC v. FCC*, 880 F.2d 422, 430 (D.C. Cir. 1989) ("The

FCC has the burden . . . of showing with some specificity that [State regulation] . . . would negate the federal policy. . . . "). Finally, the FCC cannot implicate the exception by simply abdicating its statutory responsibility and refusing to engage in the jurisdictional separations process. *Smith v. Illinois*, *supra*, 282 U.S. at 148-149 (some form of jurisdictional separations mandatory); *Crockett Telephone Co. v. FCC*, *supra*, 963 F.2d at 1571 (same).

Indeed, in a number of similar contexts, the FCC has held that the dual jurisdictional scheme applies to the prices or rates charged by LECs for "access," "unbundled access" and "interconnection" to the local network. For example, in the Access Charge case, *MTS & WATS Market Structure: Third Report and Order*, 93 F.C.C.2d 241, 260-265 (1983), *affirmed on other grounds, NARUC v. FCC, supra*, 737 F.2d 1095, the FCC acknowledged the long-standing practice of imposing state-approved access charges upon competing long distance carriers for use of the LEC's intrastate network. Moreover, on appeal, the court of appeals, while affirming the FCC's setting interstate access charges for use of local plant applicable to interstate service, endorsed the imposition by States of intrastate access charges for the use of local plant applicable to intrastate service. *See* 737 F.2d at 1114, 1115. Notably, such intrastate access charges are imposed upon competing long distance carriers, not on end use customers.

Similarly, in the *ONA Reconsideration Order*, *supra*, 5 FCC Rcd at 3088-3090, 3100 n. 111, the FCC required that LECs file tariffs with the FCC offering unbundled basic service elements ("BSEs") for access to the *interstate* network and that they similarly file tariffs with the relevant State commission offering unbundled BSEs for access to the *intrastate* network. On appeal, in concluding that the FCC's

approach was fully consistent with the statutory scheme, the court of appeals said: "The ONA orders clearly establish a dual federal and state tariffing structure for BSEs, and the states will retain authority to set rates for those BSEs which are used for intrastate service. This system complies with the Supreme Court's decision in *Louisiana* that the Communications Act is designed to establish a dual regulatory scheme." *California v. FCC*, *supra*, 4 F.3d at 1515. Once tariffed, BSEs were then offered to competitive enhanced service providers – not end users – who in turn provided enhanced services utilizing the BSEs to end use customers. If the intrastate component of these charges for providing unbundled network elements to competitive service providers was properly subject to State jurisdiction, as the FCC conceded in the ONA Tariffing case, then the intrastate component of the interconnection, access and unbundled network element charges imposed upon competitive local telephone service providers here is similarly subject to State jurisdiction.

The same is true with respect to "interconnection" charges. In *In the Matter of the Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services*, 2 FCC Rcd 2910 (1987), which involved the terms and conditions under which cellular service providers would be permitted to interconnect with the local network, the FCC stated that "[t]he charges for interconnection . . . are severable between the jurisdictions because the underlying costs of interconnection are segregable. Charges for switching of interconnected calls are also subject to dual jurisdiction." *Id.* at 2911, ¶ 12.

The FCC nevertheless argues that Congress could not have intended to accord State commissions jurisdiction over

pricing and other aspects of local competition because without FCC jurisdiction, final resolution of issues under the Act would not occur for many years, "after the various pricing and other issues have wound their way through 50 state commissions, numerous federal district courts, various courts of appeal, and ultimately this Court, all without comprehensive direction from the federal agency with the expertise to interpret federal communications law." FCC Brief, at 40. The short answer to this exaggerated policy argument is that it asks the Court to *legislate*.

Contrary to the FCC's argument, Congress knew how to establish a system of appellate review which would maximize and expedite uniformity, certainty and finality if that was its predominant goal. *See, e.g.*, 15 U.S.C. § 29(b) (providing for direct appeal from a district court to this Court under certain circumstances). Instead, Congress chose the States to make the initial determination of pricing and related matters, with appellate review of State commission system in the Federal courts, in order to accord at least some degree of respect, deference and comity to local and regional differences in markets and competitive conditions and the ability of State regulators to address those differences.

It is beyond the role of the FCC and of this Court to effectuate a legislative approach which Congress consciously rejected. As in *Louisiana*, the Court should not "grant the agency power to override Congress." 476 U.S. at 374-375.

III. THE SECOND REPORT AND ORDER MUST BE VACATED BECAUSE THE 1996 ACT GRANTS THE STATES EXCLUSIVE AUTHORITY OVER INTRA-LATA DIALING PARITY

A. Section 2(b) Prohibits the FCC From Adopting Standards and Rules Governing Intrastate and Intra-LATA Dialing Parity and Related Cost Recovery

Under § 2(b), the States possess exclusive jurisdiction over intrastate dialing parity.[19] California's brief addresses *intraLATA*, rather than *intrastate*, dialing parity for three reasons. First, dialing parity requirements for the *interLATA*, or *long distance*, market occurred more than a decade ago with the imposition of the "1 plus" presubscription methodology under the supervision of the MFJ court, the FCC and the States.[20] Dialing parity to facilitate interLATA competition is thus irrelevant to the issue before the Court.

Second, virtually all intraLATA telephone calls initiated in the United States are intrastate in nature. Thus virtually all intraLATA calls fall on the State side of the jurisdictional fence erected by § 2(b). Since this case is about intraLATA

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[19] In making its § 2(b) argument regarding dialing parity, California relies on all points raised in Argument II, *supra*, and, to minimize repetition, primarily addresses in Argument III the factual and analytical differences between the pricing and dialing parity arguments predicated on § 2(b). If the Court concludes that the 1996 Act grants the States express authority over pricing, as did the Eighth Circuit, then dialing parity with its unique factual setting, will perhaps be the *only* jurisdictional issue which requires the Court to address the § 2(b) analysis set forth in Arguments II and III.

[20] At the time, dialing parity requirements for intrastate long distance service were placed in intrastate access tariffs under the supervision and authority of the State commissions, while dialing parity requirements for interstate long distance service were placed in interstate access tariffs under the supervision and authority of the FCC.

dialing parity (interLATA dialing parity having been addressed long ago), and since virtually all intraLATA calls are intrastate calls which, under § 2(b), fall within exclusive State jurisdiction, it is obvious that § 2(b) leaves the matter of intraLATA dialing parity to the States.

Third, the duty of LECs "to provide dialing parity to competing providers of telephone exchange service and telephone toll service" under § 251(b)(3), App. A5, appears to address only intraLATA dialing parity. The BOCs, which provide the overwhelming majority of LEC service nationally, are not yet permitted to compete in the interLATA, or long distance, market. *See* § 271 of the Act, 47 U.S.C. § 271. Moreover, § 251(b)(3) places a duty on LECs to provide dialing parity to *their own* competitors – competitors in the intraLATA market – not to the interexchange carriers that compete with AT&T and others in the interLATA market.

This construction of § 251(b)(3) is supported by the section's legislative history. The Joint Explanatory Statement of the Committee of Conference notes at p. 5 that in the Senate bill, "[n]umber portability and *local* dialing parity are included in the minimum standards of subsection 251(b)" (emphasis added). Similarly, the House amendment provision set out "the specific requirements . . . that apply to LECs *as competitors enter the local market*," *id.*, at 7 (emphasis added). Finally, the conference agreement established § 251(b)(3) as ultimately signed into law, with the conferees noting that "the duties imposed under section new 251(b) make sense only in the context of a specific request from another telecommunications carrier or any other person *who actually seeks to connect with or provide services using the LEC's network*," *id.*, at 8 (emphasis added).

It is therefore entirely reasonable to conclude that Congress intended that the dialing parity requirement of § 251(b)(3) be fashioned and implemented by the States, subject only to the express requirements of the Act. Section 2(b), which after much Congressional debate was intentionally left intact by the 1996 Act, mandates that "*nothing* in this chapter" – including § 251(b)(3) – "shall be construed to apply or to give the [FCC] jurisdiction with respect to charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier" (emphasis added). The broad statutory phrase, "charges, classifications, practices, services, facilities, or regulations," plainly includes the provision of dialing parity. *Louisiana*, 476 U.S. at 372-373.

The FCC nevertheless concluded in the *Second Report and Order* that it possessed statutory authority to adopt nationwide standards governing intraLATA dialing parity. It said: "We conclude that the purpose of the statutory dialing parity requirements – to facilitate the introduction of competition in the local and toll markets – is best served by the adoption of broad guidelines and minimum federal standards that build upon the states' experiences. . . . [S]uch minimum nationwide standards will facilitate competition to the extent the new entrants seeking to offer regional or national services will not be subjected to an array of differing state standards or timetables. . . . [U]niform standards – in some cases minimum, uniform standards – will speed competitive entry by more promptly opening the local and toll markets to competition." *Second Report and Order*, ¶ 25, J.A. 1176; footnotes omitted.

The FCC's arrogating to itself the authority to dictate standards, policies and rules for intraLATA dialing parity is

refuted by FCC's concession that §§ 251 and 252 "do not contain an explicit grant of intrastate authority to the Commission." *First Report and Order*, ¶ 84, J.A. 448. As above noted, *Louisiana* and the cases following it teach that the absence of such an explicit grant of authority precludes preemption. *Louisiana*, *supra*, 476 U.S. at 368-69, 377. *See also NPRM, Administration of the North American Numbering Plan*, *supra*, 9 FCC Rcd at 2077 n. 93 (in which the FCC stated in connection with dialing parity that most intraLATA toll calls "are intrastate and not within our purview"). As no such clear expression appears here, the principle of *Louisiana* controls and the jurisdictional conclusions in the *Second Report and Order* with respect to intrastate dialing parity must be vacated.

The legislative history of the 1996 Act also supports this view. Congress' choosing to omit from the statute the provision that would have expressly excepted Part II of Title II and thus §§ 251 and 252 from the applicability of § 2(b) strongly supports the conclusion that Congress consciously chose to leave § 251(b)(3) subject to § 2(b).

There can be little doubt that the statutory phrase "charges, classifications, practices, services, facilities, or regulations" includes dialing parity. In *Louisiana*, the FCC's narrow construction of the phrase was emphatically rejected by the Court. 476 U.S. at 372-73. Indeed, the Court in *Louisiana* made clear that the broad statutory language could not be read to simply "forb[id] the FCC to establish specific rates for certain intrastate services." *Id.* at 373. "[H]ad this been the intention, it would hardly have been necessary to deny the FCC the jurisdiction over 'charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service. . . . ' " *Id.* The FCC's

similarly narrow construction of these words here, so as to exclude "practices" and "regulations" seeking to ensure a customer's ability to complete intrastate and intraLATA toll calls through a chosen competitive service provider without having to dial extra digits, must also be rejected.

Nor is there an "impossibility" or "inseverability" issue with respect to dialing parity requirements, even though dialing parity does not involve rates. Again, the FCC did not rely on the impossibility exception in the *Second Report and Order*. Moreover, the *Second Report and Order*, at ¶ 37, J.A. 1183, itself acknowledges that dialing parity rules can be separated into interLATA and intraLATA components, or interstate and intrastate components, at the discretion of the relevant State commission. It states: "[W]e have also concluded that each state should have the opportunity to determine whether customers should be able to presubscribe to carriers for intrastate toll service and for interstate toll service in lieu of the intraLATA and interLATA toll presubscription dichotomy that we have established. . . . We thus conclude that states . . . should have the flexibility to require that toll dialing parity implementation be based on state boundaries where they determine that implementing toll dialing parity on the basis of state boundaries would be pro-competitive and otherwise in the public interest." *Id.*

In addition, the FCC's interest in imposing dialing parity rules which would apply to intraLATA calls which are 99.8 per cent intrastate in nature (100 per cent in California) is obviously *de minimis*. In other contexts, the FCC has held that the Federal interest in regulating service which involves less than ten per cent interstate traffic is *de minimis*. *Decision and Order, In the Matter of MTS and WATS Market Structure*, 4

FCC Rcd 5660 (1989), at ¶ 2, *adopting Recommended Decision and Order, In the Matter of MTS and WATS Market Structure*, 4 FCC Rcd 1352 (1989).

In sum, § 2(b) precludes the FCC's assertion and exercise of authority over intraLATA dialing parity.

B. Other Provisions of the 1996 Act Support the Conclusion That the FCC Has Exceeded Its Statutory Authority in Adopting Standards and Rules Governing Intrastate and IntraLATA Dialing Parity and Related Cost Recovery

Other provisions of the 1996 Act support California's argument. Several subdivisions of § 251 *do* grant the FCC authority over limited substantive areas addressed by the section, while § 251(b)(3), App. A5, addressing dialing parity, does not. For example, in § 251 Congress gave the FCC authority to prescribe requirements for "number portability" (§ 251(b)(2), App. A5) as well as "exclusive jurisdiction" over the portions of the North American Numbering Plan applicable to the United States (§ 251(e)(1), App. A8). However, the dialing parity provisions of § 251(b)(3) include no such grant of authority to the FCC. "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the deliberate inclusion or exclusion." *Russello, supra*, 464 U.S. at 23.

This conclusion is reinforced by the fact that Congress gave the FCC no express authority over dialing parity cost recovery. Having expressly given the FCC jurisdiction over number portability and numbering administration in §§ 251(b)(2) and 251(e)(1), App. A5, A8, Congress carefully

clarified in § 251(e)(2), App. A9, that the FCC had *additional* jurisdiction to determine cost recovery issues relating to number portability and numbering administration. It stated: "The cost of establishing telecommunications numbering administration arrangements and number portability shall be borne by all telecommunications carriers on a competitively neutral basis *as determined by the Commission*." 47 U.S.C. § 251(e)(2), App. A9; emphasis added. However, no such explicit grant of authority to the FCC was made with respect to cost recovery for dialing parity.[21]

In addition, Congress directly addressed "intraLATA toll dialing parity" in § 271(e)(2)(B) of the 1996 Act, App. A12-A13, twice referring to narrow requirements affecting the timing of an exercise of *state* authority to implement intra-LATA toll dialing parity. It said:

> Except for single-LATA States and States that have issued an order by December 19, 1995, requiring a [BOC] to implement intraLATA toll dialing parity, *a State may not require* a [BOC] to implement intra-LATA toll dialing parity in that State before a [BOC] has been granted authority . . . to provide interLATA services originating in that State or before 3 years after the date of enactment of the

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[21] The FCC rests its determination that it has authority to regulate dialing parity cost recovery on the implementation timetable of § 251(d)(1) and the catch-all provision of § 4(i) of the 1934 Act, 47 U.S.C. § 154(i), which authorizes it "to take any action [it] consider[s] 'necessary and proper' to further the public interest." *Second Report and Order*, ¶ 92; J.A. 1209. However, neither of these provisions constitutes a substantive grant of jurisdiction to take action not otherwise authorized by the Act. *E.g., California v. FCC*, 905 F.2d 1217, 1240-41 n. 35 (9th Cir. 1990). Moreover, those provisions are themselves subject to the limitation and rule of statutory construction of § 2(b). *Id.*

> Telecommunications Act of 1996, whichever is earlier. Nothing in this paragraph precludes *a State from issuing an order* requiring intraLATA toll dialing parity in that State prior to either such date so long as such order does not take effect until after the earlier of either such dates.

47 U.S.C. § 271(e)(2)(B), App. A12-A13; emphasis added.

Similarly, in the "competitive checklist" for BOCs seeking to provide interLATA service contained in § 271(c)(2)(B), App. A12, Congress referred to number portability, but not dialing parity, as a matter upon which the FCC "issues regulations pursuant to section 251." It set a standard for number portability applicable "[u]ntil the date by which *the Commission issues regulations pursuant to section 251 to require number portability* . . . " (*see* § 271(c)(2)(B)(xi), App. A12) but made no such reference with respect to the checklist requirement for dialing parity (*see* § 271(c)(2)(B)(xii), App. A12). The obvious inference is that Congress did not intend the FCC to issue regulations pursuant to § 251 governing dialing parity.

Finally, petitioners appear to have abandoned their heavy reliance on § 251(g) of the 1996 Act, 47 U.S.C. § 251(g), App. A9, in this Court. If they have done so, the abandonment is justified. Section 251(g) does not grant the FCC authority to regulate intraLATA dialing parity. In the first place, the FCC itself in the *Second Report and Order* correctly determined that § 251(g) has nothing to do with the intraLATA dialing parity duty of § 251(b)(3). The *Second Report and Order* states: "That section [251(g)] contains no reference or cross reference to dialing parity or to section 251(b)(3). Section 251(g) preserves the equal access obligations already imposed on the BOCs and GTE, but does not exempt them

from the toll dialing parity requirements." *Second Report and Order*, ¶ 29, J.A. 1178-1179. Thus the FCC's argument to the effect that § 251(g) grants it the authority to interpret and enforce the § 251(b)(3) dialing parity duty is nothing but an impermissible post hoc rationalization of counsel. *SEC v. Chenery Corp., supra*, 332 U.S. at 196.

Moreover, § 251(g) addresses only the obligations of the BOCs and GTE under their respective consent decrees, while § 251(b)(3) addresses the obligations of all LECs. Further, § 251(g), by its terms, involves only the provision of equal access to interexchange carriers and information services providers – parties with whom the BOCs were at one time precluded from competing by MFJ restrictions. It does not address the LECs' provision of intraLATA dialing parity to facilitate competition between the LECs and those seeking to compete with them directly in the provision of intraLATA service. That latter subject is addressed by § 251(b)(3). As all parties appear to concede, the MFJ court left to the States the question of whether there would be intraLATA competition at all, as well as the subsidiary question of the appropriate dialing parity requirements, should there be such competition. *United States v. Western Electric Co., supra*, 569 F.Supp. 990, at 1005; *United States v. Western Electric Co., supra*, 569 F.Supp. 1057, at 1109.[22]

Both § 2(b) and other provisions of the 1996 Act compel the conclusion that the Act does not authorize the FCC to regulate intraLATA dialing parity.

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[22] The legislative history of § 251(g) supports this view. *See* Joint Explanatory Statement of the Committee of Conference, at p. 9.

CONCLUSION

In the final analysis, this case is fundamentally the same as *Louisiana*. There, the FCC argued that "federal displacement of state regulation is justified under the Act when necessary 'to avoid frustration of validly adopted federal policies.' " 476 U.S. at 362, 363. In the face of this argument, the Court observed that "it goes without saying that we do not assess the wisdom of the asserted federal policy of encouraging competition within the telecommunications industry. Nor do we consider whether the FCC should have authority to enforce, as it sees fit, practices which it believes would best effectuate this purpose." *Id.* at 359. The Court then rejected the FCC's argument, stating: "As we so often admonish, only Congress can rewrite this statute." *Id.* at 376. The Court should take the same course here.

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APPENDIX OF STATUTES

47 U.S.C. § 152(b)(1)

(b) Exceptions to Federal Communications Commission jurisdiction

Except as provided in sections 223 and 227 of this title, inclusive, and section 332 of this title, and subject to the provisions of section 301 of this title and subchapter V-A of this chapter, nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier.

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47 U.S.C. § 153(15), (16), (21), (22), (25), (26), (47), (48)

§ 153. Definitions

For the purposes of this chapter, unless the context otherwise requires –

(15) Dialing parity

The term "dialing parity" means that a person that is not an affiliate of a local exchange carrier is able to provide telecommunications services in such a manner that customers have the ability to route automatically, without the use of any access code, their telecommunications to the telecommunications services provider of the customer's designation from among 2 or more telecommunications services providers (including such local exchange carrier).

(16) Exchange access

The term "exchange access" means the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services.

(21) InterLATA service

The term "interLATA service" means telecommunications between a point located in a local access and transport area and a point located outside such area.

(22) Interstate communication

The term "interstate communication" or "interstate transmission" means communication or transmission (A) from any State, Territory, or possession of the United States (other than the Canal Zone), or the District of Columbia, to any other State, Territory, or possession of the United States (other than the Canal Zone), or the District of Columbia, (B) from or to the United States to or from the Canal Zone, insofar as such communication or transmission takes place within the United States, or (C) between points within the United States but through a foreign country; but shall not, with respect to the provisions of subchapter II of this chapter (other than section 223 of this title), include wire or radio communication between points in the same State, Territory, or possession of the United States, or the District of Columbia, through any place outside thereof, if such communication is regulated by a State commission.

(25) Local access and transport area

The term "local access and transport area" or "LATA" means a contiguous geographic area –

(A) established before February 8, 1996, by a Bell operating company such that no exchange area includes points within more than 1 metropolitan statistical area, consolidated metropolitan statistical area, or State, except as expressly permitted under the AT&T Consent Decree; or

(B) established or modified by a Bell operating company after February 8, 1996, and approved by the Commission.

(26) Local exchange carrier

The term "local exchange carrier" means any person that is engaged in the provision of telephone exchange service or exchange access. Such term does not include a person insofar as such person is engaged in the provision of a commercial mobile service under section 332(c) of this title, except to the extent that the Commission finds that such service should be included in the definition of such term.

(47) Telephone exchange service

The term "telephone exchange service" means (A) service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge, or (B) comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which subscriber can originate and terminate a telecommunications service.

(48) Telephone toll service

The term "telephone toll service" means telephone service between stations in different exchange areas for which there is made a separate charge not included in contracts with subscribers for exchange service.

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47 U.S.C. § 221(b), (c)

(b) State jurisdiction over services

Subject to the provisions of sections 225 and 301 of this title, nothing in this chapter shall be construed to apply, or to give the Commission jurisdiction, with respect to charges, classifications, practices, services, facilities, or regulations for or in connection with wire, mobile, or point-to-point radio telephone exchange service, or any combination thereof, even

though a portion of such exchange service constitutes interstate or foreign communication, in any case where such matters are subject to regulation by a State commission or by local governmental authority.

(c) Determination of property used in interstate toll service

For the purpose of administering this chapter as to carriers engaged in wire telephone communication, the Commission may classify the property of any such carrier used for wire telephone communications, and determine what property of said carrier shall be considered as used in interstate or foreign telephone toll service. Such classification shall be made after hearing, upon notice to the carrier, the State commission (or the Governor, if the State has no State commission) of any State in which the property of said carrier is located, and such other persons as the Commission may prescribe.

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47 U.S.C. § 251(a)-(e), (g)

§ 251. Interconnection

(a) General duty of telecommunications carriers

Each telecommunications carrier has the duty –

(1) to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers; and

(2) not to install network features, functions, or capabilities that do not comply with the guidelines and standards established pursuant to section 255 or 256 of this title.

(b) Obligations of all local exchange carriers

Each local exchange carrier has the following duties:

(1) Resale

The duty not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications services.

(2) Number portability

The duty to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission.

(3) Dialing parity

The duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service, and the duty to permit all such providers to have nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listing, with no unreasonable dialing delays.

(4) Access to rights-of-way

The duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224 of this title.

(5) Reciprocal compensation

The duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.

(c) Additional obligations of incumbent local exchange carriers

In addition to the duties contained in subsection (b) of this section, each incumbent local exchange carrier has the following duties:

(1) Duty to negotiate

The duty to negotiate in good faith in accordance with section 252 of this title the particular terms and

conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) of this section and this subsection. The requesting telecommunications carrier also has the duty to negotiate in good faith the terms and conditions of such agreements.

(2) Interconnection

The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network –

(A) for the transmission and routing of telephone exchange service and exchange access;

(B) at any technically feasible point within the carrier's network;

(C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and

(D) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title.

(3) Unbundled access

The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.

(4) Resale

The duty –

(A) to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers; and

(B) not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service, except that a State commission may, consistent with regulations prescribed by the Commission under this section, prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such service to a different category of subscribers.

(5) Notice of changes

The duty to provide reasonable public notice of changes in the information necessary for the transmission and routing of services using that local exchange carrier's facilities or networks, as well as of any other changes that would affect the interoperability of those facilities and networks.

(6) Collocation

The duty to provide, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier, except that the carrier may provide for virtual collocation if the local exchange carrier demonstrates to the State commission that physical collocation is not practical for technical reasons or because of space limitations.

(d) Implementation

(1) In general

Within 6 months after February 8, 1996, the Commission shall complete all actions necessary to establish regulations to implement the requirements of this section.

(2) Access standards

In determining what network elements should be made available for purposes of subsection (c)(3) of this section, the Commission shall consider, at a minimum, whether –

(A) access to such network elements as are proprietary in nature is necessary; and

(B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.

(3) Preservation of State access regulations

In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that –

(A) establishes access and interconnection obligations of local exchange carriers;

(B) is consistent with the requirements of this section; and

(C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.

(e) Numbering administration

(1) Commission authority and jurisdiction

The Commission shall create or designate one or more impartial entities to administer telecommunications

numbering and to make such numbers available on an equitable basis. The Commission shall have exclusive jurisdiction over those portions of the North American Numbering Plan that pertain to the United States. Nothing in this paragraph shall preclude the Commission from delegating to State commissions or other entities all or any portion of such jurisdiction.

(2) Costs

The cost of establishing telecommunications numbering administration arrangements and number portability shall be borne by all telecommunications carriers on a competively neutral basis as determined by the Commission.

(g) Continued enforcement of exchange access and interconnection requirements

On and after February 8, 1996, each local exchange carrier, to the extent that it provides wireline services, shall provide exchange access, information access, and exchange services for such access to interexchange carriers and information service providers in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier on the date immediately preceding February 8, 1996 under any court order, consent decree, or regulation, order, or policy of the Commission, until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after February 8, 1996. During the period beginning on February 8, 1996 and until such restrictions and obligations are so superseded, such restrictions and obligations shall be enforceable in the same manner as regulations of the Commission.

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47 U.S.C. § 252(c), (d)

(c) Standards for arbitration

In resolving by arbitration under subsection (b) of this section any open issues and imposing conditions upon the parties to the agreement, a State commission shall –

(1) ensure that such resolution and conditions meet the requirements of section 251 of this title, including the regulations prescribed by the Commission pursuant to section 251 of this title;

(2) establish any rates for interconnection, services, or network elements according to subsection (d) of this section; and

(3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

(d) Pricing standards

(1) Interconnection and network element charges

Determinations by a State commission of the just and reasonable rate for the interconnection of facilities and equipment for purposes of subsection (c)(2) of section 251 of this title, and the just and reasonable rate for network elements for purposes of subsection (c)(3) of such section –

(A) shall be –

(i) based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element (whichever is applicable), and

(ii) nondiscriminatory, and

(B) may include a reasonable profit.

(2) Charges for transport and termination of traffic

(A) In general

For the purposes of compliance by an incumbent local exchange carrier with section 251(b)(5) of this

title, a State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless –

(i) such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier; and

(ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls.

(B) Rules of construction

This paragraph shall not be construed –

(i) to preclude arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as bill-and-keep arrangements); or

(ii) to authorize the Commission or any State commission to engage in any rate regulation proceeding to establish with particularity the additional costs of transporting or terminating calls, or to require carriers to maintain records with respect to the additional costs of such calls.

(3) Wholesale prices for telecommunications services

For the purposes of section 251(c)(4) of this title, a State commission shall determine wholesale rates on the basis of retail rates charges to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier.

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47 U.S.C. § 271(c)(2)(B)(xi), (xii)

(B) Competitive checklist

Access or interconnection provided or generally offered by a Bell operating company to other telecommunications carriers meets the requirements of this subparagraph if such access and interconnection includes each of the following:

(xi) Until the date by which the Commission issues regulations pursuant to section 251 of this title to require number portability, interim telecommunications number portability through remote call forwarding, direct inward dialing trunks, or other comparable arrangements, with as little impairment of functioning, quality, reliability, and convenience as possible. After that date, full compliance with such regulations.

(xii) Nondiscriminatory access to such services or information as are necessary to allow the requesting carrier to implement local dialing parity in accordance with the requirements of section 251(b)(3) of this title.

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47 U.S.C. § 271(e)(2)

(2) IntraLATA toll dialing parity

(A) Provision required

A Bell operating company granted authority to provide interLATA services under subsection (d) of this section shall provide intraLATA toll dialing parity throughout that State coincident with its exercise of that authority.

(B) Limitation

Except for single-LATA States and States that have issued an order by December 19, 1995, requiring a Bell operating company to implement intraLATA toll dialing parity, a State may not require a Bell operating company to implement intraLATA toll dialing parity in that State before a Bell operating company has been granted

authority under this section to provide interLATA services originating in that State or before 3 years after February 8, 1996, whichever is earlier. Nothing in this subparagraph precludes a State from issuing an order requiring intraLATA toll dialing parity in that State prior to either such date so long as such order does not take effect until after the earlier of either such dates.

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47 U.S.C. § 410(c)

The Commission shall refer any proceeding regarding the jurisdictional separation of common carrier property and expenses between interstate and intrastate operations, which it institutes pursuant to a notice of proposed rulemaking and, except as provided in section 409 of this title, may refer any other matter, relating to common carrier communications of joint Federal-State concern, to a Federal-State Joint Board. The Joint Board shall possess the same jurisdiction, powers, duties, and obligations as a joint board established under subsection (a) of this section, and shall prepare a recommended decision for prompt review and action by the Commission. In addition, the State members of the Joint Board shall sit with the Commission en banc at any oral argument that may be scheduled in the proceeding. The Commission shall also afford the State members of the Joint Board an opportunity to participate in its deliberations, but not vote, when it has under consideration the recommended decision of the Joint Board or any further decisional action that may be required in the proceeding. The Joint Board shall be composed of three Commissioners of the Commission and of four State commissioners nominated by the national organization of the State commissions and approved by the Commission. The Chairman of the Commission, or another Commissioner designated by the Commission, shall serve as Chairman of the Joint Board.

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§ 601(c)(1), Telecommunications Act of 1996, Pub.L. 104-104, Title VI, § 601(c)(1), 110 Stat. 143 (Feb. 8, 1996)

(c) Federal, State, and local law –

(1) No implied effect. – This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments.

Supreme Court, U.S.
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Nos. 97-826, 97-829, 97-830, 97-831, 97-1075, 97-1087, 97-1099, and 97-1141

In the Supreme Court of the United States

OCTOBER TERM, 1997

AT&T CORP., ET AL., PETITIONERS

v.

IOWA UTILITIES BOARD, ET AL., RESPONDENTS

AMERITECH CORPORATION, ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL., RESPONDENTS

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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REPLY BRIEF FOR CROSS-PETITIONER AMERITECH CORPORATION

Petitioners' agenda in defending *both* the "all elements" rule *and* Rule 315(b) is clear: they seek to overturn the Eighth Circuit's ruling that incumbent local exchange carriers ("incumbent LECs") may not be required to provide new entrants with the so-called "unbundled network element platform" or UNE platform. The UNE platform is a preassembled combination of network components that consists of *precisely* the same facilities, in *exactly* the same configuration, as the network designed and used by the incumbent to provide its own retail services to customers and resale services to new entrants. However, large new entrants like AT&T and MCI seek to obtain the platform *not* at the statutory wholesale discount mandated by Congress for the resale of retail services, but rather at the lower cost-based rates reserved for unbundled network elements.

Our opening brief (at 15-20, 24-31) demonstrated that the UNE platform would obliterate the distinction between the unbundled network element and resale entry options established in sections 251(c)(3) and (c)(4) of the Telecommunications Act of 1996 ("1996 Act"). See also Bell Atl. Br. 46-65; GTE Br. 62-71. Significantly, the Association for Local Telecommunications Services ("ALTS"), an association of smaller facilities-based new entrants that compete with incumbent LECs in local service markets, concurs. As ALTS correctly observes, "[h]ad Congress intended that resold services be made available at 'cost' pursuant to section 251(c)(3), it [would] not have created a separate statutory mechanism" for resale. ALTS Opposing Br. 8.

Petitioners do not dispute the central proposition underlying our and ALTS's position: that the 1996 Act prohibits new entrants from obtaining the incumbent's resale services at the lower cost-based rates reserved for unbundled network elements. Rather, petitioners argue — contradicting what

they have said in other forums — that the UNE platform is somehow different from the incumbent's resale services. As explained below, their argument has no merit. Indeed, former FCC Chairman Reed Hundt, who presided over the agency's promulgation of the "all elements" rule and Rule 315(b), acknowledged just three days ago that "[t]he UNE platform is a version of resale."[1] The only difference between the platform and resale services is price, which is *precisely* what creates the arbitrage opportunities that unravel the 1996 Act's distinction between the unbundled network element and resale entry options.

Our opening brief (at 34-37) also demonstrated that the UNE platform is not a combination of "unbundled" network elements within the meaning of section 251(c)(3). Petitioners argue that two physically connected network elements are "unbundled" if a new entrant has the option to acquire one of the elements but not the other. We explained that even if that were true, the UNE platform still would not be a combination of "unbundled" network elements because entrants acquiring the platform do not have the option of obtaining the platform's interoffice transmission component without also taking the local switching component. Petitioners respond with silence, effectively conceding that the platform cannot be classified as a combination of "unbundled" network elements under section 251(c)(3).

Finally, our opening brief (at 32-33) demonstrated that the UNE platform violates the plain language of section 251(c)(3) because it does not give new entrants "access" to network elements "on an unbundled basis at any technically feasible point." 47 U.S.C. § 251(c)(3). The FCC's principal response — that section 251(c)(3) does not *require* that new entrants gain "access" to network elements at a "technically feasible point," but only gives them the *option* of doing so —

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[1] *In the Matter of: Telecommunications Policy Open Meeting*, Tr. 235 (Ill. Comm. Comm'n July 14, 1998) (statement of Reed Hundt).

rests upon a patently absurd reading of the statute. And petitioners' argument that new entrants would gain "access * * * at any technically feasible point" to the UNE platform through the incumbent's operations support systems ("OSS") is equally unsound. The argument simply proves too much: new entrants purchasing the incumbent's resale services under section 251(c)(4), which does *not* give the new entrant "access * * * at a technically feasible point" to the incumbent's facilities, *also* use the incumbent's OSS — indeed, in precisely the same manner as an entrant acquiring the platform.

For these reasons, the UNE platform is incompatible with the 1996 Act. Pet. App. 71a. And while this Court should reverse the Eighth Circuit's approval of the FCC's "all elements" rule — and affirm the Eighth Circuit's vacatur of Rule 315(b) — at the very least the Court should hold that both rules are invalid insofar as they require incumbents to provide the UNE platform at the cost-based rates reserved for unbundled elements.

ARGUMENT

I. The UNE Platform Violates Section 251(c)(3) Because It Does Not Provide New Entrants With "Access To Network Elements On An Unbundled Basis At Any Technically Feasible Point."

Petitioners' defense of the UNE platform fails to come to grips with the plain text of section 251(c)(3). As we have explained, the UNE platform, while a preassembled combination of the incumbent carrier's *facilities*, is not a combination of *unbundled network elements* within the meaning of section 251(c)(3). Ameritech Br. 32-37. Thus, irrespective of the fate of the "all elements" rule, section 251(c)(3) prohibits new entrants from obtaining the UNE platform at cost-based rates. The FCC, AT&T and MCI offer nothing to refute this conclusion.

A. The Components Of The UNE Platform Are Not "Unbundled" Network Elements Within The Meaning of Section 251(c)(3).

Section 251(c)(3) establishes the ground rules for the unbundled network element entry option, and requires incumbent LECs to provide "access" to network elements "on an unbundled basis." 47 U.S.C. § 251(c)(3). Because the term "unbundled" means physically separated, the UNE platform — which consists of all elements in the incumbent's entire bundled network — obviously could not be a combination of "unbundled" network elements. Petitioners assert, however, that the Eighth Circuit was wrong in holding that the term "unbundled" means physically separated. Rather, they maintain, two physically connected network elements are "unbundled" so long as a new entrant has the option to acquire one of the elements but not the other. See Ameritech Br. 35.[2]

Even if petitioners were right on that score,[3] the UNE platform *still* would not be a combination of "unbundled" network elements. It is undisputed that the UNE platform consists of a combination of numerous incumbent LEC facilities, including "shared transport" and "switching."[4] The

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[2] See also Ex Parte Letter of AT&T's Albert M. Lewis, Director and Senior Attorney for Federal Government Affairs, to William F. Caton, Acting Secretary of the Federal Communications Commission, CC Docket No. 96-98, at 5 (Aug. 8, 1997) ("when Congress used the term 'unbundled' in § 251(c)(3)," it meant to require incumbent LECs "simply to state a separate *price* for the element and give consumers the *option* of declining to purchase the element from that carrier and obtaining it from a different source") (AT&T's emphasis).

[3] They are, in fact, wrong. See Bell Atl. Br. 53-57; GTE Br. 65-71; U S WEST Br. 47-53.

[4] AT&T witnesses have testified in other forums that "[t]he platform is a combination of unbundled network elements," including "the unbundled switch, shared transport, * * * and tandem switching." *In the Matter of Application by Ameritech Michigan for Authorization Under Section 271*

FCC has defined "shared transport" and "switching" to be separate network elements. See 47 C.F.R. §§ 51.319(c), (d) (Pet. App. 296a-298a). And the FCC has expressly acknowledged that a new entrant does not have the option of taking the transport component of the UNE platform without *also* taking the switching component. See *Third Reconsideration Order*, ¶ 47 (new entrant acquiring "shared transport" from the incumbent LEC "must also take local switching") (J.A. 248).[5]

As explained in our opening brief (at 35-37), these admissions are fatal to the UNE platform. Because a new entrant *must* take the transport and switching components of the platform together as an integrated whole, and thus does *not* have the option of taking the former without the latter, the platform is not a combination of "unbundled" network elements under section 251(c)(3) — *even* under petitioners' unduly restrictive definition of the term "unbundled." Indeed, petitioners' definition would invalidate *any* preassembled combination of two or more network elements where the entrant does not have the option of taking one constituent element without taking another. Those elements could not be "unbundled" elements because, as AT&T puts it (AT&T Br. 38-39), the entrant would not have "the option of declining to purchase [each element] as part of a package."

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of the Communications Act to Provide In-Region InterLATA Services in the State of Michigan, CC Docket No. 97-137, Affidavit of Robert V. Falcone and Maureen E. Gerson on Behalf of AT&T Corp., ¶ 13 (filed June 10, 1997).

[5] *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996* (CC Docket No. 96-98), Third Order on Reconsideration and Further Notice of Proposed Rulemaking, FCC 97-295, 12 F.C.C.R. 12460 (1997) ("*Third Reconsideration Order*") (J.A. 1359-1402), petitions for review pending, *Southwestern Bell Tel. Co. v. FCC*, Nos. 97-3389 et al. (8th Cir.).

The FCC, AT&T and MCI remain silent on this matter, apparently hoping that our point will get lost amid the welter of arguments advanced in this case. But petitioners' ostrich-like tactics cannot obscure the fact that, even using their own definition of "unbundled,"[6] the UNE platform is not a combination of "unbundled" network elements.

In sum, the text of section 251(c)(3) prohibits new entrants from acquiring the UNE platform at the cost-based rates reserved by section 252(d)(1) for unbundled network elements. For that reason, even if this Court were to uphold the facial validity of the "all elements" rule and Rule 315(b), it should still hold that section 251(c) invalidates the UNE platform.

B. The UNE Platform Does Not Give A New Entrant "Access" To Network Elements "At A "Technically Feasible Point," As Required By Section 251(c)(3).

The UNE platform irreconcilably clashes with the text of section 251(c) in another way. The statute requires incumbent

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[6] Apparently recognizing that their interpretation would invalidate the UNE platform and many other preassembled network element combinations, the FCC and MCI hastily retreat. In its opening brief, the FCC vigorously argued that "the term 'unbundled' * * * denote[s] giving someone a *choice* of elements at separate prices." FCC Br. 44 (emphasis added). The FCC shifts gears in its response brief, even going so far as to mischaracterize what it said in its opening brief. FCC Reply 25 ("[a]s we observe in our opening brief (at 44-45), however, the prevailing definition of 'unbundled' * * * was 'offered at separate prices'"). MCI takes the same turn. In its opening brief, MCI argued that the "normal meaning" of "unbundled" is "'*separately available* at a separate price.'" MCI Br. 19 (emphasis added) (citation omitted). In its response brief, MCI suggests that a network element can be "unbundled" even if it cannot be made "separately available" from adjacent elements. MCI Reply 8 n.2 ("[e]lements that can be unbundled for use by a lessor at a separate price typically — though not inevitably — can be made available as physically separate items").

LECs to provide "*access* to network elements on an unbundled basis *at any technically feasible point*." 47 U.S.C. § 251(c)(3) (emphasis added). As explained in our opening brief (at 32 & n.16), the words "access to network elements * * * at any technically feasible point" undeniably has a physical dimension. Because the platform allows new entrants to use the incumbent's network as a bundled, amalgamated whole, the platform does not give entrants physical "access" to network elements at *any* point, let alone at a "technically feasible point." The platform, then, is flatly inconsistent with the text of section 251(c)(3). See Ameritech Br. 32-33; Bell Atl. Br. 57-60; GTE Br. 66.

Petitioners offer two wholly unpersuasive responses. The first is that section 251(c)(3) allows, but does not require, new entrants obtaining access to unbundled network elements to do so at a "technically feasible point." The second assumes that section 251(c)(3) requires new entrants to obtain access to network elements at a "technically feasible point," but holds that entrants acquiring the UNE platform would obtain such access through the incumbent's operations support systems ("OSS").

1. The FCC claims that section 251(c)(3) does not require a new entrant using unbundled network elements to obtain "access" to such elements at a "technically feasible point." Rather, the FCC asserts, section 251(c)(3) gives network element purchasers the choice of whether or not to obtain such "access." FCC Reply 28.

This reading of section 251(c)(3), which AT&T and MCI do not adopt,[7] is preposterous. The FCC maintains that

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[7] AT&T advances a less radical, but equally unpersuasive, variant of the FCC's argument. According to AT&T, "§ 251(c)(3)'s requirement that LECs provide access to 'network *elements*' (in the plural) at any 'technically feasible *point*' (in the singular) clearly establishes that new entrants can obtain access to network elements in combination." AT&T Reply 34 (AT&T's emphasis). This argument reflects a fundamental

the "access * * * at any technically feasible point" language in the statute is optional for new entrants.[8] If that were correct, then the "on an unbundled basis" language of section 251(c)(3) would have to be optional as well, and new entrants would be entitled to acquire network elements on something *other* than on an "unbundled basis." Indeed, if the FCC were right, a new entrant could acquire use of all of the incumbent LEC's combined network elements without obtaining "access" at a "technically feasible point" to *any* of them. That, of course, would destroy the distinction between unbundled network elements and resale services: If a new entrant could acquire under section 251(c)(3) all of the incumbent's network elements without obtaining "access" thereto, the entrant would acquire precisely what a reseller acquires under section 251(c)(4).

The FCC's statutory theory, in sum, would make a mockery of the statutory language. Section 251(c)(3) establishes the scope of the incumbent LECs' duty to provide, and a new entrant's right to acquire, network elements. Just as a

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misunderstanding of how unbundled access actually works. For example, a new entrant acquiring unbundled local switching from an incumbent LEC, and combining that switching with the entrant's local loops and interoffice transport facilities, must obtain "access" to local switching at *two* technically feasible points: the line (loop) side of the switch and the trunk (transport) side of the switch. See 47 C.F.R. § 51.319(c)(1)(i)(A)-(B) (Pet. App. 296a). (As a technical matter, the entrant would obtain such access via cross-connect wires terminating in its collocation space.) The fact that a new entrant can obtain access to a single network element at two technically feasible points shows that AT&T incorrectly attributes significance to the statute's use of "network elements" in the plural and "technically feasible point" in the singular.

[8] Contra *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996* (CC Docket No. 96-98), First Report and Order, ¶ 269, FCC 96-325, 11 F.C.C.R. 15499, 15636 (1996) (J.A. 541) ("[w]e further conclude that * * * section 251(c)(3) *requires* 'access * * * at any technically feasible point'") (emphasis added).

new entrant must take network elements "on an unbundled basis," so, too, must the entrant obtain "access" to network elements at a "technically feasible point." The FCC's contrary interpretation would read the words "access * * * at any technically feasible point" out of the statute, in violation of the "cardinal principle of statutory construction" that courts must "give effect, if possible, to every clause and word of a statute." *Bennett* v. *Spear*, 117 S. Ct. 1154, 1166 (1997) (internal quotation marks omitted); see also *Bailey* v. *United States*, 516 U.S. 137, 145-46 (1995).

2. Petitioners next argue that new entrants acquiring the UNE platform would, in fact, obtain access to the incumbent LEC's network elements at a "technically feasible point." That access, they argue, is obtained at the incumbent's operations support systems ("OSS"). See FCC Reply 29; AT&T Reply 39-40; MCI Reply 12.

Even if OSS were an unbundled network element,[9] petitioners' argument would have no merit. OSS consists of the backoffice databases and information that support the incumbent's pre-ordering, ordering, provisioning, maintenance and repair, and billing functions. See 47 C.F.R. § 51.319(f)(1) (Pet. App. 301a). Although it is true that new entrants must use the incumbent's OSS when acquiring *unbundled network elements*, the same holds when an entrant acquires the incumbent's *resale services*.[10]

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[9] It is not. See Bell. Atl. Br. 69-70; GTE Br. 58-59; U S WEST Br. 37-41. Accordingly, access to OSS does not qualify as the "access to network elements * * * at any technically feasible point" required by section 251(c)(3).

[10] This is undisputed. See *In re Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act, as amended, To Provide In-Region, InterLATA Services in Michigan* (CC Docket No. 97-137), Memorandum Opinion and Order, FCC 97-298, ¶ 133 (rel. Aug. 19, 1998) ("*Ameritech Michigan 271 Order*") (access to OSS "supports each of the three modes of competitive entry strategies established by the

That fact defeats petitioners' argument. If use of the incumbent's OSS qualified as "access" to the incumbent's facilities at a "technically feasible point," then it necessarily would follow that resellers obtain such access. But the text of section 251(c)(4) makes clear that an entrant purchasing the incumbent LEC's resale services does *not* obtain access to the incumbent's network at a "technically feasible point." Compare 47 U.S.C. § 251(c)(3) (requiring entrant to obtain "access" to network elements "at any technical feasible point") with *id.* § 251(c)(4) (no such requirement for entrants acquiring resale services). Because a reseller uses the incumbent's OSS when purchasing resale services, use of OSS cannot possibly qualify as the "access * * * at any technically feasible point" required by section 251(c)(3). Indeed, a new entrant acquiring resale services uses OSS in the same manner as an entrant purchasing the UNE platform — with the touch of the entrant's keypad. It follows that a UNE platform purchaser's use of the incumbent's OSS cannot possibly distinguish the platform from resale; indeed, it simply confirms their equivalence.

In sum, new entrants acquiring the UNE platform, like new entrants engaged in the resale of the incumbent's retail services, do not obtain "access" to the incumbent's network elements at a "technically feasible point." Therefore, the UNE platform is not a combination of unbundled network elements within the meaning of section 251(c)(3).

Act: interconnection, unbundled network elements, and services offered for resale"); AT&T Reply 46 ("nondiscriminatory access to [OSS] is necessary to the statutory requirement that LECs provide nondiscriminatory access to * * * services for resale").

II. The UNE Platform Undermines The Structure Of Section 251(c) By Obliterating The Statutory Distinction Between Access To Unbundled Network Elements And Resale.

The foregoing textual arguments are sufficient, in and of themselves, to find that the UNE platform violates section 251(c). But the platform is invalid for an additional reason: it obliterates the distinction between the unbundled network element and resale entry options established by Congress in sections 251(c)(3) and 251(c)(4), and thus undermines the structure of section 251(c). See Ameritech Br. 24-31.

Unlike competitors that combine unbundled network elements into a competing network, new entrants acquiring the UNE platform would not design and establish their own alternative network; would not determine the amount of network elements necessary to carry their customers' traffic; would not make an up-front investment in all of the necessary elements; and would not make any effort even to identify the particular network elements they need. Rather, the platform would allow new entrants to use the incumbent's entire preassembled network — identical to what an entrant acquires when purchasing resale services under section 251(c)(4). Yet the platform would be priced *not* at the retail-minus-avoided-cost rate mandated by section 252(d)(3) for the resale of retail services, but rather at the cost-based rates reserved in section 252(d)(1) for unbundled network elements.

Petitioners do not and could not challenge our central proposition: that the 1996 Act prohibits new entrants from obtaining resale services at the cost-based rates reserved for unbundled network elements. Compare 47 U.S.C. § 252(d)(1) with *id.* § 252(d)(3). See also H.R. Rep. 104-204, at 71-72 (1995) (while rate for "unbundling" is based on "cost," the "resale rates" for resale services "should * * * take into account the rate at which local service is tariffed in a particular State"); Ameritech Br. 25, 27-30. Nor do peti-

tioners seriously challenge our argument that entrants using unbundled network elements must design and establish their own alternative, competing network. See Ameritech Br. 26-27.

These are significant concessions. If the UNE platform is equivalent to resale services for all material purposes, *or* if the platform permits new entrants to compete without designing and establishing an alternative network, then there can be no dispute that the platform violates the 1996 Act. Thus, petitioners have no choice but to argue that the UNE platform is somehow distinct from resale. Their arguments are far-fetched and meritless.

1. a. Petitioners spill much ink attempting to show that the UNE platform and resale services are distinct telecommunications products. But nowhere do they challenge, let alone disprove, the fact that both consist of the same preexisting, bundled network through which the incumbent carrier provides retail service to its own customers. Accordingly, petitioners do not, and could not, explain why Congress would have established a separate resale entry option (§ 251(c)(4)), with its own wholesale rate structure (§ 252(d)(3)), if it wished to permit entrants to obtain the same product through the network element entry option (§ 251(c)(3)) at cost-based rates (§ 252(d)(1)).

AT&T simply denies that Congress intended to "preserv[e] a separate role for the resale authorized by § 251(c)(4)," arguing that preservation of the resale option is a "non-textual objective[] of Congress" dreamed up by cross-petitioners. AT&T Reply 19. That is absurd. Because Congress established three entry options, with different rules governing each, it must have expected that each would play a separate role in the development of local competition. Congress could not have intended, and the 1996 Act does not allow, new entrants to get the benefit of the cost-based unbundled network element rate structure when acquiring an incumbent LEC's resale services. The UNE platform would

have precisely that effect. Thus, far from being a "non-textual objective[ ]," the distinction between the resale and unbundled network element entry options is firmly established in the statutory text. See *Bennett*, 117 S. Ct. at 1166 (citing cases). The fact that the FCC has different policy objectives than those reflected in the statute does not entitle the agency to disregard this statutory command.

b. Petitioners next attempt to show that the UNE platform is different from the incumbent LEC's resale services. Yet their arguments contradict what they have said outside of this litigation. In other forums, AT&T and MCI have not hesitated to admit — indeed, boast — that the UNE platform gives new entrants access to the same thing as resale, but at cost-based rates. For example, in a meeting with investment analysts, AT&T's president touted the UNE platform as "another way to resell" the incumbent's retail services, but at an effective discount twice as deep as the wholesale discount applicable to resale services under sections 251(c)(4) and 252(d)(3).[11]

Along the same lines, AT&T and MCI have argued to State commissions across the country that they should be permitted to obtain what has been dubbed "as is" migration to the UNE platform.[12] With "as is" migration, an incumbent LEC retail customer switches carriers and becomes, instantaneously and with the press of a button, an AT&T or MCI UNE platform customer. As AT&T argued less than three months ago — elsewhere, of course — "as is" migra-

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[11] Transcript, Investment Community Meeting (Mar. 3, 1997) (comments of John Zeglis) ("Zeglis Statement") (J.A. 255-256).

[12] See, *e.g.*, Comments of AT&T Communications of Ohio Regarding the Effect of the Eighth Circuit Order, Case No. 96-922-TP-UNC (Pub. Util. Comm'n of Ohio), at 6-9 (filed Aug. 19, 1997); Comments of MCI Telecommunications on the Impact of the Decision of the Eighth Circuit, Case No. 96-922-TP-UNC (Pub. Util. Comm'n of Ohio), at 6-9 (filed Aug. 19, 1997).

tion to the UNE platform is appropriate "for Ameritech retail customers who want to keep *the same type of service using the same equipment* but simply want to switch local service providers from Ameritech to AT&T." In those circumstances, AT&T noted, "no physical changes are necessary and no interconnection charge will be assessed."[13] That is, of course, exactly what happens when an Ameritech retail customer switches and becomes an AT&T *resale* customer. AT&T's candid admissions confirm that even AT&T believes that, putting aside price, the platform is indistinguishable from resale services.

Notably, petitioners remain silent on these matters, which figured prominently in our opening brief (at 16-17). Instead, they offer platitudes concerning how the UNE platform will allow AT&T and MCI to offer "different services" than those offered by the incumbent LEC for resale. See FCC Reply 38-40; AT&T Reply 20-21; MCI Reply 15. That argument, even if it were true, begs the question. Regardless of which new services a new entrant can *provide* with the UNE platform, an entrant ordering the platform *receives* the same thing from the incumbent LEC as an entrant ordering a resale service — the preexisting, bundled network that the incumbent uses to provide retail service to its own customers — but at the cost-based rates applicable to unbundled network elements. Again, Congress would not have established a separate resale entry option, with a separate rate structure, if it wanted to allow new entrants to obtain the same product via the unbundled network element option.

In any event, petitioners give few examples of the "different services" the UNE platform supposedly will allow new entrants to offer, and those examples belie any such distinction. For instance, AT&T suggests that the platform

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[13] AT&T's Memorandum Contra to Ameritech Ohio's Application for Rehearing and Request for Stay, Case No. 96-922-TP-UNC (Pub. Util. Comm'n of Ohio), at 25-26 (filed May 4, 1998) (emphasis added).

would permit it to "use its own operator service facilities in combination with LEC network elements." AT&T Reply 41. That hardly distinguishes the platform from resale services, because AT&T's interconnection agreements with Ameritech allow AT&T to use its own operator service facilities in conjunction with resale services acquired from Ameritech.[14]

Perhaps most significantly, petitioners do not challenge the proposition that new entrants using the network element entry option, unlike resellers, must design and establish their own alternative, competing network. See Ameritech Br. 26-27. Establishing an alternative network requires, at a minimum, that the new entrant designate and combine the particular network facilities that will carry its customers' traffic. Yet the UNE platform *relieves* entrants of these obligations by permitting them to use the incumbent LEC's entire bundled, preassembled network. Like resellers, then, entrants acquiring the platform do not establish their own competing network, but simply use the incumbent's existing network.

In the end, the FCC is reduced to the *ipse dixit* that the UNE platform and resale are different because an entrant purchasing the platform "does not resell anything; it leases an incumbent's underlying elements." FCC Reply 38. But if AT&T were to obtain the UNE platform on an "as is" basis, it would do the same thing that a reseller does: provide local service to its own customers by acquiring the same preexisting, bundled network used by the incumbent to serve the incumbent's customers. Thus, although AT&T *nominally*

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[14] See, *e.g.*, Interconnection Agreement Under Sections 251 and 252 of the Telecommunications Act of 1996 by and between Ameritech Information Industry Services and AT&T Communications of Illinois, Inc., § 10.10.2 (approved by the Ill. Commerce Comm'n Jan. 8, 1997) (when AT&T acquires a resale service from Ameritech, "Ameritech shall make available to AT&T, upon AT&T's request, the ability to route * * * Local Operator Services calls (0+, 0-) dialed by AT&T Customers directly to the AT&T Local Operator Services platform * * * to the extent such routing is technically feasible").

would be leasing the incumbent LEC's network elements, in substance it would receive from the incumbent precisely what a reseller acquires — but at cost-based rates.

c. The FCC understandably is loathe to acknowledge our point that the UNE platform is indistinguishable from resale. In addition to insisting that the "UNE platform" label transforms the incumbent's preassembled network into a different product, the FCC also asserts that the platform will be a boon to facilities-based competition. See FCC Reply 33-41. However, the FCC's former Chairman — under whose direction the agency promulgated the rules designed to give new entrants access to the UNE platform — recently repudiated the central premises of the FCC's position at a hearing before the Illinois Commerce Commission. Addressing the UNE platform, Mr Hundt stated:

> I think it has to be stipulated that real competition, competition that brings investment and innovation, * * * has to be essentially facilities based. I think all versions of resale are transitional techniques. The UNE platform is a version of resale.[15]

Thus, as both AT&T's president and the former FCC Chairman have acknowledged, there is no difference between the UNE platform and resale. The platform therefore is antithetical to the separate unbundled network element entry provisions enacted by Congress.

2. Petitioners also do not come to grips with our second proposition: that the UNE platform, priced at the cost-based rates reserved for unbundled network elements (§ 252(d)(1)) rather than the retail-less-avoided-cost rate established for resale (§ 252(d)(3)), creates arbitrage opportunities that obliterate the distinction between the network element and resale entry options. See Ameritech Br. 27-30.

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[15] *In the Matter of: Telecommunications Policy Open Meeting*, Tr. 235 (Ill. Comm. Comm'n July 14, 1998) (statement of Reed Hundt).

a. *First*, petitioners argue that the UNE platform will not nullify the resale entry provisions because new entrants will acquire the incumbent LEC's resale services under section 251(c)(4), rather than the platform under section 251(c)(3), when it is less expensive to do so. See FCC Reply 40 n.27; AT&T Reply 23; MCI Reply 13. But that only confirms our point. It is a prescription for arbitrage to allow a new entrant, when obtaining use of an incumbent LEC's entire bundled network, to invoke the label "resale" when the resale rate is lower than the UNE platform rate, and the label "UNE platform" when the UNE platform rate is lower than the resale rate. Regardless of which rate is lower, there is only one legal rate for use of the incumbent's entire bundled network on an "as is" basis: the retail-minus-avoided-cost rate established in section 252(d)(3) for resale services. Allowing new entrants to obtain cost-based rates simply by using a different label would corrupt the 1996 Act.

Requiring new entrants to abide by the 1996 Act's resale provisions does not, as petitioners claim, improperly "disadvantage" or "limit" the network element entry option in favor of the resale entry option. See AT&T Reply 23; MCI Reply 20; FCC Reply 37. It simply enforces Congress' explicit command that the wholesale rate structure apply to resale services. See 47 U.S.C. §§ 251(c)(4), 252(d)(3). Likewise, it reserves the cost-based network element rate for those entrants that actually use unbundled elements to establish a competing, alternative network. See *id.* §§ 251(c)(3), 252(d)(1).

b. *Second*, petitioners maintain that the UNE platform imposes pricing risks not assumed by resellers. See FCC Reply 39; AT&T Reply 24-25; MCI Reply 15-16. AT&T argues that "in contrast to resellers of [incumbent] LECs' retail services, a network element purchaser can *never* avoid the fact that its profit or loss depends on customer usage volumes and usage patterns." AT&T Reply 25 (emphasis added). AT&T's claim rests upon the premise that a new

entrant must charge its UNE platform customers a flat monthly rate for local service. That premise is false: AT&T can simply establish a rate consisting of a low monthly flat fee, plus additional charges based upon the customer's usage — just as incumbent LECs establish similar usage sensitive rates for their own retail customers. That would guarantee that an entrant using the UNE platform would recover the costs incurred by its customer's high usage volumes.

c. *Third*, petitioners argue that new entrants acquiring the UNE platform, unlike resellers, will have to incur costs establishing systems to bill and collect for exchange access services. See FCC Reply 39-40; AT&T Reply 24-25. This argument fails on a number of grounds. Most obviously, as ALTS points out, "almost all new entrants" — including, presumably, giants like AT&T and MCI — already "have the back office systems and financial resources" necessary to bill and collect when using the UNE platform. ALTS Opposing Br. 17-18.

Moreover, the FCC and AT&T grossly exaggerate the efforts a new entrant must undertake to bill for and collect exchange access revenues when using the UNE platform. In opposing Ameritech Michigan's application for authority to provide long distance services, AT&T argued that *Ameritech* was obligated to provide the "billing detail" necessary for AT&T to collect exchange access revenues.[16] In its order denying Ameritech's application, the FCC agreed that Ameritech has an "*obligation* to provide usage information to competing LECs * * * in a manner that permits competing LECs to collect access revenues." *Ameritech Michigan 271*

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[16] *In the Matter of Application by Ameritech Michigan for Authorization Under Section 271 of the Communications Act to Provide In-Region InterLATA Services in the State of Michigan*, CC Docket No. 97-137, Affidavit of Robert V. Falcone and Robert A. Sherry on Behalf of AT&T Corp., ¶¶ 78-81 (filed June 10, 1997); *id.*, Affidavit of Robert V. Falcone and Maureen E. Gerson, ¶¶ 32-33 (filed June 10, 1997).

Order, ¶ 330 (emphasis added). This puts the lie to the FCC's and AT&T's argument in *this* litigation about the alleged burdens of establishing systems to bill for and collect exchange access revenues.

Indeed, a UNE platform purchaser's ability to collect exchange access revenues can hardly be termed a "responsibility" or a "task" (FCC Reply 38) at all. Rather, it is an additional *benefit* that exacerbates the arbitrage opportunities created by the platform. When a new entrant's resale customer makes or receives a long distance call, the incumbent LEC collects "access" charges from the long distance company as compensation for originating or terminating the call. However, if the entrant serves its customer via the UNE platform, the entrant would collect the access revenues — even though it would do nothing more than a reseller does to originate or terminate the call. A new entrant acquiring the UNE platform, then, not only would pay the cost-based rates reserved for unbundled network elements, but *also* would collect access charges from long distance companies. Thus, petitioners' argument that the new entrant's ability to "compete in the highly profitable market for exchange access" (MCI Reply 14; see also AT&T Reply 21-22; FCC Reply 38-39) distinguishes the UNE platform from resale is correct — and supports *our* position on the platform.

d. As explained in our opening brief (at 29-30, 38-40), the real reason why AT&T and MCI want to affix the "UNE platform" label rather than "resale" to use of the incumbent's entire bundled network is because those carriers are dissatisfied with the retail-less-avoided-cost rate structure established by Congress in section 252(d)(3). It therefore is ironic that petitioners repeatedly accuse us of relying upon "policy" arguments in opposing their efforts to obtain the UNE platform at the cost-based rates reserved by section 252(d)(1) for unbundled network elements. See FCC Reply 38-39; AT&T Reply 19; MCI Reply 18. For the reasons set forth above, it is the statutory text and structure that supports —

indeed, compels — the conclusion that the UNE platform would obliterate the distinction between the unbundled network element and resale provisions of the 1996 Act.

3. Finally, petitioners do not even address our argument that the UNE platform would allow the large long distance carriers to evade the joint marketing restrictions of section 271(e)(1). See Ameritech Br. 30-31. Petitioners' only possible defense would be that the UNE platform is somehow distinct from resale services. Such a claim, however, lacks merit for the reasons set forth above.

* * *

As ALTS correctly observes, the UNE platform is a tool of "the long distance companies" like AT&T and MCI that "have not invested to the same degree in local competitive facilities" as ALTS members, but that nonetheless want to enter local service markets by acquiring resale services on the cheap. ALTS Opposing Br. 7. The fact that ALTS — whose members compete by combining their facilities with the incumbent's unbundled network elements — opposes the UNE platform puts the lie to petitioners' refrain that opponents of the platform simply wish to "cripple" (AT&T Reply 33) the network element entry option. Indeed, by seeking to allow new entrants to acquire the incumbent's resale services under the label "UNE platform," it is petitioners that seek to eliminate one of the entry options explicitly created by Congress.

CONCLUSION

The judgment of the court of appeals should be reversed insofar as it upholds the "all elements" rule. If this Court determines that the "all elements" rule and Rule 315(b) are valid on their face, the Court should hold that the rules are invalid to the extent they require incumbent LECs to provide the UNE platform at the cost-based rates reserved for unbundled network elements.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

GTE MIDWEST INCORPORATED,

Cross-Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA,

Cross-Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Eighth Circuit

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RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, GTE Midwest Incorporated hereby incorporates by reference the statement made in its opening brief.

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INTRODUCTION[1]

GTE's opening brief demonstrated that the FCC's quadruple-barreled expansion of the duty to provide unbundled network elements ignores the terms of the Act and upsets the balance Congress achieved between competing objectives. In response, the FCC and its allies focus primarily on two tactics.

First, the FCC attempts to mischaracterize challenges to its unbundling rules as a "variety of policy contentions" unrelated to the text. FCC Reply 21. That is an obvious strawman. GTE's arguments are grounded firmly in the terms of the Act.

Specifically, with respect to the FCC's attempt to expand the definition of "network elements" to all aspects of an incumbent's business, the text limits network elements to "facilit[ies] and equipment" (including their "features") "used" in providing telecommunications service. 47 U.S.C. § 153(29). It is hardly a "policy contention" to point out that this language limits network elements to physical pieces of equipment in an incumbent's call-delivery network.

Similarly, with respect to *which* network elements should be unbundled, it is not a policy contention to show that the FCC misinterpreted the phrase in § 251(c)(3) governing *where* network elements must be available for interconnection ("at any technically feasible point") to create an erroneous presumption concerning *which* elements must be unbundled — namely, any element that it is technically feasible to unbundle. Nor is it a policy argument to demonstrate that, to conform the rest of the statute to its misreading of § 251(c)(3), the FCC eviscerated the standards of § 251(d)(2) that govern what network elements should be made available.

Likewise, the argument that the FCC erred in allowing entrants to engage in "sham unbundling" — purchasing all the elements needed to provide completed service in lieu of

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[1] In lieu of filing their own reply brief on the subjects addressed here, the Mid-Sized Local Exchange Carriers, Cross-Petitioners in No. 97-1141, have authorized GTE to state that they adopt the arguments in this brief.

purchasing service according to the statutory resale method — is again rooted in the text. Section 251(c)(3) provides new entrants "access" to "unbundled" "elements" of the network at any "technically feasible point." Those terms describe leasing *pieces* of the network; they do not reasonably extend to purchasing *complete* service — especially at prices different from the prices set by the Act for the same service.[2] The FCC's approach undermines the structure of the Act by creating a second, extra-statutory route for resale that evades the restrictions on resold services. The result of these distortions of the text, as we have explained, is a rampant opportunity for arbitrage that will undermine universal service.

More generally, reading the Act as a whole (rather than parsing individual terms in isolation), and evaluating the cumulative effect of the FCC's expansions of the unbundling duty, does not involve an appeal to free-floating policy. Even under the first step of *Chevron* analysis, considering the overall structure of an act of Congress to ensure that the construction of different sections will create a functioning whole (and to ensure that a misreading of an individual term will not undermine complementary parts of the statutory plan) is an integral part of a *textual* approach to statutory interpretation.[3]

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[2] This reply brief is limited to the issues raised in our cross-petition in No. 97-1087 and thus does not revisit specific arguments relating to the FCC's fourth step in expanding the unbundling duty — namely the requirement in Rule 315(b) that incumbents provide pre-assembled combinations of network elements. For the reasons stated in our opening brief, that rule, which is an integral part of the conversion of elements into "another way to resell," also violates the Act. *See* GTE Br. 65-71.

[3] *See, e.g.*, *Sullivan v. Everhart*, 494 U.S. 83, 89 (1990) (on first step of *Chevron* analysis, court must determine meaning of statute by examining both "the particular statutory language at issue, as well as the language and design of the statute as a whole"); *Dole v. United Steelworkers*, 494 U.S. 26, 36 (1990) (evaluating agency rule in light of "consideration of the object and structure of the Act as a whole").

Second, unable to deny the plain effect of its four-part expansion of the unbundling duty, the FCC attempts to relabel bad as good. The FCC nowhere denies that its rules will promote precisely the arbitrage we have described. By allowing entrants to buy *all* the elements needed to provide finished service (indeed, by allowing entrants to purchase them as a pre-assembled platform at no extra charge), the FCC has converted network elements, as AT&T's president has explained, into "[a]nother way to resell." J.A. 255. This extra-statutory avenue for reselling service, however, evades the restrictions Congress imposed on resale. *See* §§ 251(c)(4), 252(d)(3). In particular, while Congress specified that an entrant reselling a service would pay a wholesale rate based on the incumbent's own retail rate, *see* § 252(d)(3) — a rate that would thus reflect universal service subsidies in retail rates — an entrant exploiting the FCC's unbundling rules can purchase finished service at a price that excludes universal service costs. The entrant is thus guaranteed that, while doing nothing but reselling an incumbent's service, it will be able to undercut retail rates for business customers whose rates have been set above cost to support universal service.

Unable to deny these results, the FCC resorts to Orwellian relabeling, claiming that the regulatory arbitrage promoted by its rules "is [merely] another name for . . . rational, cost-based competition." FCC Br. 21. But what the FCC's rules set in motion is, by definition, arbitrage: the FCC allows entrants to game two regulatory systems to buy service at one price, add nothing whatsoever, and turn around and sell at a higher price while undercutting state-regulated rates.

It is not "*real* competition," MCI Reply 5 (emphasis in original), moreover, to allow a competitor to purchase every last element of the incumbent's business at the prices that supposedly would prevail for a hypothetical, most-efficient network in a perfectly competitive market. Declaring by bureaucratic edict that the incumbent must sell its services to

its competitors at the price a government regulator believes would be established by perfect competition is not allowing competition to work (which is what Congress required); rather it is *bypassing* competition by attempting to set *in advance* the prices that a perfectly competitive (and perfectly nonexistent) market would produce.

By requiring an incumbent to sell its service at those prices to *competitors*, moreover, the FCC merely allows competitors to pocket most of the difference between current retail rates and its hypothetical, most-efficient price — thus depriving customers of the benefits of the process of competition. Worse still, since current retail rates reflect the costs of subsidizing universal service, the impact of the FCC's approach is to allow entrants such as AT&T and MCI to pocket the amounts that currently support affordable rates. Nothing about this system of arbitrage can remotely be equated with "real competition."

ARGUMENT

I. THE FCC ERRED BY RULING THAT ENTRANTS COULD PROVIDE SERVICE USING *SOLELY* NETWORK ELEMENTS.

Section 251(c)(3) provides potential entrants a method for purchasing discrete pieces or "elements" of the incumbent's network and for obtaining access to them "at any technically feasible point." The terms of the section make plain that Congress contemplated an incumbent offering entrants discrete pieces of its network and allowing an entrant to interconnect its facilities with these pieces at any of various points. The section thus provides a method of entry for carriers that have some facilities of their own.

For entrants who wanted to rely solely on the incumbent's network, Congress established a distinct method of purchasing finished service at wholesale rates for resale, *see* § 251(c)(4), and specified that the wholesale rate would be pegged to the incumbent's own (state-regulated) retail rate. *See* § 252(d)(3).

By allowing an entrant to purchase *all* of the parts of the network needed to provide service so that elements could be used — as AT&T's president put it — to "create local service," J.A. 256, the FCC impermissibly converted unbundled elements into another method for obtaining finished service and provided entrants a means for evading the limitations Congress imposed on resale.

The primary defense of the FCC's approach seems to be that Congress failed to explain in detail in § 251(c)(3) that converting the statutory method for buying discrete "elements" into an avenue for obtaining everything needed to resell local service — thus transforming it into "another way to resell" — would disrupt the separate system for resale that Congress explicitly created in § 251(c)(4). But there was no need for such an extraordinary caution. The ordinary presumption is that "[w]hen a statute limits a thing to be done in a particular mode, it includes the negative of any other mode." *Botany Worsted Mills v. United States*, 278 U.S. 282, 289 (1929). Section 251(c)(4) provides the method for obtaining finished service, and there can be no basis for twisting § 251(c)(3) into a redundant means of obtaining the same thing.[4]

The FCC and its allies do not advance analysis by repeating the mantra that there should be no restraint on network elements because Congress created several entry vehicles to give entrants a "range of opportunities." AT&T Reply 23. The very question is what sort of opportunity each distinct entry vehicle was intended to provide. Contrary to the

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[4] The FCC also strains to find support in the fact that § 251(c)(2), addressing interconnection, expressly refers to the entrant's "facilities and equipment," while § 251(c)(3) lacks a similar reference. *See* FCC Reply 27. That is hardly a basis for distorting the import of § 251(c)(3). Section 251(c)(2) also provides for "interconnection," and while § 251(c)(3) nowhere repeats that express requirement, the FCC found no difficulty in concluding that the section included an obligation to "provide a connection to a network element" independent of § 251(c)(2). J.A. 541 (¶ 269).

FCC's efforts at distortion, our arguments have nothing to do with imposing "artificial" limits on the use of unbundling to limit its utility as a means of entry, but rather with ensuring that each mode of promoting entry is used only as Congress specified in the Act.

Underlying the refrain about "multiple routes of entry" is the implicit assumption that Congress created multiple routes for obtaining effectively the same thing and established different pricing standards for these routes. That is utterly illogical. Congress explicitly addressed the method by which entrants could obtain service for resale in § 251(c)(4) and established a wholesale pricing standard to apply to such service. *See* § 252(d)(3). The FCC's efforts to expand a *different* provision of the Act dealing with access to pieces of the network into "another way to resell" — and at a different price to boot — turns statutory construction on its head.

Nor can the FCC defend its refusal to enforce the distinction between resale and purchasing discrete pieces of the network by claiming that it would be too hard to administer any requirement that purchasers of elements have at least some facilities of their own. FCC Reply 27-28. Such a rule no doubt would require the FCC to exercise discretion in drawing lines to preserve the structure of the Act Congress intended, but that is an agency's role. Where the FCC has wanted to extend its regulatory power, moreover — such as in the realm of setting prices — it has never balked at the difficulty of the task at hand.

Indeed, the FCC's confidence in its price-setting ability is particularly ironic here. The FCC claims that enforcing any facilities-ownership requirement will require the agency to force the use of alternative facilities, and thus that it would interfere with pure "market forces" guiding decisions about deploying facilities. *See* FCC Reply 22, 33. But by dictating the prices for network elements, government regulators are controlling incentives for deploying facilities just as surely as

they would be by requiring purchasers of elements to have some facilities of their own. As the FCC occasionally acknowledges, *see id.* 34, 35, it can pretend that its rules leave decisions up to the "market" only by assuming that prices for elements have been set perfectly at market levels, and that regulated rates will continue to mimic perfectly the prices that would be set in a dynamic market — a far-fetched proposition at best.[5] Enforcing a reasonable ownership rule thus would not fundamentally alter the agency's role at all. In short, regulation already controls incentives for deploying facilities, and an agency with such unbounded confidence in its ability to set rates perfectly could surely devise a reasonable rule to ensure that purchasing elements does not become an end-run around the Act's resale provisions.

Moving beyond the basic textual difficulties it encounters in transforming access to elements into an extra-statutory method for obtaining finished service, the FCC prefers to defend its rules at a higher level of generality. Thus, it makes a series of arguments intended to minimize the arbitrage that its rules promote. None of these efforts can reconcile the FCC's approach to unbundling with the terms of the Act.

1. The Arbitrage Fostered by the FCC's Unbundling Rules Is Not "Real Competition."

The FCC's boldest maneuver is its effort to claim that the arbitrage promoted by its rules is not arbitrage at all, but rather the "rational, cost-based competition" that Congress intended to promote. FCC Reply 21. That is nonsense. Under the FCC's rules, an entrant can buy all the elements needed to "create local service" at rates that exclude any of the costs of supporting universal service. Then, without adding any facilities of its own or providing any inputs, it can secure a

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[5] One of the guiding assumptions of a de-regulatory statute like the Act, after all, is that regulation cannot perfectly mimic the market and thus that consumers will benefit from the actual process of competition.

guaranteed profit by turning around and reselling the incumbent's own service at rates below the above-cost rates state regulators have set (primarily for businesses) to support universal service.

To suggest that this quick-turnaround, buy-and-sell approach to repackaging the incumbent's own service is the "*real* competition," MCI Reply 5 (emphasis in original), that is the goal of the Act is absurd. An entrant exploiting the price differential between network element rates and the above-cost retail rates that support universal service does not produce any efficiencies or provide the benefits of innovation that Congress sought to foster through competition. *Cf.* H.R. Conf. Rep. No. 104-458, at 113 (1996) (Act seeks to "accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services").

Indeed, to the extent that such an arbitrageur might bring some consumers even the short-term benefit of lower prices, that results not from any added efficiency, but simply from the fact that the FCC allows the entrant to play two different regulatory systems off one another so as to buy an incumbent's service at one regulated price and to sell it by undercutting higher, regulated retail rates. The lower price comes from the entrant's ability to avoid the real costs of universal service built disproportionately into some customers' retail rates. This is not an "efficiency-inducing process," FCC Reply 30; it is the essence of arbitrage.[6]

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[6] Even the former Chairman of the FCC who presided over the creation of the First Report and Order has rejected the idea that the sham-unbundling approach fosters real competition. *See* Telecommunications Policy Open Meeting, transcript at 235 (Ill. Comm. Comm'n, July 14, 1998) (testimony of Reed Hundt) ("[R]eal competition, competition that brings investment and innovation, that ultimately permits deregulation, that has to be essentially facility based. I think all versions of resale are transitional techniques. The UNE platform is a version of resale.").

The FCC's effort to pass off this regulatory gamesmanship as genuine "competition," moreover, speaks volumes about the vision driving the FCC's approach to the Act. The FCC has made the classic error of conflating the proliferation of the number of "competitors" in the market with the advancement of competition. By providing an easy route for entrants to use the incumbent's own network to provide service at rates that are guaranteed to undercut current retail prices, the agency may succeed in subsidizing entry by a number of firms piggy-backing on the incumbent's network. But by stifling incentives for entrants to deploy new technologies of their own, it will inhibit the competitive process the Act was designed to foster.[7]

More fundamentally, the FCC and its allies demonstrate that their approach to expanding the unbundling duty is rooted in the belief that facilities-based competition is not a realistic possibility. AT&T makes this premise clearest as it asserts that the Act in no way rejects the assumption that local networks are a natural monopoly. *See* AT&T Reply 28 & n.11. Such an assumption necessarily leads to a very different view of the type of competition that can be fostered under the Act. Under AT&T's view, it would be irrational for competitors to develop rival networks. And not surprisingly, the FCC's approach to unbundling tracks this assumption perfectly. It is custom-tailored to produce a system in which there is only *one* network, effectively nationalized and sold off to so-called "competitors" at regulated rates so that they can provide carbon-copy services over the same facilities. That is plainly not the vision of robust competition that Congress had in mind.

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[7] *Cf.* Hon. Stephen G. Breyer, *Antitrust, Deregulation, and the Newly Liberated Marketplace*, 75 Calif. L. Rev. 1005, 1018 (1987) (explaining the risk that regulators "will protect competitors instead of protecting competition" and that the "consequence of misdirect[ed] protection is to threaten to deprive the consumer of the very benefits deregulation seeks").

2. The FCC's Extra-Statutory Creation of "Another Way to Resell" Promotes Arbitrage and Undermines the Restrictions Congress Established to Govern Resold Service.

The FCC and its allies next resort to a series of quibbles purportedly intended to downplay the arbitrage the FCC has opened up or to show that it will not systematically favor network elements in all scenarios. These claims are either misleading or irrelevant, and they provide no basis for reconciling the FCC's approach with the text of the Act.

To start, the FCC acts as if it can score a decisive point by explaining that a purchaser of elements does not receive the *exact* equivalent of service for resale. FCC Reply 38 (element purchaser can use the incumbent's facilities to provide services in different packages, for example, and can offer exchange access). But the basic end-run the FCC has created around the Act's resale provisions in no way depends on the capabilities offered to a purchaser of elements being limited in every detail to match those secured by a statutory reseller. Rather, the problem arises because the FCC has converted an avenue for buying "elements" into a method for "creat[ing] local service," J.A. 256, and thus has offered, in all functional respects, "[a]nother way to resell," J.A. 255.

In any event, the differences the FCC highlights serve only to show that an entrant exploiting the FCC's unbundling rules to "create local service" actually receives *more* than under the statutory resale route. But these facts only exacerbate the magnitude of the arbitrage opportunity by showing that a purchaser of elements gets a souped-up version of finished service — and still gets it all for a *lower price*. The FCC cannot logically *defend* its rules by pointing out that it has found a way to provide an even *more* outrageous arbitrage option than it would have provided by recreating an exact equivalent to wholesale service.

Next, the FCC and its allies proclaim that the FCC's reading must be permissible because it will not cause resale to fall *wholly* into disuse. This point, too, is irrelevant. What MCI would like to paint as the "key premise" of our argument — namely that "resale will *always* be more expensive than relying exclusively on network elements," MCI Reply 14 (emphasis added) — is not a premise of our argument at all. It is trivially true that for some customers — those who currently enjoy below-cost, subsidized rates — resale will remain the preferred method of entry. The entire point of the arbitrage problem is that there are different sets of customers who enjoy very different retail rates. The focus of arbitrage will be on customers at the *other* end of the spectrum — business customers whose retail rates have been set high to support universal service. Thus, the mere fact that the FCC's rules will not make resale *entirely* a dead letter in no way rescues the FCC's approach. If anything, by highlighting that the FCC has relegated statutory resale to the role of serving only one limited set of customers, this point again re-emphasizes that the FCC has devised an end-run around resale for the highest-profit segments of the market.

Next, the FCC and its allies claim that purchasers of network elements will not really be guaranteed easy profits because they face different risks from statutory resellers — in particular, the risk that they might not be able to cover the fixed cost of elements. *See, e.g.*, FCC Reply 39. Again, such claims incorporate a number of misleading assumptions. To start, the only elements that an entrant must purchase at a flat rate are the loop, network interface device (NID), and the port. Other elements have been priced on a usage-sensitive basis, and thus an entrant has no risk of an excess, up-front investment. And as for these flat-rated elements, comparisons to *residential* rates again distort the picture. *See* FCC Reply 39 n.25; MCI Reply 14 & n.5. Retail *business* rates typically exceed the basic cost of elements by a wide margin. For example, in North Carolina's Research Triangle Park, the cost

of an unbundled loop, NID, and port from GTE is $20.41; far below the retail rate of $39.95.[8] A purchaser of elements thus starts out with a hefty guaranteed profit.

As a result, there is nothing to the claims that entrants face a risk that they will not "stimulat[e]" sufficient demand for *new* services to cover costs. AT&T Reply 24. The purchaser of elements is not starting off with a loss to make up and does not need to "stimulate" demand to make a profit. Such complaints, moreover, create the impression that entrants like AT&T and MCI are gambling that they will not end up with high-cost customers that make little use of their telephones. That is misleading at best. Unlike incumbents, entrants are not required by state law to serve all customers in a given area; rather, they can target selected customers. And it is well known that the name of the game is high-volume, urban business customers — that is, customers who generate high revenues and low costs. Entrants have already established a pattern of targeting such customers,[9] and as AT&T's president has explained, their declared strategy is "to go into a high density, low [UNE] price zone," J.A. 257. Established interexchange carriers such as AT&T and MCI, moreover, already know which large business customers have high long

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[8] *See* North Carolina General Customer Tariff, GTE South Incorporated, 23d revised page 3 (filed Feb. 2, 1998) (retail rate); Recommended Arb. Order, *Petition of AT&T Communications of the Southern States, Inc. for Arbitration of Interconnection with GTE South, Inc.*, Docket No. P-140, Sub. 51, at 53, 60 (N.C.U.C. Feb. 4, 1997) (element rates).

[9] *See, e.g.*, M. Mills, *Bells Are Ringing on Wall St. for Local Phone Start-Ups*, Wash. Post, Oct. 1, 1997, at D-10 (entrants are "not after a mass market: Their target is business customers . . . ."); S. Berkelman, *Unleashed, AT&T Goes After Bells*, Newsday, Feb. 9, 1996 ("It's logical that bees follow honey and banks are robbed because that's where the money is, and our focus will be on concentrated markets in major cities with concentrations of business customers.") (quoting Robert Allen, Chairman of AT&T).

distance bills, and they can target those customers specifically.[10]

Any suggestion, moreover, that purchasers of elements face large up-front costs in developing new billing systems, *see, e.g.*, FCC Reply 40; MCI Reply 16, is baseless. One of the very arguments in this Court is an effort to protect current FCC rules that entrants believe will give them access to all the OSS necessary to handle billing and to "convert the recorded customer usage information into bills." AT&T Reply 44.

Finally, the FCC's supporters cannot immunize the FCC's rules by arguing that they are based on "findings" and "predictive judgments" showing that the agency's reading of the unbundling duty will not undermine the resale provisions. *See, e.g.*, MCI Reply 12-13; AT&T Reply 20. These supposed "findings" are just the quibbles about pricing and incentives dealt with above. At bottom, moreover, these assertions are nothing but a transparent effort to wrap up in the terminology of a factual "finding" a *legal* conclusion that the undisputed arbitrage promoted by the FCC does not evade the terms of the Act. But that question of law is for the Court to decide.

3. By Creating "Another Way To Resell" That Will Undermine Universal Service Funding, the FCC Violated the Terms of the Act.

The FCC and its allies cannot dispute that the arbitrage outlined above will undermine universal service funding. Indeed, they nowhere deny that, at least until an entirely new funding mechanism is in place under § 254, entrants taking

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[10] If by no other means, an entrant could ensure that its customers would meet a target volume of calls by selling local service in a package with a set number of minutes of long distance pre-paid. Unlike a statutory reseller, the purchaser of elements would not be prohibited from jointly marketing its long distance service with local service effectively resold from a local Bell company. *See* § 271(e). The FCC's version of unbundled elements provides an end-run around that restriction of the Act as well.

advantage of the FCC's approach to unbundling would be able to evade any contribution at all to universal service. Instead, they attempt, in part, to belittle this result as a mere "policy" concern. But that ignores the text of the Act. Congress specifically pegged the wholesale price for an incumbent's service to the retail rate — and thus ensured that it would reflect the costs of universal service subsidies. *See* § 252(d)(3). By creating another way to "create local service" through network elements sold at rates that (under the prevailing interpretation) *do not* reflect such subsidies, the FCC's rules evade the explicit protection built into the wholesale pricing term. As explained above, moreover, examining the FCC's approach to unbundling in light of the text and structure of the Act's resale provisions, and more generally in light of terms showing Congress's concern for preserving (rather than undermining) universal service, is not a foray into policy — it is part and parcel of proper construction of the Act.

Next, the FCC and its allies try to brush aside the free ride on universal service that the FCC is offering entrants by claiming that these are "interim concerns" properly resolved by the reforms required by § 254, including a new, explicit funding system. But the "interim" period these parties would like the Court to overlook is the critical transition period that will give entrants like AT&T and MCI a chance to cash in on a unique exemption from universal service burdens to cream-skim billions of dollars worth of incumbents' highest-value customers. AT&T's explanations of how entrants *will* contribute to universal service *once* § 254 has been implemented, AT&T Reply 29, are irrelevant. That system does not yet exist. Rather, the FCC has determined that there will be no explicit funding to reform universal service until at least 1999. In re Federal State Joint Board on Universal Service, CC Docket No. 96-45, ¶ 26 (May 8, 1997).

Indeed, for that reason it is supremely ironic that the FCC would now claim that the "proper way" to deal with the threat

that its unbundling rules undeniably pose to universal service is to "ensure timely implementation of the universal service reforms ordered in Section 254." FCC Reply 31. Ignoring the fifteen-month timetable set by Congress, *see* § 254(a), the FCC has postponed explicit funding under § 254 until 1999 and is now fighting before the Fifth Circuit to protect its delays, insisting that the "explicit and sufficient" funding system demanded by the Act is not an "immediate requirement" at all, but rather is merely an "eventual goal." *See* Brief for the FCC 49, *in Texas Office of Pub. Utility Counsel v. FCC*, Nos. 97-60421, *et al.* (5th Cir.).[11] Even on its face, therefore, the suggestion that unbundling arbitrage will be taken care of by swift action on § 254 cannot be taken seriously.

In any event, efforts to reduce the arbitrage here to an interim quibble about the timing of universal service reform are misplaced. First, as explained above, the root problem in the FCC's approach to converting access to "elements" into "another way to resell" is that it defies a basic limitation in the text of the Act linking the price for wholesale service to retail rates. *See* § 252(d)(3). That limitation applies at all times, regardless of the state of universal service reform. Creating a second method for purchasing service that will avoid that pricing standard flatly distorts the Act.

Second, at a more practical level, the suggestion that § 254 will remove any opportunity to game the system is simply incorrect. To be sure, the discrepancy between the wholesale rate set by the Act and the price for service recreated through "unbundled" elements is starkest when one focuses on implicit subsidies in retail rates. But even if implicit subsidies are removed, the FCC's rules will still offer entrants two routes for obtaining finished service at prices determined under

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[11] In fact, the FCC is now considering proposals to postpone explicit funding even further. *See* In re En Banc Hearing, tr. at 26 (FCC June 8, 1998) (available at http://www.fcc.gov/enbanc/060898/eb060898.html).

different statutory sections. There is no guarantee that the bottom-up approach of setting cost-based rates for elements will result in the same price as the top-down approach of applying a discount to retail rates — the method that Congress demanded in § 252(d)(3) for wholesale service. To the contrary, the prevailing approach under § 252(d)(1)'s cost-based standard (using long-run incremental costs of hypothetical networks) systematically excludes a variety of actual costs included in incumbents' retail rates; thus, it would necessarily yield a different price from the wholesale rate. The FCC's extra-textual method for using elements as "another way to resell" thus will always provide entrants some opportunity for gaming the system to receive a substitute for wholesale service at a price different from the one specified by the Act.

II. THE FCC IMPROPERLY EXPANDED THE DEFINITION OF NETWORK ELEMENTS.

Remarkably, the FCC does not spend a single sentence in its brief defending the construction of the statutory definition of network elements that is at the heart of this part of the case. Below, the FCC insisted that by referring to a "facility or equipment" used in providing "telecommunications *service*," § 153(29) (emphasis added), Congress radically expanded "network elements" far beyond the network itself to include any asset that an incumbent uses in "offering" telecommunications to the public. Indeed, the agency convinced the Eighth Circuit to adopt this reading, making the breadth of the "overall commercial offering of telecommunications" the key factor in determining the scope of network elements. Pet. App. 42a-43a. *See also id.* (OSS are network elements because they "constitute features, functions, and capabilities that are provided through the use of software and hardware that is used *in the commercial offering of telecommunication services to the public*") (emphasis added).

As we explained before, that extravagant gloss removes any textual constraint on what is deemed a "network element."

Everything that a LEC owns is used in some way to "offer" service. No doubt recognizing the indefensible overbreadth of that rationale, the FCC now abandons it, relegating it to a parenthetical in a footnote, *see* FCC Reply 47 n.31, and leaves any further defense of that theory to its allies. *See* AT&T Reply 47. As a result, the FCC nowhere provides any limiting principle to constrain the approach to defining network elements that the decision below has enshrined as law.[12]

An illustration readily shows the limitless nature of the FCC's distorted definition. If an incumbent used telemarketers to offer subscribers new services, such as Caller ID, an entrant could demand the right to "unbundle" and rent four or five telemarketers to perform the same functions on its behalf. The telemarketers are, after all, plainly used in "offering" telecommunications service to the public. Under the FCC's definition, there could be no logical reason for refusing to treat them, like operators, *see infra* pp. 19-20, as network elements.

Nor do the FCC's allies provide any principle to limit what might be deemed a network element. Instead, in response to the charge that the FCC would require incumbents to offer entrants effectively every back-office system so that entrants can manage their businesses "just as efficiently as incumbents," they confirm that this is "precisely" what they want. MCI Reply 24. But by mandating access to the "facilit[ies] or equipment" of the network, Congress in no way required incumbents to turn over additional systems entirely outside the network that they use to run their businesses. *See infra* pp. 20-

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[12] Nor does the FCC attempt to reconcile its countertextual gloss on the term "facilities" with the opposite approach the agency itself took in another section of the same Act. As noted before, *see* GTE Br. 56 n.22, under § 214(e), the FCC has determined that "facilities" used to "offer" telecommunications services are limited to "physical components of the telecommunications network that are used in the transmission or routing" of calls. In re Federal-State Joint Board on Universal Service, CC Docket No. 96-45, ¶ 151 (May 8, 1997).

22. Requiring incumbents to surrender such expertise eliminates incentives for entrants to develop systems of their own and short-circuits the innovation the Act was designed to foster.

Even a cursory examination of the text shows that the FCC's approach to defining elements has nothing to do with the definition set by Congress. By limiting a "network element" to a "facility or equipment" (including its "features, functions, and capabilities") "used in the provision of a telecommunications service," § 153(29), Congress rooted "network elements" in the physical facilities of the local exchange. Indeed, Congress made clear that the equipment it was designating consisted of components of the call-routing network as it went on to explain that the "features" of such equipment that should also be made available are those "used in the transmission, routing, or other provision of a telecommunications service." *id.* Despite the FCC's protests, there is no logical or textual basis for reading this reference to "other provision" of service as an engine for expanding "network elements" beyond the physical network. That general term rounds out a list of specific steps in the delivery of a call and should be read to refer to similar call-delivery functions.

Parsing the text thus confirms the result demanded by common sense. Congress did not transform the term "network element" into obscure jargon designating a limitless array of capacities an incumbent uses to run its business. Rather, the term means physical "elements" or pieces of the network — along with features and functions embedded in those facilities.

By concocting a concept of network elements that has no bounds, the FCC abandoned the task of determining what facilities actually fit the definition enacted by Congress. In particular, the agency erred by requiring unbundling of operator services and directory assistance and by treating all operational support systems (OSS) as network elements.

1. The FCC Erred By Treating Discrete Services As Network Elements.

Virtually the entire defense that the FCC and its allies can muster for the rules treating operator services and directory assistance as network elements is the repeated assertion that operator functions are "increasingly automated," FCC Reply 49, and thus that the FCC's rules will not *always* require the bizarre task of "unbundling" and renting out to competitors live operators. *See also* MCI Reply 25; AT&T Reply 49. But this half-hearted effort to blunt the jarring results of the FCC's rules simply papers over the basic conflict between unbundling operators and the terms of the Act. The Act limits network elements to a "facility or equipment" (or its "features") and cannot be stretched to include people (or the complex of tasks they perform). Whether operator services or directory assistance may in *some* instances be entirely automated is irrelevant. The FCC's approach to defining network elements treats an incumbent's personnel as the "elements" to be leased to an entrant and thus is flatly at odds with the text.

Similarly, the FCC cannot defend its rules with the facile claim that all network elements are controlled at some level by people and thus that "human involvement" cannot take operator services out of the ambit of network elements. FCC Reply 49. Providing "unbundled" operator services demands far more than the "human involvement" that may be needed to ensure, for example, that an unbundled loop is still up and functioning when an entrant orders it. The very "element" that the entrant is ordering, after all, is not a piece of equipment, but the service provided by the operators themselves. Indeed, in all relevant respects, leasing operators is indistinguishable from leasing the telemarketers described above. Neither can be reconciled with the text of the Act.

Finally, the FCC offers no plausible justification for treating distinct services (such as operator services) as network elements. As we noted before, Congress addressed "services"

and "network elements" in separate sections of the Act and even deleted any references to "services" from the definitions of network elements that had appeared in earlier drafts of the statute. *See* GTE Br. 57-58. The FCC's bald assertion that distinct services nevertheless should be treated as network elements ignores standard principles of construction. Where Congress has established distinct, defined terms such as finished "services" and "network elements" the use of one term necessarily implies the exclusion of the other. *See, e.g., O'Melveny & Meyers v. FDIC*, 512 U.S. 79, 86 (1994). Nor can the FCC salvage its approach to conflating services with network elements with the specter of incumbents evading unbundling by artificially labeling pieces of the network as separate services. *See* FCC Reply 48. The agency could easily prevent such patent evasions.

2. The FCC Erred By Indiscriminately Treating OSS as Network Elements.

As explained in our opening brief, the broad category of OSS includes a number of different systems used by an incumbent LEC in running its business. The FCC naturally tries to portray OSS as systems needed to "manipulat[e] network elements to provide services." FCC Reply 45. It is indisputable, however, that not every system included under the generalized heading of OSS performs such a function; rather, many such systems control entirely independent business functions such as managing billing or even scheduling the visits of repairmen. Indeed, even AT&T tacitly acknowledges that not all OSS play a role in operating the network. Instead, the most that AT&T can assert is that "[m]any of these systems" — not all — are "connected electronically to the facilities that route calls within the network." AT&T Reply 44-45. The rest of the systems grouped into the class of OSS are thus entirely *outside* the network.

By indiscriminately treating *all* OSS as network elements, the FCC failed even to undertake any inquiry to determine whether each system it was making available to entrants could actually fit within the definition of a network element — that is, a "facility or equipment" (or a feature of such a piece of equipment) that is used in the LEC's call-routing network.

In part, the FCC defends this broad-brush approach to OSS unbundling by focusing on half-truths. Thus, the FCC asserts that the second sentence of the statutory definition includes items such as "databases" and "information sufficient for billing and collection," § 153(29), that are examples of OSS. *See* FCC Reply 47; *see also* MCI Reply 24. The mere fact that Congress specifically designated *some* items that might be called OSS as network elements, however, does not remotely justify the FCC's decision to treat *every* system in the loose category of OSS as a network element.

Moreover, contrary to the FCC's assertions, *see* FCC Reply 47, by proposing that network elements should be limited — as the Act requires — to "facilit[ies] or equipment" in the call-routing network (including their "features, functions, and capabilities"), GTE has not offered a definition that would exclude any items actually enumerated in § 153(29). The "databases" and "information" mentioned in the section are plainly recorded and stored in computers that are part of the physical pieces of the call-routing network — not entirely separate systems that the LEC uses in administrative functions. Indeed, the Act lists such databases and information not as free-floating categories of network elements in their own right, but solely as examples of the "features, functions, and capabilities that are provided *by means of [a] facility or equipment*." § 153(29) (emphasis added).

Having established the trivial proposition that *some* OSS are included in the definition of network elements, the FCC and its supporters would like to gloss over the critical distinction between systems that are part of the network — such as the

databases in § 153(29) — and every separate software system used by a LEC in conducting other functions — for example, software used to transform information from network databases into bills. As AT&T candidly acknowledges, what it wants through access to OSS is not simply access to the "databases" or "information *sufficient* for billing and collection" that Congress included in the definition of network elements, § 153(29) (emphasis added). Rather, it wants the entire software system used "to *convert* the recorded customer usage information into bills." AT&T Reply 44 (emphasis added). By mandating access to data "sufficient" to create bills, however, Congress did not remotely require the broad access to software systems that AT&T would like.[13] By indiscriminately lumping into "network elements" anything that might be called a support system, however, the FCC never considered whether the terms of the Act were sufficient to grant access to the various systems it was providing to entrants.

Finally, the FCC and its allies assert that the FCC found that access to OSS should be required to ensure nondiscriminatory access to other network elements. *See, e.g.*, FCC Reply 46. But that is the purest makeweight. The FCC would render the specific terms of the definition limiting network elements utterly meaningless if it could grant access to every aspect of an incumbent's business on the theory that it was necessary for nondiscriminatory access to elements.

III. THE FCC REFUSED EVEN TO CONSIDER THE STANDARD CONGRESS SET FOR DETERMINING WHAT ELEMENTS MUST BE UNBUNDLED.

The FCC does not even respond to the errors the cross-petitions have identified in its approach to the "necessary" and

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[13] Indeed, under the FCC's approach, it is hard to see what would stop AT&T from ordering the entire function of "billing" to be performed for it by the incumbent's personnel as yet another so-called "network element."

"impair" standards of § 251(d)(2). The section directs that, in determining which network elements should be made available, the FCC "shall consider" whether access to proprietary elements is "necessary" and whether failure to provide access to non-proprietary elements would "impair" an entrant's ability to provide service. § 251(d)(2). As we have explained, the FCC distorted those tests in two steps.

First, the agency misconstrued § 251(c)(3)'s command concerning *where* an incumbent must provide access to elements ("at any technically feasible point") as a command defining *what* had to be unbundled. The FCC thus created an extra-statutory presumption (since vacated, *see* Pet. App. 46a-47a) requiring unbundling of every element that could technically be unbundled. Next, when the FCC turned to the standards in § 251(d)(2) *limiting* access to elements, it perceived a tension between the section and its own blanket presumption favoring unbundling. Giving primacy to its own erroneous presumption, the FCC read § 251(d)(2) so as not to "significantly diminish the obligation imposed by section 251(c)(3)." J.A. 54. As a result, the FCC watered down the "necessary" and "impair" standards by refusing even to look at existing alternative facilities outside the incumbent's own network. The FCC thus distorted the standards enacted by Congress and evaluated entirely different tests.

Rather than addressing these undeniable errors, the FCC resorts to diversions, claiming that its dictionary definitions for "necessary" and "impair" were reasonable and stressing that Congress did not make those standards dispositive tests. *See, e.g.*, FCC Reply 42-44. Similarly, its supporters repeat that there was no need to consider the *theoretical* possibility of future alternative facilities. *See* MCI Reply 29-30.

GTE's challenge has nothing to do with these red herrings, and in particular does not turn on whether Congress made the § 251(d)(2) standards dispositive. The question is whether the FCC *considered* the standards Congress specified *at all*, or

whether, by refusing to consider alternatives outside the network, it fundamentally distorted the statutory criteria. When Congress limits an agency's discretion by defining a standard to be considered — even if it is not a dispositive test — the agency must at least evaluate the standard enacted into law, not a modified test of its own creation. *See Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 378 (1989) (agency must consider "the relevant factors"); *United States v. Markgraf*, 736 F.2d 1179, 1183 (7th Cir. 1984) ("Where Congress has provided express standards to guide an agency in its exercise of discretion, we will presume that Congress did not intend the agency to substitute its own standards for discretion."), *cert. dismissed*, 469 U.S. 1199 (1985).

On this point the FCC offers no defense. The statutory command is so straightforward — and the FCC's disregard for it so stark — that there is no justification for its approach. It defies plain English for the FCC to pretend that access to a particular element is "necessary" (or that its absence would "impair" ability to provide service) when an entrant can obtain comparable equipment from another source.

Despite AT&T's assertions, moreover, *see* AT&T Reply 43-44 & n.17, alternative facilities are not mere fantasies. As the Conference Report pointed out, the infrastructure that cable companies have already deployed provides a realistic basis for facilities-based competition. *See* H.R. Rep. 104-458, at 148. Indeed, AT&T itself is banking on the use of such facilities "to begin providing digital telephony and data services to consumers"[14] — that is the very basis for its recent proposed merger with TCI. By refusing even to consider when such facilities (or others) would provide an alternative to the incumbent's network, the FCC removed any restraint on access to elements that would encourage entrants to use alternatives in providing local service.

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[14] AT&T and TCI Joint Press Release, June 24, 1998.

Nor can the FCC be rescued with the claim that considering alternatives outside the network would be pointless because entrants would voluntarily choose alternatives if they were more efficient. *See* MCI Reply 30; AT&T Reply 43. If Congress had intended to leave it entirely up to entrants to determine when they would use elements from an incumbent's network and when they would use alternatives, Congress would not have enacted § 251(d)(2). Section 251(d)(2) contemplates that the FCC will exercise discretion in determining whether particular elements should be made available to entrants, and that it will do so after evaluating a standard set by Congress. By mandating this independent evaluation of *need*, Congress clearly intended to restrain access to elements to preserve incentives for entrants to use alternative facilities where possible. Only where entrants use alternative facilities (or deploy their own) will they begin to generate efficiencies and provide the genuine benefits of competition. Some restraint on access to elements was essential, for as has long been recognized in the antitrust context, when the government forces a company to "provide [a] facility and regulat[es] the price to competitive levels, then the [entrant's] incentive to build an alternative facility is destroyed altogether." 3A P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 771b, at 175 (1996).

By effectively leaving the choice between an incumbent's network and using comparable alternative facilities wholly in the hands of new entrants, the FCC abdicated the role Congress assigned it and defeated the purpose of § 251(d)(2).

CONCLUSION

For the foregoing reasons, the Eighth Circuit's judgment upholding the FCC's rules (i) allowing entrants to provide service using *solely* network elements; (ii) expanding the definition of network elements; and (iii) refusing to consider alternative facilities outside an incumbent's network under the standards specified by § 251(d)(2) should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

AT&T CORP., *et al.*,
Petitioners,
v.
IOWA UTILITIES BOARD, *et al.*,
Respondents.

U S WEST, INC., *et al.*,
Petitioners,
v.
FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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AMENDED RULE 29.6 STATEMENT

U S WEST, Inc. advises the Court of an amendment to the company's Rule 29.6 statement to reflect a transaction and restructuring that occurred after the filing of its opening brief. U S WEST, Inc. still has no parent companies and has no non-wholly owned subsidiaries. U S WEST, Inc. has filed separately with the Court an explanation of the underlying transaction resulting in these changes.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

Nos. 97-826, 97-829, 97-830, 97-831, 97-1075, 97-1087, 97-1099 and 97-1141

AT&T CORP., *et al.*,
Petitioners,

v.

IOWA UTILITIES BOARD, *et al.*,
Respondents.

U S WEST, INC., *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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REPLY BRIEF OF CROSS-PETITIONER U S WEST, INC.

INTRODUCTION

In their responses to U S WEST's opening brief, the FCC and its supporters repeatedly characterize the agency's far-reaching unbundling mandates—laid out in hundreds of pages of regulations and explanations—as procompetitive rules that somehow minimize government intrusion and maximize market-based decisionmaking. Despite the FCC's apparent hope that repetition might make this claim

come true, the reality is that, while the FCC's regime undoubtedly benefits the particular *competitors* who defend it so vociferously, the agency's unbundling rules do nothing to encourage the development of *competition*. Instead, key elements of those rules impose on incumbent telephone companies regulatory obligations that will stifle investment and innovation by new entrants and incumbents alike and undermine universal service.

As the FCC admits, its rules give competitors the right to obtain and use virtually every productive asset in an incumbent's business, preassembled into a combined "platform" of network elements—and at a price set by regulators—even when an element could be readily obtained from a source other than the incumbent. Such a rule maximizes regulatory interference with the marketplace and suppresses competition by discouraging investment in rival facilities. The FCC also embraces the fact that the "platform" enables a rival to obtain the incumbent's finished services for resale at the cost-based prices that apply to unbundled network elements rather than the wholesale prices specified by section 252(d)(3). The agency does not deny that this result, by enabling new entrants to obtain the same service for resale at two different prices, allows entrants to undercut an incumbent's prices, not by providing a service more efficiently, but by engaging in regulatory arbitrage. Such arbitrage undermines universal service subsidies in direct contravention of the Act.

The FCC and its supporters defend this regime by isolating each individual aspect of the agency's decision, claiming deference for the FCC's interpretation of individual statutory phrases, and eschewing analysis of the structure and goals of the statute as "mere policy arguments." However, what the FCC dismisses as "policy" is part and parcel of the "language and design of the statute as a whole." *Sullivan v. Everhart*, 494 U.S. 83, 89 (1990). And the end result of the FCC's rules cannot be reconciled with the entirety of the statute, as reflected in its language, structure, and purposes.

Crucial to the FCC's distortion of the Act was its decision to nullify the "impair" and "necessary" standards of section 251(d)(2) for determining what network elements must be unbundled. The agency did this by refusing even to consider whether and how easily a competitor can obtain a particular element from sources other than the incumbent. The FCC and its supporters never squarely address this failing in their briefs, preferring instead to set up and attack straw men.

The FCC's failure to confront the issue is unsurprising, for its decision cannot be reconciled with the language of the Act. The FCC simply cannot, as Congress commanded, "consider" whether failure to provide access to an incumbent's element would "impair" a competitor's ability to provide service (or whether access to an incumbent's proprietary element is "necessary") without evaluating the competitor's need to obtain the element from the incumbent. And, as in the closely analogous context of the "essential facilities" doctrine, such an evaluation requires appraising the competitor's ability reasonably to obtain the same or an equivalent element from sources other than the incumbent. Such an appraisal would promote the development of vigorous competition by ensuring that new entrants are able to access facilities they truly need in order to enter the market but that are available only from the incumbent. At the same time it would leave intact the incentives for new entrants to build or obtain their own facilities when doing so is feasible, instead of relying entirely on the incumbent.

The FCC's nullification of section 251(d)(2), coupled with its unlawful expansion of the definition of "network element" and its requirement that incumbents provide network elements in a combined form, collapses the distinction drawn in the Act between network elements and resale. The agency's rules enable new entrants to obtain at cost-based rates an incumbent's finished services for resale by employing the sham of ordering all the network elements needed to provide the service on an "unbundled"

basis but precombined into a platform that provides the service.[1] The FCC and its supporters do not dispute that this device enables competitors to choose between two different prices when they purchase the same finished service for resale. Nor can they deny that the only meaningful effect of this scheme is to open the way to massive arbitrage that Congress deliberately sought to prevent and that undermines the subsidies on which state universal service programs will rely for the foreseeable future.

Instead, the FCC and its supporters point to irrelevant differences between the FCC's conceptions of unbundling and resale. None of their arguments confronts the fact that the availability of the network element platform eliminates resale under section 251(c)(4) as a distinct competitive option. In particular, contrary to the FCC's assertion, a competitor that buys the complete platform makes no commitment to specific facilities and therefore does not bear the risks that the FCC itself has identified as central to the use of network elements.

The FCC asserts that it must allow access to the complete platform because it cannot practically limit the availability of network elements. But that is an attempt to hide behind a problem of the FCC's own making. Properly implemented, section 251(d)(2) limits the unbundling requirement to those network elements that a new entrant

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[1] The expansion of the definition of "network element" to encompass vertical services and business assets that are not parts of the network was discussed in detail in U S WEST's opening brief. *See* Opening Brief of Respondent/Cross-Petitioner U S WEST, Inc. at 36-41 (May 18, 1998) ("U S WEST Br."). U S WEST incorporates by reference the discussions in the reply briefs for Bell Atlantic Corp., BellSouth Corp., and SBC Communications, Inc. and for GTE responding to the FCC's arguments concerning this issue. *See* Reply Brief for Cross-Petitioners Bell Atlantic Corp., BellSouth Corp., and SBC Communications, Inc. (July 17, 1998); Reply Brief for Cross-Petitioner GTE Midwest, Inc. (July 17, 1998). Because U S WEST and other cross-petitioners prevailed on the combination issue in the court below, it is not within the scope of this reply brief to address the FCC's most recent arguments on that issue.

cannot reasonably obtain from a source other than the incumbent. That limiting principle is both prescribed by the Act and the most sensible way to encourage the development of competition.

ARGUMENT

I. THE FCC OFFERS NO DEFENSE FOR ITS REFUSAL TO CONSIDER A COMPETITOR'S ACTUAL NEED TO OBTAIN PARTICULAR UNBUNDLED ELEMENTS FROM THE INCUMBENT.

Rather than defending the FCC's failure to consider the availability of network elements outside an incumbent's network, the agency and its supporters devote much of their discussion of the "impair" and "necessary" standards to defending against attacks that no cross-petitioner makes. The FCC asserts that its interpretation of "impair" and "necessary" is consistent with dictionary definitions, but no one has challenged the agency's definitions of these terms. FCC Reply Br. at 42-43; *see also* MCI Reply Br. at 29; AT&T Reply Br. at 43. Nor does the FCC make any headway by claiming that the statute requires it merely to "consider" the "impair" and "necessary" standards. FCC Reply Br. at 42-44; *see also* MCI Reply Br. at 28-29. Again, no one claims that these standards must always receive dispositive weight.

What U S WEST does contend is that the FCC may not evaluate the need for an element in a vacuum. The FCC may have discretion in judging the degree of need required to satisfy the "impair" and "necessary" standards and how much weight is given to this factor. But, even under the FCC's own definitions, the agency cannot "consider" whether lack of access to an element will "impair" service or whether access to a proprietary element is "necessary" without taking into account whether and how easily a competitor could procure the element from sources other than the incumbent. The FCC's refusal to undertake this analysis contravenes Congress's explicit directive.

In defense of the FCC's decision, its supporters fall back on the rationale articulated in the agency's Order—that "eventually" or "in theory" new entrants could duplicate any facility, and that therefore giving real consideration to the impair and necessary standards would eviscerate the unbundling requirements. MCI Reply Br. at 29-30. But here again, the FCC's supporters erect and knock down a straw man. U S WEST does not contend that an element may be unbundled only if it is impossible, now and forever, to obtain that element from a source other than an incumbent. Rather, our point is that the FCC cannot reasonably do what Congress required—"consider" the "impair" and "necessary" standards—without evaluating at all whether a given element can practically be duplicated from sources other than the incumbent and, to the extent that it can, whether that availability means that the incumbent should not be required to provide that element to its competitors. "Theory" has nothing to do with the issue; the focus should be on what is available *in practice* given current, actual market and technological conditions.

Moreover, an element that is available only "in theory" today may become available as a practical matter in the future as a result of technological or marketplace changes. For example, lack of access to an incumbent's local loops generally may impair a competitor's ability to provide local service today. But AT&T and TCI have promoted their recently announced plan to merge on the "theory" that it promises an alternative route for AT&T to reach consumers' homes to provide local telephone service.[2] If

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[2] *See AT&T, TCI to merge, create new AT&T consumer services unit*, Press release, June 24, 1998, *available at* <http://www.att.com/press/0698/980624.cha.html> (visited July 13, 1998); Leslie Cauley, *AT&T To Acquire TCI for $37.3 Billion—Agreement Paves the Way for Long-Distance Firm To Pursue Local Market*, Wall St. J., June 25, 1998, at A3; Hearing on the Convergence of Technologies and Consolidation in the Telecommunications Industry Before the Antitrust, Business Rights and Competition Subcommittee of the Senate Judiciary Committee (July 7, 1998) (testimony of C.

this claim is borne out in practice, the merger may mean that, in the not too distant future, lack of access to incumbents' local loops will not impair AT&T's ability to provide service. The FCC's refusal to consider alternative sources precludes it from even analyzing the effect this change might have.

Unable to defend its interpretation of the statute, the FCC asserts that its error makes no real difference because new entrants will not voluntarily depend on the incumbent and instead will use other sources if they are efficient. FCC Reply Br. at 45; *see also* AT&T Reply Br. at 43-44. Even if that were true, of course, the FCC's action still would be contrary to the statute. But the FCC's assertion is also incorrect. New entrants will have a substantial incentive to use incumbent facilities at regulatorily mandated cost-based prices even if they can reasonably duplicate or procure those same facilities elsewhere. The ability to obtain incumbent facilities at cost-based prices enables competitors to avoid the investment and risk of creating or obtaining facilities of their own. A competitor that builds its own facility takes the risk that the underlying investment may never be recovered if demand for the competitor's service is insufficient. A competitor that procures the same facility from an incumbent largely avoids that risk, since it can always abandon the facility by terminating the contract with the incumbent.[3]

Michael Armstrong, Chairman and CEO, AT&T Corp.), *available in* 1998 WL 1276107; Stephanie N. Mehta, *AT&T's Bold Projections for Earnings Unveiled in Effort To Placate Investors*, Wall St. J., June 29, 1998, at B5.

[3] Moreover, in many cases the new entrant can obtain network elements on a usage-sensitive basis, which eliminates all risk of stranded investments. *See infra* at 14-15.

The entrant's incentive to rely on the incumbent's facilities instead of building its own is further increased by the FCC's interpretation of the "necessary" standard, which permits competitors

The flaw in the FCC's analysis is confirmed by consideration of the closely analogous essential facilities doctrine under antitrust law. In that context, courts and commentators have recognized that a competitor should have access to a monopoly's facility only if that facility cannot be duplicated by the competitor and is not reasonably available elsewhere. *See* U S WEST Br. at 33 & n.13. This limitation would be entirely unnecessary if, as the FCC suggests, a competitor always would exploit a source other than the incumbent where such an alternative is reasonably available. The FCC fails to recognize the effect of mandated sharing on incentives: When the government "order[s] the [monopolist] to provide the facility and regulat[es] the price to competitive levels, then the [prospective entrant's] incentive to build an alternative facility is destroyed altogether." 3A Philip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 771b (1996). Even if the impair and necessary standards of section 251(d)(2) do not incorporate all the particular requirements of the essential facilities doctrine, they share its basic thrust—whether a competitor should be entitled to an incumbent's facility must depend, at least in part, on whether the competitor can reasonably obtain the facility elsewhere or build the facility itself.

In the height of irony, the FCC and its supporters finally suggest that the agency's refusal to consider alternative sources is appropriate because the free market should determine what facilities are duplicated. FCC Reply Br. at 22, 33-35; MCI Reply Br. at 30-31. But reliance on market forces is precisely what the FCC has prevented by issuing regulatory mandates that let competitors obtain

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to obtain all of the incumbent's proprietary elements unless the incumbent also offers equivalent, nonproprietary alternatives. That ruling enables a competitor that uses network elements to avoid any expenditures for research without taking a risk that the incumbent may obtain a competitive advantage through innovation —a risk that would exist if the competitor were to construct and utilize its own facilities.

incumbents' network elements with little or no risk, thereby squelching competitors' incentives to invest in productive assets of their own. Market forces may be insufficient, and regulation may be appropriate, where an incumbent has essential facilities that are unavailable to competitors from any other source. But where competitors can obtain needed facilities from other sources, the incumbent lacks the power to exclude them. The competitors may rely on the market and select among the multiple choices it provides (including, of course, the possibility of arriving at a mutually satisfactory arrangement with the incumbent). The FCC has supplanted this market-driven selection process by forcing incumbents to provide all facilities at prices set by regulators.

II. ALLOWING COMPETITORS TO USE NETWORK ELEMENTS TO ENGAGE IN *DE FACTO* RESALE AT COST-BASED PRICES IS CONTRARY TO THE ACT.

The cumulative effect of the FCC's rules interpreting section 251(c)(3) is to allow new entrants to buy a complete network element "platform" that, when used to provide local exchange services, is functionally equivalent to resale under section 251(c)(4). The FCC and its supporters trot out some differences between sections 251 (c)(3) and (c)(4), but all they succeed in showing is that unbundled elements can be used for additional purposes than those available through resale. What they cannot refute is that, under the FCC's rules, unbundled elements can be used to obtain the equivalent of resale at a different—and often much lower—price. As a result, section 251(c)(4) becomes simply a different pricing option for something a new entrant already can obtain under section 251(c)(3), and new entrants are free to engage in arbitrage by exploiting state-mandated price structures that reflect universal service policies. Congress did not intend any such result: It made resale a distinct competitive option under section 251(c), and deliberately prescribed a

price standard for that option that would limit easy arbitrage opportunities. A narrower reading of the Act's unbundled access provisions than that adopted by the FCC—one that does not provide access to the full "platform"—is necessary to effectuate Congress's intent.

A. The FCC and Its Supporters Do Not Refute That the Platform Eliminates Resale as a Distinct Competitive Option.

Building on its nullification of the Act's "impair" and "necessary" standards for determining what network elements should be unbundled, the FCC expanded the definition of "network element" to include nonnetwork business assets and ruled that a new entrant has the right to obtain all network elements on a precombined basis. *See generally* U S WEST Br. at 15-16. Nobody disputes that the cumulative effect of these rules is to allow new entrants to buy, at cost-based prices, the complete unbundled network element "platform"—the full, prepackaged set of "all of the network elements necessary to provide service," already "combined together" into a functional whole. MCI Reply Br. at 10, 14. In the name of "*unbundled* access," a new entrant gets a fully *bundled* final product.

The FCC and its supporters try without avail to refute the Eighth Circuit's conclusion that access to the full, precombined platform would "obliterate the careful distinctions Congress has drawn in subsections 251(c)(3) and (4) between access to unbundled network elements on the one hand and the purchase at wholesale rates of an incumbent's telecommunications retail services for resale on the other." *Iowa Utilities Board*, Order on Petitions for Rehearing, Pet. App. 71a. Their arguments never focus on the effect of access to the platform. Instead, they try to divert attention by stressing differences that exist in general between resale and the use of unbundled network elements. Nobody denies that such differences may exist; the point is that none of these differences prevents the

"platform" from being a perfect, differently priced substitute for statutory resale of local telephone service. The platform provides *everything* that the competitor can obtain through resale of an incumbent's finished service. Only the price differs.

The FCC argues that leasing unbundled network elements offers new entrants greater flexibility than resale, including the ability to design and provide services that the incumbent does not itself provide to customers. FCC Reply Br. at 38; *see also* AT&T Reply Br. at 22; MCI Reply Br. at 15. But even if selecting and combining *individual* network elements offers such flexibility, the flexibility enjoyed by a new entrant that provides service through the *complete, preassembled platform* of elements is limited at best—the new entrant using the platform by definition does not add or rearrange any facilities and hence is limited to the services that can be provided by the incumbent's existing network configuration.

Moreover, the fact that unbundled elements can be used for a broader array of services (including exchange access) than resale is beside the point: For the provision of basic local exchange service (and any other service subject to section 251(c)(4)), the platform offers a functionally equivalent alternative to resale. Under the FCC's unbundling regime, a new entrant has two options if it wishes to provide local telephone service to a particular customer without investing in any of its own facilities or taking any responsibility for configuring a network. The entrant can purchase finished local exchange service from the incumbent and resell it to the customer pursuant to section 251(c)(4). Alternatively, it can purchase the full set of network elements needed to provide local exchange service, already selected, configured, and combined by the incumbent into a functioning service—the "platform." Either way, the new entrant simply markets and sells to the end user a local exchange service that, functionally, is supplied entirely by the incumbent over the incumbent's

existing network. The only difference is that, in the first instance, the new entrant acknowledges that it is engaging in resale, while in the second it embraces the fiction that it has somehow purchased individual network components and assembled them into a finished service.[4]

In short, the FCC has made section 251(c)(4) functionally redundant; the provision does not offer new entrants any capabilities that they could not already obtain under section 251(c)(3). The fact that section 251 (c)(4) offers *fewer* services and *less* flexibility than unbundling under section 251(c)(3), *see* U S WEST Br. at 42-43; Bell Atlantic Br. at 51-52; FCC Reply Br. at 38, simply reinforces the extent to which the FCC has rendered the Act's resale provisions a dead letter (with the sole exception of an arbitrage-related purpose barred by the Act and discussed *infra* at 16-19). The FCC's broad unbundling rules permit the same type of entry strategy as resale, but with additional advantages.

The FCC argues, however, that differences in the way unbundled elements and resale services are ordered and paid for make resale less risky than unbundling and hence preserve it as a distinct competitive option. In particular, the agency argues, citing its claims in the First Report and Order, that a purchaser of unbundled elements pays a flat fee for some elements and takes the risk that it will not sell enough services to cover those costs. FCC Reply

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[4] Indeed, Reed Hundt, the Chairman of the FCC at the time the First Report and Order was adopted, recently recognized that use of the platform is effectively equivalent to resale:

> I think it has to be stipulated that real competition, competition that brings investment and innovation, that ultimately permits deregulation, that has to be essentially facility based. I think all versions of resale are transitional techniques. The [unbundled network element] platform is a version of resale.

Telecommunications Policy, Open Meeting (Ill. Commerce Comm'n, July 14, 1998) at 235 (statement of Mr. Hundt in response to question by Ms. Swanson-Hull).

Br. at 39 (citing Pet. App. 245a (Order ¶ 334)); *see also* AT&T Reply Br. at 24; MCI Reply Br. at 15-16. A reseller pays only for what it sells and thus bears no comparable risk.[5]

That *should* be a key difference between unbundled elements and resale. But the difference exists only if a new entrant, in order to compete using unbundled elements, must make a commitment to specific facilities—a commitment that cannot easily be reversed if customer demand for services using those facilities is lower than expected. Otherwise, there is no real risk in using unbundled network elements. As the FCC correctly recognized in the First Report and Order, Pet. App. 245a (Order ¶ 334), competition through unbundled elements should entail such a commitment. A new entrant that configures a network using some assets of its own and some leased from the incumbent is committed to those leased assets; it has connected its own facilities to them and has integrated them into its network, so it cannot easily reverse its choices. If the network it has configured turns out to be poorly matched to the demand for its services, the new entrant may find itself saddled with leased elements whose use is too low to justify their cost.

Where a new entrant buys the complete platform, however, it makes no such commitment and hence takes no such risk. The FCC argues that such risk exists because the new entrant must lease the local loop on a flat-rated

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[5] AT&T also suggests that a purchaser of unbundled elements bears the risk that its customers will use a particularly *high* volume of local services (for on-line or Internet services, for example), resulting in high charges for elements that are priced on a traffic-sensitive basis. AT&T Reply Br. at 25. But extra charges for high volumes are a problem only if they are not offset by extra revenues. Therefore, the risk AT&T describes would be the result of a new entrant's *self-imposed* decision to rely exclusively on flat-rate pricing to consumers; the risk easily could be avoided by combining some flat-rate fee with traffic-sensitive prices for use above specified levels.

basis. FCC Reply Br. at 39. But each customer is served by a single, dedicated local loop, and thus a new entrant leasing a particular customer's loop is assured of all that customer's business. The new entrant, in other words, knows that it will receive all revenues from that customer's local telephone use. Indeed, if the new entrant charges any type of fixed monthly fee to the customer, it will be assured of a predictable revenue stream even if the customer never uses the telephone. And because each loop corresponds to a single customer, the new entrant can cancel the loop and avoid all costs as soon as the customer changes carriers.

Nor is there substantial risk in any of the other components of the platform. Under the FCC's rules, the loop is the only significant flat-rated element that a purchaser of the platform must specify.[6] Switching (the function of routing calls) and transport (the function of carrying calls between switches in the incumbent's network) generally are priced on a usage-sensitive basis, so the new entrant pays only for what it needs.[7] And the FCC has held that a new entrant may order switching and transport as generic functions, leaving to the incumbent the task of determin-

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[6] AT&T mentions the network interface device (AT&T Reply Br. at 24) and MCI the port (MCI Reply Br. at 16) as other flat-rated elements that a new entrant must buy in order to provide service. But these elements are nothing more than the equipment that connects one end of the loop to the telephone wiring in the customer's home and the other end to the carrier's switching facilities. A new entrant purchases them together with the loop when it wins a customer and cancels them when it loses the customer. And just as in the case of the loop, the flat-rated costs of these elements easily can be recovered through a flat-rated monthly fee to the customer. In short, the reasons why the loop entails no substantial risk apply to the network interface device and the port as well.

[7] *See* J.A. 243 (Third Order on Reconsideration ¶ 30, *petitions for review pending, Southwestern Bell Telephone Co. v. FCC* (No. 97-3389 and consolidated cases) (8th Cir.)).

ing what particular facilities to use.[8] Thus, unlike a competitor that actually configures a network, a competitor that simply buys the full platform bears no risk of being committed to specific facilities that may turn out to be underutilized by consumers.

The FCC also points out that users of unbundled elements bear the cost of developing systems to bill long distance carriers for exchange access service. FCC Reply Br. at 39-40; *see also* AT&T Reply Br. at 21-22; MCI Reply Br. at 16. But a new entrant needs to develop a billing system for whatever local services it provides, regardless of whether it uses resale or unbundled elements, and the incremental cost of expanding or adapting that system to handle exchange access billing as well is not likely to be significant. Indeed, as ALTS has noted, "almost all new entrants have the back office systems and financial resources" needed to pursue a competitive strategy based on the use of unbundled network elements. ALTS Opp. Br. at 17. In any event, the minimal incremental cost of billing for access services will be more than offset by the additional revenues from those services, which are widely recognized to be priced above cost.[9] Be-

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[8] *See generally* J.A. 1359-1402 (Third Order on Reconsideration) (defining a "shared transport" element consisting of the right to use an incumbent's entire interoffice transport network without specifying particular facilities). Consistent with its apparent desire to expand the scope of the Act's unbundled access provisions wherever possible, the FCC rejected the "contention that a network element must be identifiable as a limited or pre-identified portion of the network." J.A. 246 (Third Order on Reconsideration ¶ 43). Moreover, the FCC expressly acknowledged that its intent was to shield purchasers of unbundled network elements from risk, on the theory that a new entrant attempting to select individual facilities "would almost inevitably miscalculate the capacity or routing patterns" necessary to serve its customers. *Id.* (Third Order on Reconsideration ¶ 35).

[9] *See, e.g., Access Charge Reform*, First Report and Order, CC Docket No. 96-262, FCC 97-158 (rel. May 16, 1997) ¶¶ 11, 28,

cause a carrier engaging in resale pursuant to section 251(c)(4) does not have the opportunity to collect revenues from access services, the ability of users of unbundled elements to provide those services, far from helping to preserve resale as a meaningful competitive option, simply provides an additional reason for new entrants to use the unbundled network element platform instead.

The FCC's supporters further argue that the agency's rules do not eliminate resale as a separate and viable competitive option because the wholesale price applicable to resale may, for services to some customers, be lower than the cost-based price applicable to network elements. AT&T Reply Br. at 23; MCI Reply Br. at 14. This argument simply misses the point. The flaw in the FCC's rules is not that no carrier would ever choose to label its activity as "resale." Rather, it is that the rules eliminate resale as a distinct competitive option with its own set of *real* (non-price) advantages and disadvantages. A new entrant buying the full platform of network elements pursuant to section 251(c)(3) gets everything it would get if it bought the equivalent finished service for resale; only the price is different. Thus, where cost-based prices are lower than wholesale prices—as often will be the case—a new entrant has no reason to engage in resale under section 251(c)(4). Resale is a potentially viable option *only* for services that, thanks to state universal service policies, are required to be sold to consumers at below-cost prices. In other words, the FCC's rules make resale nothing more than a vehicle to enable new entrants to exploit state pricing structures. It has no genuine competitive role.[10]

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petitions for review pending, Southwestern Bell Telephone Co. v. FCC (No. 97-2618 and consolidated cases) (8th Cir.). The FCC has begun a process to restructure access charges but estimates that it may take "several years" to complete the task. *Id.* ¶ 45.

[10] The FCC also claims that resale provides a "more immediate" entry strategy. FCC Reply Br. at 40. But since the platform comes precombined and consists of the incumbent's preexisting network

Congress did not intend such a result. The structure of Congress's scheme for promoting local competition makes sense only if the finished services a new entrant can obtain under section 251(c)(4) are *substantively* different from what it can obtain under section 251(c)(3)—not just differently priced. Congress would not have included section 251(c)(4) in the Act merely to give new entrants a second pricing option for something already available to them under section 251(c)(3). If Congress had intended simply to create a pricing alternative, it could have said so expressly in section 252(d), the section establishing "pricing standards," rather than creating an additional and independent duty under section 251(c). Similarly, Congress could not have intended, when it provided that new entrants reselling an incumbent's services would pay "wholesale rates," *see* 47 U.S.C. §§ 251(c)(4)(A), 252(d)(3), that resellers could in practice choose to pay cost-based rates instead if they merely relabeled their activity as "unbundling." For all nonsubsidized services, the FCC's rules effectively read the wholesale pricing standard of section 252(d)(3) out of the Act.

Moreover, Congress plainly did not intend to permit the arbitrage opportunities that result from allowing section 251(c)(3) to serve as a functional equivalent for resale under section 251(c)(4). *See* U S WEST Br. at 44-46. The FCC defends such arbitrage as the "market-oriented, efficiency inducing process . . . called 'competition.'" FCC Reply Br. at 30. But Congress's view, reflected in the Act, is that any benefits associated with such arbitrage are heavily outweighed by countervailing considerations. If Congress had wanted "competition" that is nothing more than the exploitation of state-mandated pricing structures by new entrants using only the

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configuration, there is no reason to think that a new entrant could not obtain and begin offering services with it just as quickly as with resale.

incumbent's facilities, it would have expressly mandated cost-based rates for resale. Instead, in prescribing prices for resale—the easiest competitive option—Congress abandoned the cost-based standard it used for interconnection and unbundled elements. It adopted a special "wholesale" standard that is based on retail prices that states set to effectuate their own pricing policies. *See* 47 U.S.C. § 252(d)(3); H.R. Rep. No. 104-204, at 72 (1995) ("The [resale] rate should reflect whether, and to what extent, the local dialtone service is subsidized by other services."). The FCC and its supporters do not and cannot offer an explanation for this decision; under their theory of the Act, the adoption of a wholesale pricing standard simply makes no sense.

In fact, the wholesale pricing standard of section 252 (d)(3) has only one possible explanation: Congress recognized that the growth of competition would put pressure over time on state pricing structures, but it did not wish to allow the quick option of resale to force a flash-cut to cost-based pricing because of the destructive effect that would have on universal service. In other words, prevention of arbitrage built around universal service subsidies, far from being merely the "policy preference" of the incumbent LECs, MCI Reply Br. at 1, 2, is the policy Congress adopted in enacting section 252(d)(3). That the FCC now embraces such arbitrage with open arms is a further indication of how far the agency has strayed from Congress's vision.

The FCC also argues that universal service arbitrage, if it is a problem at all, is only temporary and hence unworthy of Congress's attention. FCC Reply Br. at 21, 32. But, as noted above, Congress *did* choose to address the issue. Nor was this an unreasonable choice; the arbitrage problem is far less "temporary" than the FCC suggests. The Act sets no timetable for state action to reform local rate structures, and, more than two years after passage of the Act, not a single state has even begun to elim-

inate implicit subsidies from local rates. And the FCC itself has argued before the Fifth Circuit that the replacement of current universal service subsidies with a new, explicit support system is "an eventual goal," not "an immediate requirement." Brief for the FCC at 49, *Texas Office of Pub. Util. Counsel v. FCC* (5th Cir.) (No. 97-60421 and consolidated cases). Congress correctly anticipated that the transition to a reformed universal service system might be slow and took action to prevent quick, resale-based arbitrage in the interim.

B. Declining To Make the Full Platform Available Would Be Neither Impractical Nor Contrary to the Goals of the Act.

The FCC and its supporters do their best to disparage any interpretation of the unbundled access provisions that would limit section 251(c)(3) to its intended scope. They repeatedly observe, for example, that the text of section 251(c)(3) contains no express restrictions on unbundling. *E.g.*, FCC Reply Br. at 20; AT&T Reply Br. at 19; MCI Reply Br. at 10. But, as discussed above, there is ample textual evidence in sections 251(d)(2) and 251(c)(4) that Congress did not intend the unbundled access obligation to be boundless and, in particular, to eclipse resale. Congress did not spell out further express restrictions because it never imagined that the FCC would try to make *everything* available as an unbundled element. Congress's vision was straightforward: New entrants may need access to certain of the incumbent's elements in order to compete, and allowing them to lease *those needed elements* at regulated prices will enable them to start competing. Congress's failure expressly to list and prohibit the various possible distortions of its statutory scheme does not leave the FCC free to take an entirely different tack. The FCC's order created a regime fundamentally different from the one Congress intended; no express prohibition is necessary to make such a course unlawful.

The FCC also suggests that there is no principled way to determine which or how many facilities a new entrant should be required to obtain on its own before turning to unbundled elements under section 251(c)(3). FCC Reply Br. at 27-28; *see also* AT&T Reply Br. at 40. If a token facility were all that was required, the limitation plainly would have little practical effect. But this problem is a red herring, created entirely by the FCC's unlawful decision to make virtually every part of an incumbent LEC's business subject to section 251(c)(3) in the first place. If the scope of section 251(c)(3) were properly limited to those facilities that a new entrant truly needs to obtain from the incumbent because they are not reasonably available from other sources, then a new entrant would not be able to provide service entirely through unbundled elements. Instead, it would have to provide some facilities on its own—namely, those facilities that are not within the bottleneck control of the incumbent. The particular facilities that are "nonessential" in this respect might vary from case to case or over time, but there is no question that the notion of "essential facilities" provides a reasonable principle for determining what facilities a new entrant must provide on its own.

Such a principle would not, contrary to the FCC's contention, "confin[e] new entrants to one option (resale)." FCC Reply Br. at 37. Unbundling would remain a viable option for many carriers, a useful and time-saving halfway house on the road to facilities-based competition. Nor would this narrower interpretation of the Act's unbundling provisions constitute an "artificial limitation." *Id.* Rather, it would simply recognize that one section of the Act may not be read so broadly as to engulf another. In short, the narrower interpretation, unlike that adopted by the FCC, would make sense of the Act's structure and effectuate Congress's purposes.

CONCLUSION

For these reasons, as well as those stated in U S WEST's opening brief, the Court should vacate the FCC's unbundling rules in their entirety.

Respectfully submitted,

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July 17, 1998

Nos. 97-829, 97-1075, 97-1087, 97-1099, 97-1141

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

MCI TELECOMMUNICATIONS CORPORATION,
Petitioner,
v.
IOWA UTILITIES BOARD, *et al.*,
Respondents.

AND RELATED CASES

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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INTRODUCTION AND SUMMARY OF ARGUMENT

Respondents and cross-petitioners impermissibly ask this Court to recreate national telecommunications policy *de novo*. Avoiding any serious analysis of the statutory text and ignoring the compelling factual and policy findings of the Federal Communications Commission ("FCC"), the incumbent local carriers (joined by the state commissions only on the jurisdictional issue) demand a series of judicially imposed restrictions that appear nowhere in the Telecommunications Act of 1996 (the "1996 Act" or "Act"), and serve only to protect their entrenched interests. It is hardly surprising that the incumbent carriers would seek to derail efforts to end their longstanding monopolies, or that state utility commissions would be unhappy about Congress' decision to limit their prior authority to prescribe the substantive law governing competition in intrastate markets. But this case is not about whether Congress or the FCC made the best policy choices. The issue here is whether Congress foreclosed the FCC from implementing the 1996 Act in the way that the FCC has. *See Regions Hosp. v. Shalala*, 118 S. Ct. 909, 915-16 (1998). On that question, respondents and cross-petitioners are virtually silent.

The incumbent carriers' attempt to replace the statutory text and the FCC's expert policy judgments with their own policy preferences is most transparent in their attacks on the FCC rules implementing § 251(c)(3), the provision requiring incumbents to lease unbundled elements of the local network. Those attacks rest on the premise that entry into local markets through the use of unbundled elements should be discouraged because such entry would threaten the existing scheme of implicit universal service subsidies and create disincentives to pure facilities-based competition. For these reasons, the incumbents demand four specific restrictions: (i) no leasing of existing combinations of network elements; (ii) no leasing of *any* network elements unless a new entrant already has facilities of its own; (iii) no leasing of critical features, functions and capabilities of the network; and

(iv) no leasing of network elements that are theoretically "available" from a source other than the incumbent.

The Act, however, does not suggest, much less impose, the restrictions the incumbents demand. Had Congress wanted to impose them, it could easily have done so in plain English. There is no reason to think that Congress wanted to preserve the status quo of monopoly service and implicit subsidies until some distant future time when (or if) competing ubiquitous physical networks have been built. To the contrary, Congress wanted to ignite competition as "quickly as possible," [1] and (as even the incumbents' own lawyers have acknowledged) legislated an end to the insupportable scheme of hidden subsidies that was the sole remaining justification for shielding the incumbent carriers from competition. *See* P. Huber, M. Kellogg & J. Thorne, *The Telecommunications Act of 1996*, at 55 (1996) (praising the Act's "long overdue" reform of "the universal service guarantee [that] has evolved into a rat's nest of implicit subsidies and accounting sleight-of-hands utterly unsuited to a competitive marketplace"). Nor did Congress view the prospect of the immediate reduction of implicit subsidies as a threat requiring remedial statutory impediments. Instead, in § 254 of the Act, Congress mandated explicit, competitively neutral regulatory mechanisms that would fund universal service in ways that did not impede the rapid emergence of competition. Thus, there is simply no basis for concluding that Congress foreclosed the FCC from implementing the 1996 Act's unbundling requirements in a manner that would jumpstart local competition.

Respondents' efforts to deny the FCC any authority to implement the Act's pricing requirements are likewise an attempt to rewrite the statutory text in the service of policy preferences that Congress nowhere articulated. The statutory text unambiguously gives the FCC authority to implement all requirements of the 1996 Act. Section

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[1] H.R. Rep. No. 104-204 at 89 (1995) ("H. Rep.").

251(d)(1) of the 1996 Act authorizes the FCC to implement the requirements of § 251, including the substantive requirement that rates be "just, reasonable, and nondiscriminatory." Section 201(b) of the Communications Act grants the FCC authority to implement all provisions of the Act—including §§ 251 and 252. Thus, the FCC would lack authority to issue pricing regulations only if other statutory language clearly restricted these plenary grants of authority. None does.

Respondents' arguments ultimately rest on the incorrect theory that the 1996 Congress wanted to maintain the division of regulatory authority previously established by the 1934 Communications Act. That argument ignores reality. The 1996 Act dramatically changed the prior regulatory regime in which federal law governed interstate matters and state law governed intrastate matters. Congress expressly preempted state laws that restricted competitive entry into local markets (§ 253), and supplanted state laws governing intrastate carrier-to-carrier relations with federal requirements designed to foster local competition (§§ 251(c) and 252(d))—including, specifically, requirements governing the prices incumbents could charge new entrants for use of the existing network. Congress made clear that the FCC, in "implementing and enforcing" these new substantive requirements, could preempt state laws that were inconsistent with them or that hindered achievement of their purposes. § 251(d)(3). Congress also denied state courts any power to review state commission decisions under § 252 of the Act, and mandated federal court review of those decisions. § 252(e)(4), (6). Thus, it is simply not plausible to argue that the FCC was guilty of "breaching a 60-year old statutory barrier that Congress had purposely left in place" when it passed the 1996 Act. Brief of Bell Atlantic Corporation, et al. (hereinafter "BA") at 2. Congress—not the FCC—breached that barrier.

Respondents' reliance on § 2(b) of the 1934 Act does not advance their case. The issue here is quite different than the one they pose; it involves the respective roles of

the FCC and state utility commissions in implementing *federal* law. In particular, the issue is whether as a result of § 2(b), after Congress has already prescribed law governing intrastate matters and granted the FCC general implementing authority, Congress must go further and specify expressly that the FCC's rulemaking authority extends to all of the particular intrastate matters indisputably governed by federal substantive law. Section 2(b) does not impose such a requirement. Instead, the requirements of § 2(b) are met when Congress indicates its intent in a "straightforward" and "unambiguous" manner. *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 377 (1986). There is no basis for respondents' attempts to read § 2(b) as imposing an additional rule that Congress make its intent "express." Just as Congress made clear (though not express) that the local competition provisions *apply* to intrastate matters, Congress plainly intended the FCC to have jurisdiction to implement those provisions. Moreover, in *Louisiana*, the Court relied on § 2(b) to deny the FCC the authority to exercise *ancillary* jurisdiction to regulate beyond where Congress had legislated. The case does not hold that even where Congress has enacted federal requirements to govern intrastate matters, the FCC lacks authority to implement those federal requirements absent an additional, and express, grant of specific authority to regulate.

ARGUMENT

I. THE INCUMBENTS' CHALLENGES TO THE FCC'S "UNBUNDLING" REGULATIONS ARE WITHOUT MERIT.

The incumbents devote most of their briefs to arguments designed to disable § 251(c)(3). The gist of their case is that the statutory language Congress employed in § 251(c)(3) (which sets forth the leasing obligation) and § 153(29) (which defines "network elements"), if given its ordinary meaning, would make it too easy for new entrants immediately to begin offering competitive service—and compete away monopoly profits—by leasing unbundled elements. They argue that Congress instead

intended to establish only two avenues to enter the local market—either undertaking the staggeringly expensive task of building a duplicative local network (which might bring about real competition in the distant future), or following the far easier route of reselling the incumbents' existing services (which does not threaten incumbents in any serious way). The right to lease unbundled elements was, in their view, merely a means by which new entrants could temporarily obtain discrete pieces to fill in gaps as they struggled through the long, slow process of building their own networks. The FCC's decision to give the text of § 251(c)(3) its ordinary meaning, thereby making leasing unbundled elements a robust entry strategy, the incumbents argue, was a grave error because it allowed for *real* competition—which would drive retail rates to cost—in the short term. According to the incumbents, the 1996 Act contemplates a much slower transition to competition, thus preserving for the indefinite future the current system of rate averages and implicit subsidies. Until new entrants have their own networks, the incumbents contend that they should be able to compete only by using the Act's resale option, which does not threaten the existing rate structure.

This central theme animates each of the incumbents' challenges to the FCC rules implementing § 251(c)(3). First, the incumbents defend the Eighth Circuit's invalidation of Rule 315(b) on the ground that new entrants must be made to bear the senseless and discriminatory cost of reconnecting the elements needlessly ripped apart by the incumbents, because otherwise leasing network elements might become an economically feasible means of competing away the incumbents' supracompetitive profits. Second, the incumbents attack the Eighth Circuit's affirmance of the FCC's decision that new entrants may lease network elements even if they do not yet have any of their own facilities, again arguing that new entrants will be able to erode too quickly the incumbents' monopoly profits. Third, the incumbents argue that the FCC made too much of the network avaliable for lease.

Finally, the incumbents assert that the FCC made it too easy for new entrants by allowing them to lease particular unbundled elements of the existing network even when those elements might be available (at a higher price) from another source. These particular complaints form the substance of incumbents' rhetorical claims that the FCC has authorized "sham unbundling" and read resale out of the Act.

Although the incumbents colorfully describe the FCC's rules as a "wrecking ball" demolishing carefully crafted statutory restrictions on the Act's leasing provisions, the truth is that the statutory text contains no such restrictions. That is critical, for (though the incumbents never mention it) the FCC's interpretation of § 251(c)(3) and § 153(29) is subject to judicial invalidation only if (i) Congress has spoken to " 'the precise question at issue' " and foreclosed the agency's interpretation, or (ii) that interpretation is arbitrary and capricious or otherwise unreasonable. *Regions Hosp.*, 118 S. Ct. at 915 (quoting *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984)). In evaluating the FCC's unbundling rules, judicial deference is particularly warranted, both because Congress directly delegated to the FCC the task of implementing the Act's unbundling requirements, *see United States v. O'Hagan*, 117 S. Ct. 2199, 2217 (1997), and because these issues involve a "complex and highly technical regulatory program" and "necessarily require significant expertise and entail the exercise of judgment grounded in policy concerns." *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (quotation omitted). Indeed, deference should be at its zenith because (as will be shown) the incumbents' unbundling arguments ultimately rest on disagreements with the FCC's findings and predictive judgment about how market participants will behave. *See FCC v. National Citizens Comm. for Broad.*, 436 U.S. 775, 813 (1978) (deference especially appropriate for findings "of a judgmental or predictive nature").

With respect to each of the incumbents' challenges to the FCC's unbundling rules, there is no plausible argument that the statutory text unambiguously forecloses the FCC's interpretation. Nor have the incumbents shown that the FCC's rules are arbitrary or capricious, or otherwise unreasonable. In the rulemaking process, the incumbents vigorously pressed their demands for delaying local competition, preserving implicit subsidies, and creating artificial incentives for competitors to construct competing networks by burdening other possible entry strategies. But the FCC chose to implement the Act's unbundling requirements so as to jumpstart local competition. The FCC did so only after making appropriately detailed findings that its rules would not "read resale out of the Act" or otherwise threaten the legitimate interests of the incumbents. The FCC was not insensitive to the incumbents' policy pleas. But it made clear that the preservation of universal service would be accomplished as Congress intended—through the explicit, competitively neutral mechanisms mandated by § 254 of the Act—and not by subverting the goal of immediate competition in local markets. The 1996 Act did not deny the FCC that policy choice, and reviewing courts are not in a position to second-guess it.

A. The Incumbents Have Not Demonstrated That the Text of § 251(c)(3) Unambiguously Forecloses the FCC's Decision to Impose Rule 315(b), Or That the Rule Is Arbitrary And Capricious Or Otherwise Unreasonable.

The incumbents make only a half-hearted effort to defend the Eighth Circuit's invalidation of Rule 315(b). They do not take issue with most of what was said in petitioners' opening briefs. They do not even mention (much less try to satisfy) the governing legal standard set forth in *Chevron*. Nor do they even acknowledge the FCC's detailed findings made in support of Rule 315(b).

The best the incumbents can do by way of textual analysis is to argue that the FCC's interpretation of § 251(c)(3) is not the only possible reading. More

specifically, they assert that the statutory term "unbundle" in the first sentence of § 251(c)(3) can mean "physically separated," and that "separately priced" is therefore not "the only reasonable" interpretation of the term. BA 54. That hardly suffices. Under *Chevron*, an agency has the discretion to adopt *any* reasonable interpretation of a term, and past agency usage and multiple dictionary definitions are powerful indications that the agency's construction is reasonable.[2]

To buttress their argument that "physically separated" is the better reading, the incumbents argue that the requirement in the second sentence of § 251(c)(3) that incumbents "shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements," must be read as authorizing the lease of individual elements *only* in a physically separated form. But that is not what the statute says. The incumbents read into § 251(c)(3) the qualifier "only," a word that does not appear in the text.[3] The FCC reasonably read the second sentence of § 251(c)(3) to mean that *when* a competitor wishes to combine elements on its own in order to reconfigure the elements, the incumbent must allow the competitor to do so. It does not follow that elements which are already combined must be ripped apart for no valid economic reason. The incumbents' different construction of § 251(c)(3) "is not an inevitable one," *Regions Hosp.*, 118 S. Ct. at

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[2] Elements that can be unbundled for use by a lessor at a separate price typically—though not inevitably—*can* be made available as physically separate items. It is therefore hardly surprising that the FCC on occasion has discussed the mechanics of separating elements that are to be unbundled.

[3] *See* BA 53 ("the 1996 Act says in no uncertain terms that incumbents need *only* provide 'access to network elements on an unbundled basis' and *only* in a 'manner that allows requesting cariers to combine such elements' ") (emphasis added); GTE 66 (section 251(c)(3) "concludes by specifying that incumbents are required to provide elements *only* 'in a manner that allows requesting carriers to combine such elements' ") (emphasis added).

916-17, and does not provide a basis for invalidating Rule 315(b).

Nor have the incumbents dealt with the conflict between their definition of "unbundled" and the nondiscrimination requirement of § 251(c)(3). The incumbents contend that it is not discriminatory to force new entrants to bear the cost of reconnecting elements the incumbent has ripped apart, because the incumbents did not "stumble[] on their networks already constructed and combined." U S West 52; *see also* BA 56. In other words, they argue that by being forced to put the network back together, a competitor is doing no more than what the incumbent had to do when it initially constructed the network. But that is to ignore the economies of scale that alone made it possible for the incumbents to construct their extensive networks—economies that the leasing provisions allow new entrants to share. In any event, as the incumbents know, when a competitor leases a network element, the cost of connecting that element to the rest of the telephone network has already been built into the lease price of that element.[4] As a result, when a competitor is forced to reconnect network elements the incumbent has ripped apart, it is paying twice, while the incumbent has paid only once (and has already been fully reimbursed for the competitor's share of that cost). Moreover, competitors' customers suffer a loss of service during the reconnection process, while the identically situated Bell Atlantic customer does not. That is the very definition of discrimination, prohibited by the plain terms of § 251(c)(3).

Because the text does not help them, the incumbents resort to the argument that the Court of Appeals' deci-

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[4] For example, as Bell Atlantic testified in Maryland at the proceeding through which element prices were set, included as part of the element price of the wire loop that connects the residence to the switch is a "central office termination cost," which represents the cost of connecting the loop to the switch at the central office. Testimony of E. Beard for Bell Atlantic-Maryland, Inc., MD PSC Case No. 8731-II at 5 (Jan. 10, 1997).

sion was appropriate because it "provides a bulwark against the total elimination of Congress' distinction between unbundled elements and resale." U S West 48; *see also* GTE 50. As we demonstrate below, however, there simply is no basis for the incumbents' predictions that the FCC's rules will eliminate the distinction between unbundled elements and resale. *See infra* pp. 14-16. In any event, that concern cannot possibly justify the Eighth Circuit's hopelessly overbroad "bulwark." Rule 315(b) applies to a competitor's request to lease *any* two elements in combination, not only to a request by a competitor with no facilities of its own to lease all of the network elements necessary to provide service, the so-called "platform" of elements the incumbents wrongly assert is the functional equivalent of resale. The invalidation of Rule 315(b) is thus a grossly overbroad response to the policy concern the incumbents have raised. Knocking out every existing combination of network elements merely to prevent new entrants from relying *entirely* on leased elements has enormously harmful marketplace consequences. MCI, for example, has invested nearly two billion dollars in local facilities, and had intended to offer its own new services through its own facilities and facilities leased in combination from the incumbents. The Eighth Circuit's invalidation of Rule 315(b) has dramatically inflated the cost of MCI's entry strategy, even though by no stretch of the imagination could that strategy be described as the functional equivalent of resale. In sum, it was hardly unreasonable for the FCC to reject the incumbents' policy-based arguments against Rule 315(b).

B. The Act Does Not Make Ownership of Facilities a Prerequisite to Leasing Unbundled Elements.

The incumbents' attack on the FCC's refusal to read a facilities-ownership requirement into § 251(c)(3) suffers from the same flaws as their arguments against Rule 315(b): the statutory text does not unambiguously foreclose the FCC's reading, and it was reasonable for the FCC to reject the incumbents' policy arguments. Indeed, incumbents' pejorative assault on what they call

"sham unbundling," and their arguments that the FCC's rule will "read resale out of the Act"—and thereby threaten their cherished subsidies—amount to nothing more than a disagreement with the predictive judgments of the expert agency. But the FCC made detailed findings supporting its approach, and the incumbents have advanced nothing but *ipse dixit* in response.

1. *The Eighth Circuit Correctly Concluded That the FCC's Interpretation Is Not Unambiguously Foreclosed by the Statutory Text.*

The incumbents have not shown that the text of § 251 (c)(3), either standing alone or in context, "has directly spoken to the precise question at issue" and unambiguously foreclosed the FCC's interpretation. *See Chevron*, 467 U.S. at 842-43. In upholding the FCC, the Eighth Circuit relied upon the "plain language" of § 251(c)(3), which expressly imposes on incumbents "[t]he duty to provide, to *any* requesting telecommunications carrier . . . nondiscriminatory access to network elements on an unbundled basis at any technically feasible point." § 251 (c)(3) (emphasis added); *see also* Pet. App. 55a. Indeed, the Eighth Circuit agreed with the FCC that a "facilities ownership" requirement is *foreclosed* by that plain language, which "is cast exclusively in terms of obligations imposed on incumbent LECs, and . . . does not discuss, reference, or suggest a limitation or requirement in connection with the right of new entrants to obtain access to unbundled elements." *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 F.C.C.R. 15499 at ¶ 294 (1996), Pet. App. 242a ("*Local Competition Order*").

The incumbents never address the FCC's reading of "any telecommunications carrier." Instead they rely on entirely different statutory language, which requires incumbents to provide access to "network elements . . . at any technically feasible point." § 251(c)(3). This language, they assert, shows that Congress contemplated that competitors would have their own facilities to con-

nect with leased facilities. But this is not an argument based on what the text says; it is an argument based on what the incumbents claim the text presupposes. Had Congress wanted to restrict leasing to carriers who owned facilities, it surely would have imposed the intended restriction directly—as it did in the immediately preceding section of the Act. *See* § 251(c)(2) (imposing a duty to provide interconnection only for carriers that own or lease facilities).

In any event, the text does not support incumbents. The statute merely imposes a duty on incumbents to make their network elements available in a way that enables competitors to interconnect with them if that is what competitors want. Elements provided under § 251(c)(3) will, of course, be used by new entrants that do have their own facilities; the statutory language on which the incumbents rely assures that these new entrants will be able to interconnect their elements with those they lease. And, it is equally true that a new entrant relying exclusively on leased elements would require a technically feasible point of interconnection with the incumbent's operational support systems—the computers and databases that run the local network. Otherwise it would be unable to order the elements, bill for them, and connect the leased elements to long-distance networks. Thus, the inference upon which the incumbents rely is untenable.

Nor are the incumbents correct that the broader "context" of § 251 compels the facilities-ownership limitation they seek to impose. As the incumbents would have it, a facilities-ownership requirement must be read into § 251(c)(3) because the absence of such a requirement "effectively nullifie[s]" the Act's resale provision (§ 251(c)(4)), in contravention of the canon of statutory construction that a statute should be interpreted so as to give meaning to all of its parts. BA 2. But for two reasons that canon of construction is inapplicable.

First, the FCC's reading of § 251(c)(3) will have the effect the incumbents claim only if the incumbents are correct in their self-serving predictions that resale will

always be more expensive and otherwise less desirable than combinations of network elements. In other words, the incumbents' nullification argument depends on a series of empirical assumptions about contingent possibilities. That is not, in any meaningful sense, an argument about the statutory text, but is, instead, an argument about the reasonableness of the factual findings and policy judgments the FCC made in concluding that its approach would not read resale out of the Act. As will be demonstrated, the incumbents have raised no meaningful challenge to those findings and judgments, and thus they must be affirmed as reasonable. *See infra* pp. 14-21.

Second, the incumbents' own arguments make clear that the FCC's reading does not nullify the Act's resale provision. The very point of their "regulatory arbitrage" argument is that new entrants will use resale to compete for customers whose rates are presently subsidized, *see* U S West 45 ("because competitors can obtain subsidized services at a discount from the below-cost rates incumbents must charge, competitors can resell them at comparably below-cost prices"), while relying on unbundled elements (which are priced at cost-based rates pursuant to § 252(d)(1)) to compete for classes of customers whose rates generate the subsidies. Thus, even if the incumbents' views are correct, resale will remain the preferred option for competing for some classes of customers. Whatever else might be said of such an argument, it does not involve the " 'emasculat[ion of] an entire section' of a statute." BA 60 (quoting *Bennett v. Spear*, 117 S. Ct. 1154, 1166 (1997)).

In sum, because the incumbents' construction of § 251 (c)(3) "is not an inevitable one," the FCC's contrary view must be upheld so long as it is reasonable. *Regions Hosp.*, 118 S. Ct. at 916-17. The FCC's interpretation easily passes muster under that deferential standard.

2. *The FCC's Decision Not to Impose a Facilities Ownership Limitation Was Not Arbitrary and Capricious Or Otherwise Unreasonable.*

The incumbents have not shown that the FCC acted in an arbitrary or unreasonable manner in rejecting their demand that only new entrants with their own facilities be permitted to lease unbundled facilities.

First, the key premise of the incumbents' argument—that resale will always be more expensive than relying exclusively on network elements—is wrong. In some states, the price of the "platform" of all of the elements combined together is lower than the resale price. But in others the resale price for new entrants is *less* than the cost of leasing only the wire loop and port on the switch connecting the home to the switch, without even considering the cost of switching and the other elements necessary to provide service.[5] Furthermore, much of the attractiveness of using elements today results from the fact that lessors can compete in the highly profitable market for exchange access—charging long-distance companies for the use of the local lines needed to begin and end long distance calls—while resellers cannot. But this is not a permanent state of affairs; competition will reduce the price of access. When that happens, different market conditions will prevail, and market participants will make new calculations about the relative merits of building, leasing elements, or reselling existing services.

Second, resale and relying exclusively on leased elements are not "functional equivalents." As the FCC

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[5] For example, the monthly resale price for providing residential service in Texas ranges from $6.39 to $8.66. *See Southwestern Bell Telephone Company Texas Local Exchange Tariff, 3.1.1 Residential Service*, at 3 (issued Jan. 27, 1995) (effective March 3, 1995); *Petition of MFS Communications*, Docket Nos. 16189 *et al.*, Arbitration Award, at 17-19 & Appendix B (Pub. Util. Comm'n Tex. Nov. 7, 1996). In contrast, the cost of leasing the loop and switch port alone is $17.05—almost double the highest resale rate. *Petition of MFS Communications*, Docket Nos. 16189 *et al.*, Arbitration Award, at Appendix B (Pub. Util. Comm'n Tex. Dec. 19, 1997).

found, resellers and lessors face entirely "different opportunities [and] risks." *Local Competition Order* ¶ 331, Pet. App. 244a. "[C]arriers reselling incumbent LEC services are limited to offering the same service an incumbent offers at retail." *Id.* ¶ 332, Pet. App. 244a. On the other hand,

> a carrier offering services solely by recombining unbundled elements can offer services that differ from those offered by an incumbent. For example . . . carriers using unbundled elements can bundle services that incumbent LECs sell as distinct tariff offerings, as well as services that incumbent LECs have the capability to offer, but do not, and can market them as a bundle with a single price. The ability to package and market services in ways that differ from the incumbent's existing service offerings increases the requesting carrier's ability to compete against the incumbent and is likely to benefit consumers. . . . These services, however, are not available for resale under section 251(c)(4) of the 1996 Act.

Id. ¶ 333, Pet. App. 244a-245a (footnotes omitted). Moreover, a competitor who leases the full "platform" of elements to provide service can combine the leased network in any way it sees fit, while the reseller can only use the network exactly as it is configured by the incumbent. Respondents contest none of this.

Indeed, the incumbents do not really argue that these two entry vehicles are the same. The essence of their position is that relying on leased elements is in every respect superior to resold service, and therefore to "preserve" resale, only competitors who already own some of their own facilities should be able to lease elements. *See, e.g.*, BA 62. In its order, however, the FCC concluded that resale did not need "protection," because although carriers "taking unbundled elements may have greater competitive opportunities than carriers offering services available for resale, they also face greater risks." *Local Competition Order* ¶ 334, Pet. App. 245a. As the FCC explained:

> A carrier purchasing unbundled elements must pay for the cost of that facility. . . . It thus faces the risk that end-user customers will not demand a sufficient number of services using that facility for the carrier to recoup its cost. (Many network elements can be used to provide a number of different services.) A carrier that resells an incumbent LEC's services does not face the same risk. This distinction in the risk borne by carriers entering local markets through resale as opposed to unbundled elements is likely to influence the entry strategies of various potential competitors.

Id.

The incumbents would have this Court reach precisely the opposite conclusion, on the theory that because all necessary elements can be leased on an "as needed" basis, lessors "need bear no risk of demand fluctuation." BA 62. But such a bold assertion, unsupported by any record evidence, provides no basis for overturning the FCC's contrary findings as arbitrary and capricious. Moreover, it is simply not the case that all elements may be leased on an as needed basis. The local loop, the "port" that connects the loop to the switch, and other elements are all priced at flat rates. Additionally, to compete in the market for exchange access, new entrants must lease facilities and develop billing and support systems the cost of which may or may not be recouped, depending on how much long distance service their customers use. In sum, just as the FCC determined, unlike a reseller, a lessor has no predictable margin, and faces the risk of unused capacity. For all of these reasons, competitors have chosen and will continue to choose to resell rather than to lease in a variety of market settings: for example, when the customer is receiving a subsidized rate, or when the competitor needs quick or easy entry into the market. The incumbents' argument to the contrary ignores the record and misstates the facts.

Third, the incumbents have nothing to say about the FCC's administrative and policy justifications for rejecting the facilities-ownership limitation on § 251(c)(3).

The FCC determined that such a limitation would be "administratively impossible" because "it would not be possible to identify the elements carriers must own without creating incentives to build inefficient network architectures that respond not to marketplace factors, but to regulation" and any such limitation "would likely be so easy to meet it would ultimately be meaningless." *Local Competition Order* ¶ 339, Pet. App. 248a. The FCC also concluded that such a restriction would artificially limit competition to those few markets that could "efficiently support duplication of some or all of the incumbent LEC's networks." *Id.* ¶ 340, Pet. App. 249a. Unable to respond to a single one of these conclusions, the incumbents instead berate the FCC for "seek[ing] shelter in policy arguments of [its] own." BA 63. That is, however, the FCC's job.

Fourth, and most importantly, it was eminently reasonable for the FCC to reject the incumbents' argument that the absence of a facilities-ownership restriction on § 251 (c)(3) will "subvert[] the important goal of preserving universal telephone service," BA 2, by subjecting the monopoly retail rates that allegedly fund such service to competitive pressures. The very point of the Act is to create local competition that will drive down those supracompetitive prices. As the incumbents themselves acknowledge, "[i]nterservice subsidy arrangements were economically sustainable only because the States preserved . . . legal barriers to entry." BA 4. Congress understood that the existing system of alleged implicit subsidies would not survive in a competitive market, and intended to replace it with a system of subsidies that "should be explicit, rather than implicit, as many support mechanisms are today." H.R. Conf. Rep. No. 104-458 at 131 (1996) ("Conf. Rep.").

The incumbents nevertheless insist that Congress intended this change to come gradually, so that states would have a "potentially lengthy period" of time, BA 50, in which to make the transition to a system of express "universal service" subsidies. In particular, they argue that

the current system of rate averaging should remain in place until full-fledged competing physical networks have emerged. From this they insist that it follows that the Act's leasing provision was designed to be an extremely limited transitional device, lest competition develop too quickly. Congress, the story goes, intended rapid competition to develop only through resale, a method that accordingly was designed to protect the current system.

But § 251(c)(3) is not a transitional measure—it imposes permanent obligations on the incumbents—and it contains no express or implied judgment that leasing is disfavored, or disfavored during some undefined interim period. Indeed, the FCC correctly found that Congress did not "express[] a preference for one particular entry strategy," but created alternative paths new entrants could employ "as market conditions and access to capital permit." *Local Competition Order* ¶ 12, Pet. App. 137a-138a. By requiring incumbents to facilitate all three types of competitive entry equally, Congress was drawing on past experience opening the long-distance market, where the Bell System's monopoly was broken up through a market-driven combination of resellers, lessors, and companies that built their own facilities. Congress was not attempting to micro-manage the development of local competition any more than regulators micro-managed the successful transition to long-distance competition.

Moreover, the incumbents' argument rests not on the statutory text, but on yet another assumption—namely, that Congress understood that facilities-based competition would take years to develop, and wanted no real competition in the interim. But the incumbents insistently told Congress that cable companies could provide meaningful facilities-based competition in the here and now. *See, e.g., Antitrust and Communications Reform Act of 1993 (Part 2) on H.R. 3626; Hearing Before the House Subcomm. on Economic and Commercial Law of the Comm. on the Judiciary*, 103d Cong. 154 (1994) (statement of Edward E. Whitacre, Jr., Chairman and CEO of Southwestern Bell Corp.) (noting "cable television companies

. . . already have or are entering the local telephone service market"); *see also* Conf. Rep. at 148 ("[M]eaningful facilities-based competition is possible, given that cable services are available to more than 95 percent of United States homes."). If Congress wanted to protect the current system of rate averaging and implicit subsidies, it therefore surely would have mandated full implementation of § 254's universal service reform requirements in *advance* of allowing competition by owners of competing networks.

The fact is that Congress took the opposite approach. It mandated that the local competition provisions of the Act be implemented as quickly as possible. *See* § 251 (d)(1) (FCC must issue implementing regulations within six months); § 252(b)(1) (new entrants may invoke arbitration within 160 days of seeking interconnection agreements); § 252(b)(4)(C) (state commissions must resolve arbitrations within nine months). At the same time, Congress provided that federal universal service reform would be accomplished on a less expedited basis, *see* § 254(a), while state reform could be completed as quickly as was necessary to offset the effects of emerging local competition, *see* § 254(f).

In this regard, it is telling that the state commissions have not joined the incumbents in their attacks on the FCC's unbundling rules. After all, the current system of rate averages and hidden subsidies is not the product of the incumbents' altruistic desire to ensure that everyone can afford phone service. The current system is the product of *state* policy choices. Had the FCC threatened those state policies in any meaningful way, the states would have objected. Their silence speaks volumes about the legitimacy of the incumbents' claims.

Nor did the FCC "ignore[]" the problems the state commissions would face as they were forced to address the realities of a competitive market. *Compare* GTE 52. To the contrary, the FCC enacted a series of protective measures to address the possibility "that the requirements

of the 1996 Act may be disruptive to existing state universal service support mechanisms during the period commencing with this order and continuing until we complete our universal service proceeding to implement section 254." *Local Competition Order* ¶ 715 (JA 155); *see also id.* ¶¶ 715-732 (JA 155-67) (establishing interim access charge regime to protect implicit universal service subsidies during transition to local competition). Respondents do not even acknowledge the FCC's reasoned response to the issues they have raised.

While the incumbents' principal policy argument is grounded in the premise that Congress did not intend facilities-based competition to develop too quickly, its second argument is, to the contrary, that Congress wished to encourage, not discourage, facilities-based competition, and that an unlimited right to lease is inconsistent with that legislative command. This argument suffers from the same defect as the argument that Congress favored resale over leasing. Nothing in the statutory text supports the incumbents' suggestion that Congress "carefully calibrated," BA 51, the three methods of competing service to assure that one was favored over another.[6]

Moreover, the FCC found it would serve no rational purpose for regulators artificially to encourage the building of facilities when market conditions otherwise would lead a competitor to lease them. *Local Competition Order* ¶ 340, Pet. App. 249a. No rational competitor would choose to rely on the incumbents' facilities as a long-term strategy, because it would require levels of cooperation that the incumbent would have no incentive to provide. Long-term reliance on unbundled elements would require a massive investment in monitoring, regulating, and litigation costs. For such reasons, MCI has already invested almost two billion dollars in constructing its own facilities.

Finally, the most sensible way to promote the construction of competing facilities is to encourage leasing. A competitor that leases all of the necessary elements from

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[6] *See supra* pp. 14-19.

the incumbent must first build the necessary operations support systems to order, repair, and bill for the leased elements,[7] and must decide which services to market. Then, as traffic volumes increase, or technological advancement makes building more economical than leasing, the competitor would find it relatively easy to substitute its own facilities for those it had previously leased from the incumbent. A reseller, on the other hand, is the furthest removed from a facilities-based provider, and would not develop systems or expertise that would be helpful if it subsequently chose to build its own facilities. It is leasing, not resale, that is the strategy of choice for competitors like MCI whose ultimate goal is to build their own facilities.

C. The Incumbents' Remaining Challenges to the FCC's Unbundling Requirements Are Without Merit.

The incumbents argue that the FCC exceeded Congress' plan in ordering the unbundling of such critical components of local service as operational support systems, directory assistance, operator service facilities, and vertical features. Once again, however, the incumbents have no argument that the plain text of the 1996 Act forecloses the FCC's unbundling rules. Their arguments rest instead on the most strained inferences from statutory text and proceed from the false premise that Congress wanted new entrants either to build their own facilities or to resell incumbent services rather than to rely on unbundled network elements. But Congress directly delegated to the FCC the task of prescribing nationwide rules for unbundling, including rules dictating what elements should be unbundled. Had Congress wanted to limit the FCC in the way the incumbents propose, it surely would have said so in a straightforward manner. It did not.

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[7] These operational support systems allow the competitor to connect directly to the incumbents' elements, including in particular to the incumbents' *own* operational support system. *See infra* pp. 23-25.

1. *The Eighth Circuit correctly upheld the FCC's reasonable interpretation of the Act's definition of network elements.*

A network element is

> a facility or equipment used in the *provision* of a telecommunications service. Such term also includes features, functions, and capabilities that are *provided* by means of such facility or equipment, including subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or *other provision* of a telecommunications service.

§ 153(29) (emphasis added). The incumbents argue that this text imposes a requirement that a network element must be "unalterably rooted in discrete physical parts" of the network and must be used to transmit or deliver calls. *See* GTE 54-55. The Eighth Circuit rejected that implausible reading of the Act. *See* Pet. App. 41a-43a.

The statutory text does not limit "network elements" to call routing facilities, because it encompasses all facilities used in the provision of service as well as all the features, functions, and capabilities of those facilities used "in the transmission, routing, or *other provision* of a telecommunications service." § 153(29) (emphasis added). The incumbents argue that under the principle of *ejusdem generis* the term "other provision" of service is limited only to alternate means—in addition to transmission and routing—of *physical* delivery of a call. *See, e.g.*, U S West 40. But Congress previously defined the concept of "provision" of service broadly to include the features, functions, and capabilities that are "provided by" means of a facility, and it explicitly listed "information sufficient for billing and collection" as an example of network elements so defined. § 153(29). Provision of these features—critical to telecommunications service—is not a means of physical delivery of a telephone call.

Because Congress defined the term "provision" so broadly in the first part of § 153(29), the canon of

ejusdem generis does not dictate that the terms "transmission" and "routing" necessarily modify the later use of the same term and restrict it to physical delivery of a call. *See* GTE 56; U S West 40. Had Congress meant to restrict the meaning of the term "provision" after initially defining it so broadly, it would have done so explicitly. Instead, Congress emphasized again that "provision" of a service includes more than transmission and routing: the language specifies "transmission, routing, or *other*" provision of service; in context it cannot be taken to mean "transmission, routing, or *similar*" provision of service. The FCC reasonably found that because " 'transmission' and 'routing' refer to physical delivery, the phrase 'or other provision of a telecommunications service' goes beyond mere physical delivery." *Local Competition Order* ¶ 261 (JA 40).

a. *The FCC reasonably found that the incumbents must provide access to their operational support systems.*

Operational support systems ("OSS") are "software systems and accompanying databases that are necessary to process orders, handle billing, and provide maintenance and repair capabilities to phone customers." Pet. App. 42a. They allow a telephone company to assign and track the specific facilities that serve individual customers, advise new customers of their telephone numbers, and schedule repair visits when customers report service troubles. The FCC concluded, and the Eighth Circuit agreed, that OSS and the information it contains "fall squarely within the definition of 'network element.' " *Local Competition Order* ¶ 516 (JA 116-17); Pet. App. 42a-43a. In so doing, the FCC reasoned that the text of the Act reflects Congress' recognition that new competitors cannot enter local markets successfully without access to OSS, and found that "[o]perational interfaces are essential to promote viable competitive entry." *Id.* (citation and internal quotations omitted).

The FCC further found that incumbents must lease their OSS functions to competitors pursuant to § 251(c)(3) for three independent reasons. First, OSS is a network element because the systems themselves are " 'databases' " or " 'facilit[ies] . . . used in the provision of a telecommunications service,' " and their functions are " 'features, functions, and capabilities that are provided by means of such facilit[ies].' " *Id.* ¶ 517 (JA 117) (quoting § 153(29)). Second, OSS is a network element because the information contained in and processed by the systems is "information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service." *Id.* Third, even if OSS were not itself a network element, access to OSS is a "term and condition" of access to other network elements, and must, therefore, be provided on a nondiscriminatory basis pursuant to § 251(c)(3) and (c)(4). *Local Competition Order* ¶¶ 510, 518-519 (JA 114-16, 118-19). The incumbents do not even address this third and independent ground for the ordering of competitors' access to incumbents' OSS. This ground in itself provides an adequate basis for upholding the FCC's interpretation of the Act. In any event, the incumbents' argument that OSS does not fall within the statutory definition of network elements because it is not a physical part of the call-routing network fails: meeting that requirement is not necessary because the incumbents fabricated it. *See supra* pp. 22-23. The Act's definition *explicitly* encompasses OSS functions like "billing and collection," which are neither physical nor parts of the call-routing network.

Beyond this, the incumbents can only take issue with Congress' policy choices. They complain that allowing competitors access to their software would allow new entrants to run their business "just as efficiently as incumbents." GTE 59. But that is precisely what Congress hoped to accomplish when it included "databases" and "information" in the definition of network elements and directed nondiscriminatory access to those elements. *Local*

Competition Order ¶¶ 510, 518-519 (JA 114-16, 118-20). Incumbents' complaint is with the Act and not with the FCC.

b. ***The FCC reasonably found that directory assistance, operator service facilities, and vertical features are network elements.***

The Eighth Circuit's "agreement with the FCC's determination that the Act broadly defines the term 'network element' " properly led the court "also to agree with the Commission's conclusion that operator services, directory assistance, caller ID, call forwarding, and call waiting are network elements that are subject to unbundling." Pet. App. 44a. The court held that operator service facilities and directory assistance are "features, functions, or capabilities that are provided by facilities and equipment that are used in the provision of telecommunication services." *Id.* Operator service facilities include the physical equipment used to complete certain types of calls mechanically (such as calling card calls), frequently without any human intervention, as well as live operators who can, when needed, use the equipment to switch or complete calls. Contrary to the incumbents' rhetoric, it is *not* live operators that the FCC "deemed 'elements' of the network subject to unbundling." GTE 57. Rather, it is the "function" and "capability" provided by the operator services system that the FCC and the Eighth Circuit agreed fall within the Act's definition of network elements. It matters not that some human services may be involved. Human intervention is often required to deliver the features, functions, and capabilities of network equipment that are indisputably network elements.[8] For example, a switch may need to be reconfigured or to have routing information added to its database, and people perform these functions. Congress drew no line excluding the human support necessary to deliver the functions of a network element.

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[8] Indeed, labor costs are included in the pricing of most network elements. *See supra* n.4.

Incumbents also challenge the FCC's inclusion of the software features of the switch that the incumbents use to provide caller ID, call forwarding, and call waiting as network elements. *See Local Competition Order* ¶ 423 (JA 95). The Eighth Circuit properly deferred to the FCC's judgment that these so-called "vertical features" of switches are features and functions of the switch that are no different from any other "features, functions, and capabilities" of the switch which competitors therefore have the right to lease at cost-based rates. § 153(29); *see* Pet. App. 42a-43a, 47 C.F.R. §§ 51.307(c); 51.319(c)(i)(C); *Local Competition Order* ¶¶ 412-413, 423 (JA 86-88, 95). The FCC held that switching is a "network element" that includes all of the features, functions, and capabilities of the switch: both the basic software embedded in the switch needed to route any telephone call and the switching software that makes possible *added* services such as caller ID, call forwarding, and call waiting. Both the FCC and the Eighth Circuit found this result compelled by the plain meaning of the statutory text. *See* Pet. App. 43a.

In the incumbents' view, the Court of Appeals erred in refusing to consider the practical consequences of the FCC's approach. Those consequences, the incumbents argue, are that, by leasing, competitors will be able to offer their customers services like call forwarding at a lower retail price than the inflated prices the incumbents are currently offering. The incumbents insist that if competitors can compete effectively by offering such enhanced local telephone services at cost-based rates, competition will deny the monopolists the profits they claim to need to support implicit universal service subsidies. *See, e.g.*, GTE 52-53.

That policy rationale is insupportable. A competitor's ability to offer vertical features at a lower price than an incumbent's current price is precisely what Congress intended. For the reasons previously stated, *see supra* 17-20, the incumbents' arguments based on the need to preserve universal service are groundless.

Nor do respondents gain anything by calling certain pieces of the telephone network "services." The incumbents contend that all of these systems—operator service systems, directory assistance, and vertical features—are "services" rather than "facilities," and therefore do not qualify as network elements. But the FCC and the Eighth Circuit agree that simply because certain features or functions of equipment may also be characterized as services does not preclude their characterization as network elements. *Local Competition Order* ¶ 263 (JA 41); Pet. App. 42a, 44a-45a. Indeed, the incumbents assert a distinction without a difference: *all* services are comprised of collections of features, functions, or capabilities of network facilities or equipment. The Eighth Circuit held that vertical features "satisfy the definition of 'network element;' consequently they are subject to the unbundling requirements of subsection 251(c)(3)." Pet. App. 45a. It agreed with the FCC that the incumbents' arguments to the contrary "would allow the incumbent LECs to evade a substantial portion of their unbundling obligation." Pet. App. 44a-45a.

For example, switching and lines that run from the switch to the business location have all been or could easily be offered as "services" available to retail customers. If none of these elements could be considered "network elements," the statutory provisions that allow for competitive service through unbundled network elements would be a dead letter. Nothing in the Act says (or even suggests) that "services" and "elements" are mutually exclusive categories, and the FCC's interpretation of the term facilities is, as the Eighth Circuit held, consistent with the Act's purposes. It must, therefore, be sustained.

D. The Eighth Circuit Correctly Upheld the FCC's Reasonable Interpretation of the Act's Standards for Competitors' Access to the Incumbents' Network Elements.

The incumbents also take issue with the FCC's implementation of § 251(d)(2), arguing that the agency ne-

gated the Act's limitations on competitor access to incumbents' network elements. *See, e.g.*, GTE 49. Section 251(d)(2) provides that the FCC, in determining what network elements should be unbundled pursuant to § 251(c)(3), "shall consider" whether access to proprietary network elements is "necessary" and whether the failure to provide access to such network elements would "impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer." § 251(d)(2).

The incumbents disagree with the FCC's refusal to include in the "necessary" and "impairment" analyses an inquiry into the availability of similar but not identical network elements from alternate sources, *i.e.*, those outside the incumbents' networks. The incumbents argue that this refusal discourages innovation, particularly as to proprietary elements, BA 67, and that it creates disincentives to facilities-based competition. They invoke the antitrust doctrine of essential facilities in proposing that the proper analysis should examine whether the competitor can reasonably or practically duplicate the relevant element, BA 66, or at the very least should examine the availability of existing alternatives outside the incumbent's network, GTE 62.[9]

The factors Congress enumerated, however, need only be "considered." Having done so, the FCC is free to reach a reasoned conclusion that the element must be provided even if not necessary and not impairing the competitors' service. *See Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 95 (1995); *id.* at 103 (O'Connor, J., dissenting) (agreeing with majority that where Medicare Act provides that Health and Human Services "shall consider" generally accepted accounting principles in prescribing Medicare reimbursement standards, the Secretary retains "broad and

[9] Of course, if the antitrust and the Act's standards were the same, there would be no need for the Act in this regard, because competitors would achieve no more and no less by invoking the Act rather than the antitrust laws.

flexible authority" and "is not bound" to adopt these specific principles). Thus, incumbents' argument that § 251 (d)(2) expressed a congressional policy of truncating the availability of network elements cannot stand scrutiny. Beyond that, the FCC had ample basis to reject the notion that incumbents need not provide proprietary elements if competitors can obtain similar elements from a source outside the incumbents' networks, *Local Competition Order* ¶ 283 (JA 51-52), and to reject the incumbents' position that competitors are not impaired in providing service if they can obtain similar elements from another source or can provide the proposed service through resale; *id.* ¶ 286 (JA 53-54).

The FCC could hardly have been on firmer ground in so rejecting the claim that "necessary" must mean "indispensable," an interpretation that this Court has rejected in a similar context as too rigid for a word that should "be harmonized with its context." *Armour & Co. v. Wantock*, 323 U.S. 126, 129-30 (1944); *see also M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 413 (1819) ("necessary" means "convenient, or useful"). The court of appeals determined that the FCC's definition was "a reasonable one and entitled to deference," Pet. App. 49a, agreeing with the FCC that "[a]n overly strict reading of the word 'necessary,' as the petitioners propose, would unduly restrict the unbundling duty of incumbent LECs and hinder the development of competition in the local telecommunications industry." *Id.* By the same token, the court found the FCC's definition of "impair" to be consistent with dictionary definitions and consistent as well with the Act's pro-competitive purposes. It therefore concluded that the agency's definition was entitled to deference under *Chevron*. *Id.* at 50a.

As to both the "necessary" and "impairment" standards, the incumbents' "alternative sources" position would simply nullify the Act's unbundling requirements. Incumbents control almost all the network elements that currently exist. A competitor could, of course, in theory—

with enough capital and enough time—build a competing network and so provide itself with all these network elements from other sources. To say, as the incumbents do, that the analysis should at least examine existing alternatives outside the incumbents' network is to say nothing: "As a practical matter, if it is more efficient and less costly for new entrants to obtain network elements from a source other than an incumbent LEC, new entrants will likely pursue the more efficient and less costly approach." *Local Competition Order* ¶ 287 (JA 54-55); *see* Pet. App. 48a. But if (as is likely) because of economies of scale and scope, the incumbent monopolist is the most efficient source of a network element, the Act requires that those economies be shared with competitors. *See Local Competition Order* ¶ 10, Pet. App. 136a-137a. As the Eighth Circuit observed, Congress required that the monopolists' network elements be made available for lease precisely so that incumbents would have to share those economies with potential competitors, because of the extraordinary time and expense involved in constructing duplicate ubiquitous telephone networks. Pet. App. 48a.

Moreover, "requiring new entrants to duplicate unnecessarily even a part of the incumbent's network could generate delay and higher costs for new entrants, and thereby impede entry by competing local providers and delay competition, contrary to the goals of the 1996 Act." *Local Competition Order* ¶ 283 (JA 51-52). The incumbents accuse the FCC of denigrating and deliberately ignoring the Act's purpose of promoting—against other forms of entry—facilities-based competition by simply masking the concept of facilities-based competition in the pejorative term "unnecessary duplication." *See* U S West 32. But, in fact, the FCC reasonably understood that Congress could not have desired *unnecessary* duplication. Instead, competition is enhanced and consumers benefitted when the decision whether to build or to lease is dictated to the greatest extent possible by the market. Additionally, it is competition, and not just facilities-based competition, that is the primary and most urgent goal of the Act. *See*

supra 21-22. As the Eighth Circuit reasoned in determining that the FCC's alternate sources ruling was a reasonable one entitled to deference:

> Allowing incumbent LECs to evade their unbundling duties whenever a network element could be obtained elsewhere would eviscerate unbundled access as a means of entry and delay competition, because many network elements could theoretically be duplicated eventually. The Act, however, provides for unbundled access to incumbent LECs' network elements as a way to jumpstart competition in the local telecommunications industry.

Pet. App. 48a.

The FCC reasonably interpreted the Act's standards for access to network elements.

II. CONGRESS GRANTED THE FCC THE AUTHORITY TO IMPLEMENT THE LOCAL COMPETITION PROVISIONS OF THE 1996 ACT, INCLUDING THE PRICING PROVISIONS.

Congress, in the 1996 Act, unambiguously preempted state laws governing a host of local competition issues and enacted in their place a set of comprehensive federal standards. Despite this, in the name of federalism and purported loyalty to congressional intent, the Eighth Circuit denied the FCC the jurisdiction to implement many of those new federal provisions—including the pricing provisions—thus depriving the FCC of the authority to implement key provisions of federal communications law. In so doing, the Eighth Circuit ensured that, contrary to Congress' intent, the key federal provisions of the Act will be authoritatively interpreted not in an orderly, comprehensive fashion informed by the analysis of the federal agency entrusted to interpret communications law, but instead in a piecemeal fashion, over many years, by federal courts that lack any expertise in national communication policy. In part as a result of that decision, the prospects for the rapid opening of local markets have been destroyed. Neither the text of the 1996 Act, nor policy concerns, nor

any other provision of the Communications Act can justify that decision.

A. The Plain Text of the Statute Confirms That the FCC Has Authority to Implement the Local Competition Provisions of the Act, Including § 251's Rate Provisions.

The Eighth Circuit's decision to strip the FCC of rulemaking authority over most of the local competition provisions—including the pricing provisions—depends on the false premise that nothing in the 1934 Act, or in the 1996 Act (which amended it), confers on the FCC plenary authority to implement the 1996 Act's local competition provisions. Respondents' arguments in support of this premise fail.

First, the argument flies in the face of the statutory text affirmatively granting the FCC rulemaking authority. Section 251(d)(1), which instructs the FCC to "establish regulations to implement the requirements of" § 251, is not merely a time constraint but an affirmative grant of authority. Indeed, the language of § 251(d)(1) is drawn from the virtually identical provision of the House Bill, *see* H. Rep. at 4 (§ 241(b)(4)), which clearly was intended as a grant of authority. *See* Conf. Rep. at 120 ("Section 241(b)(4) directs the Commission to establish regulations"); *see id.* at 121 (same). Moreover, in § 276(b) of the Act, Congress used virtually identical language that incumbents concede (BA 36) empowers the Commission to issue regulations to implement the Act's provisions on payphone services. *See, e.g., Sorenson v. Secretary of the Treasury*, 475 U.S. 851, 861 (1986) ("identical words used in different parts of the same act are intended to have the same meaning") (citation omitted).

Section 201(b) also provides the FCC with a broad source of power. Respondents are left with the difficult prospect of arguing that § 201(b)—which authorizes the FCC to prescribe regulations "to carry out the provisions of the Act"—does not mean what it says. BA 43-44; GTE 33-34. They suggest that this clear grant of au-

thority should be limited by "context" to apply only to interstate communications. But Congress knew well the difference between a grant of authority that was section-specific, and a grant of authority that affected the entire Act. *Compare* § 317(e) ("The Commission shall prescribe appropriate rules and regulations to carry out the provisions *of this section*") (emphasis added), *with* § 201(b) ("Commission may prescribe rules and regulations . . . to carry out the provisions *of this Act*") (emphasis added).[10] Section 201(b) makes clear that Congress granted the FCC authority to prescribe regulations to carry out the provisions of the Act.[11]

Second, respondents have no cogent response to the point that their reading of § 251(d)(1) and § 201(b)

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[10] While § 201(b) grants the FCC regulatory authority to implement the provisions of the Communications Act, provisions such as § 276(b) and § 317(e) not only *grant* the FCC authority, they also *require* the exercise of that authority or add particular instructions regarding its exercise.

[11] Respondents rely on legislative history to suggest that the last sentence of § 201(b) applies only to that portion of § 201(b) that allowed radio companies to furnish reports of the location and positions of ships at sea to newspapers without charge. *See* NARUC 27. Respondents thus suggest that when Congress gave the FCC the power to implement the provisions of "this Act" it actually meant to give the FCC the power to implement the "last sentence of part (b) of this section of the Act." To state the argument is to refute it. Indeed, respondents misread the legislative history: Earlier in the bill that added the last two sentences of § 201(b), Congress used the same term—"this Act"—in a context that plainly refers to the Communications Act, making clear that Congress' use of the same term in the next sentence could not have been accidental. *See Wisconsin Dep't of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214, 225 (1992) (a phrase "ought to be accorded a consistent meaning within the section"). Finally, in passing this provision, Congress *explicitly* noted that it was amending § 201(b) of the Communications Act, *see* Communications Act of 1934, amendment, Pub. L. No. 561, 52 Stat. 588 (1938); Congress thus had to know that giving the FCC the power "to carry out the provisions of this Act" would give the FCC the broad power to implement the Act that the new bill amended, *i.e.*, the Communications Act of 1934.

would leave the FCC without authority to implement many of the other provisions of § 251, which all agree it may implement. *See, e.g.*, Pet. App. 12a n.10. These other provisions are not, as respondents claim, specific grants of authority in themselves. Most of these sections *presume* FCC power to regulate; they do not grant it. *See, e.g.*, § 251(c)(4)(B) ("a State commission may, *consistent with regulations prescribed by the Commission under this section*, prohibit" certain actions) (emphasis added); § 251(g) (requiring local exchange carriers to continue to comply with preexisting equal access and nondiscriminatory interconnection restrictions and obligations "until such restrictions and obligations are explicitly superseded *by regulations prescribed by the Commission*") (emphasis added). The text of these provisions also answers respondents' rhetorical question: "if section 251(d)(1) *already* provided the FCC with generic authority over all of sections 251 and 252, why would Congress have included these specific delegations of authority to the FCC?" BA 39 (emphasis in original). These provisions do not delegate authority to the FCC; they limit FCC authority delegated elsewhere or define limits on the power of state commissions. *See, e.g.*, § 251(d)(2) (limiting FCC authority by describing standards that the FCC must consider in determining what elements are available for unbundling); § 251(c)(4)(B) (giving state commissions the power to prohibit certain actions by a reseller, but limiting that power by requiring that it be "consistent with regulations prescribed by the Commission under this section").

Third, § 252(c)(2)—which provides that "[i]n resolving . . . any open issues . . . a State commission shall . . . establish any rates for interconnection, services, or network elements"—cannot bear the weight respondents place on it. Respondents' reliance on § 252(c)(2) is linked to their argument that the FCC lacks plenary authority to implement §§ 251 and 252. They contend that § 252(c)(2) unambiguously grants state commissions the power to set rates and pricing methodologies, BA 20;

GTE 27-28, or, at the very least, § 252(c)(2) confirms Congress' understanding that the FCC lacks such authority, and that the state commissions possess it.

Nothing in § 252(c)(2) can plausibly be read to deprive the FCC of jurisdiction to implement any of the provisions of the 1996 Act. Section 252(c)(2) merely assumes that state commissions will at times set rates, and it imposes substantive limits on state commissions when they do. The provision is conditional: It provides that "[i]n resolving . . . any open issues . . . a State commission shall—establish any rates . . . according to subsection (d)." § 252(c)(2). In terms, it requires only that whatever issues remain open, the state commission will resolve consistent with the limitations provided in § 252(c). *See, e.g.*, § 252(c)(1) (state commissions' resolution of any open issues must comply with § 251 and FCC regulations thereunder); § 252(c)(2) (state commissions' resolution of any open pricing issues must meet additional requirement of § 252(d)(1)).

Respondents suggest that § 252(c)(2) deprives the FCC of jurisdiction because it directs state commissions engaged in setting rates "to apply *solely* the standards of § 252(d)," and not the standards contained in § 252(c)(1), which incorporate by reference the FCC regulations promulgated under § 251. GTE 30 (emphasis added); *see also* BA 23. The word "solely," however, does not appear anywhere in § 252(c)(2), and with good reason. The restrictions on the state commissions' resolution of any open issues are conjunctive; thus § 252(c)(2) places an *additional* restriction on the state commissions' determinations of open issues concerning price: those determinations must comply with the requirements of § 252(d). The *additional* requirement imposed by § 252(c)(2), however, does not eliminate the other requirements imposed by § 252(c) with respect to "*any* open issues," a term which by its plain language includes price issues. In particular, § 252(c)(2)'s additional requirement governing pricing obligations cannot insulate such determinations from § 252(c)(1)'s directive to apply

"the regulations prescribed by the [Federal Communications] Commission pursuant to section 251." [12]

Moreover, the fact that § 252(c)(2) reflects Congress' assumption that state commissions would at times set rates does not deprive the FCC of jurisdiction over pricing methodology. Just as state commissions can resolve other "open issues" consistent with binding FCC regulations pursuant to § 252(c)(1), state commissions can "establish rates" pursuant to § 252(c)(2) by taking binding FCC regulations that prescribe a pricing methodology and applying them in concrete fact situations in a way that takes account of local conditions. *See also Local Competition Order* ¶¶ 135-137, Pet. App. 223a-224a.[13]

Fourth, the legislative history—and in particular the decision of the conference committee to split § 251 from § 252—does not help respondents. BA 24-25; GTE 29-31. The conference committee's decision to make §§ 251 and 252 separate provisions was not an effort to withdraw the FCC's authority over price and give it to the state commissions. Section 251 sets forth substantive standards for rates just as much as § 252 does. *See, e.g.*, § 251(c)(2)(D); § 251(c)(3); § 251(c)(4)(A). Moreover, Congress itself entitled § 252 "*Procedures* For Negotiation,

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[12] For this reason, there is no merit to respondents' suggestion that petitioners' reading of the statute renders § 252(c)(2) "wholly superfluous." BA 24; GTE 29. Section 252(c)(2) imposes an additional requirement on state commissions when they resolve open rate issues that does not exist when state commissions resolve other open issues, thus making explicit that state commissions must comply with *both* the FCC's regulations *and* the requirements of § 252(d), including in particular § 252(d)(1)'s prohibition on using rate of return or other rate based methods.

[13] Respondents argue that § 252(c)(2) trumps § 251(d)(1) and § 201(b) because the specific controls the general. *See* BA 34; GTE 34. But that argument simply assumes its conclusion, *i.e.*, that there is a conflict between the two provisions that must be resolved. As noted above, however, there is no conflict (and thus no need to resolve the tension between a specific provision and a general one) because the provisions can, and therefore must, be read harmoniously.

Arbitration, and Approval of Agreements" (emphasis added). *See, e.g., INS v. National Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 189 (1991) (title of section can aid in resolving meaning of the statutory text). Given that Congress itself indicated that the separation of § 251 from § 252 was intended to embody a separation of the substance of the interconnection agreements from the procedures for negotiating and approving them, there is no reason to believe that Congress' decision to separate §§ 251 and 252 was at all intended to foreclose FCC regulation of prices.

Respondents' arguments are not bolstered by their reliance on unsupported and self-serving assertions that their allies successfully lobbied the conference committee to make these changes in order to protect state authority. *See* BA 25 n.13; GTE 30 & nn.15-16. These arguments —which ask this Court to interpret a statute based on the unsupported assertions of private parties that they successfully lobbied Congress—are not "legislative" history at all. *See Kelly v. Robinson*, 479 U.S. 36, 51 n.13 (1986) (declining to "accord any significance" to statements because "none of those statements was made by a Member of Congress, nor were they included in the official Senate and House Reports").

In any event, respondents' cavalier approach to legislative history ignores the conference committee's own assertion that it noted changes "except for clerical corrections, conforming changes made necessary by agreements reached by the conferees, and minor drafting and clerical changes." "Conforming" changes are those changes required as a result of other, explained agreements of the conference committee. The changes respondents claim were made in conference would have been radical, substantive changes, unrelated to any explained agreement of the committee, and thus cannot possibly be considered "minor" or "clerical" or "conforming" changes.[14] *See Central States Motor*

[14] Both the House bill and the Senate bill gave the FCC the regulatory authority over pricing the respondents claim the confer-

Freight Bureau, Inc. v. Interstate Commerce Comm'n, 942 F.2d 1099, 1107 (D.C. Cir. 1991) (R.B. Ginsburg, J.).

Fifth, respondents can reconcile their reading of the statute with the plain language of other provisions of the Act such as §§ 271 and 160 only by ignoring the terms of those provisions or reading in limitations that Congress did not include. *See* MCI Opening Brief at 36-38. For example, they suggest that in passing on an application to enter the long distance market pursuant to § 271, the FCC "can require no more than interconnection in accordance with the pricing principle promulgated *by the States*." BA 42 (emphasis in original). But that is not what § 271 says. Section 271(c)(2)(B) requires the FCC independently to determine whether the § 271 applicant has provided "[i]nterconnection in accordance with the requirements of Sections 251(c)(2) and 252(d)(1)." *See SBC Communications, Inc. v. FCC*, 138 F.3d 410, 416-17 (D.C. Cir. 1998). Section 251(c)(2) includes the requirement that rates be "just, reasonable, and nondiscriminatory." No fair reading of § 271 permits the conclusion that Congress gave state commissions the license to determine the future of the nation's long-distance telecommunications markets.[15]

Similarly, respondents' arguments that the FCC's forbearance authority is limited to "certain aspects" of § 251(c)—excluding price—ignores the fact that § 160 not only contains no such limitation, but in fact *requires* the FCC to consider whether charges are just and reasonable before the FCC may exercise that authority.

In sum, respondents' arguments cannot obscure what Congress has made clear: the FCC has authority to imple-

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ence committee stripped away without comment. *See* MCI Opening Brief at 32.

[15] Respondents make no effort even to try to defend the procedural and jurisdictional chaos with respect to § 271 applications that would result from their reading of the Act, *see* MCI Opening Brief at 37, nor to explain why Congress would have created such a bizarre scheme.

ment the local competition provisions of the Act, including the provisions concerning rates.

B. Respondents' Contention That the 1996 Act Created a "Decentralized State-centered Scheme" Is Untenable.

Unable to make a case on the basis of statutory text, respondents once again resort to policy and rhetoric to justify limiting the FCC's authority to implement the substantive requirements of federal law. Respondents contend that Congress wanted a "decentralized, State-centered" approach, BA 44, that was "deregulatory," and advanced values of federalism. But it is simply not true that the 1996 Act sought to divest the federal government of powers that were transferred to the state commissions. To the contrary, the Act took back from the state commissions much of the substantive authority they had over intrastate matters under the 1934 Act. Indeed, respondents' arguments trivialize the revolutionary aspect of the 1996 Act. For the first time, Congress applied a comprehensive set of *federal* standards to govern entry into local markets. The 1996 Act is "State-centered" principally in the sense that the state commissions have been enlisted as partners in the administration of *federal* law embodied in the new national policy. It is manifestly *not* "State-centered" in the sense that state commissions decide all of the key substantive policy issues by themselves. That much is confirmed not only by the sweeping preemptive federal directives governing local competition, but also by Congress' choice of exclusive federal district court review of state actions applying the 1996 Act. *See Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 383 (1996) (one principal purpose underlying a grant of exclusive jurisdiction is "to achieve greater uniformity of construction") (internal quotation omitted).

The incumbents deride this argument as "audacious," BA 44, but the audacity is theirs. Here, they argue that the 1996 Act contemplated "differing discretionary judg-

ments" and "State autonomy and discretion." BA 45; *see also* GTE 40. But in federal courts in § 252(e)(6) proceedings, they conveniently advocate the opposite. Thus, for example, respondent U S West has argued that federal courts should apply a *de novo* standard of review and accord no deference to state commissions' determinations, because had Congress "intended that any deference be accorded the state commissions, it would not have precluded review in the state court systems, where deference to State commissions is routinely accorded." [16] Similarly, respondents have argued that "unlike a uniform application by a federal agency, a federal statute could be subject to 50 different interpretations in 50 different states. Under these circumstances, deference to a State agency's interpretation of federal law is not appropriate." [17] *See also GTE South Inc. v. Morrison*, Civ. Act. No. 3:97-CV-493, GTE's Brief in Opposition to the Commissioners' Motion for Partial Summary Judgment, at 7-8 (E.D. Va. filed Dec. 1, 1997) (deference to state agency is inappropriate because "giving deference to state agency interpretations of federal law would result in multiple, inconsistent legal interpretations of the federal statute around the country" and because "state agencies lack the expertise in implementing federal laws and the nationwide perspective characteristically possessed by a federal agency"). [18]

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[16] *U S West Communications, Inc. v. MFS Intelenet, Inc.*, No. 98-35146, Brief of Appellant, at 11 (9th Cir. filed June 11, 1998).

[17] *Southwestern Bell Telephone Co. v. AT&T Communications of the Southwest, Inc.*, Civ. Act. No. A-97-CA-132-SS, Motion for Summary Judgment of Southwestern Bell Telephone Company Based On Violations Of Statutory Standards and Supporting Brief, at 16 (W.D. Tex. filed Apr. 30, 1997).

[18] State commissions have unsuccessfully argued in § 252(e)(6) proceedings that a federal court should defer to decisions of state commissions on the meaning of federal law. Although this position avoids the brazen hypocrisy of the incumbents, it is simply wrong: federal courts do not defer to state agencies on questions of federal law. *See, e.g., AMISUB (PSL), Inc. v. Colorado Dep't of Soc. Servs.*, 879 F.2d 789, 795-96 (10th Cir. 1989); *Perry v. Dowling*, 95 F.3d 231, 236 (2d Cir. 1996). Unsurprisingly, the district courts have

Ultimately, incumbents are forced to concede that the 1996 Act adopted a "centralized" approach by providing for "ultimate federal oversight of State arbitrations," but they claim that Congress "chose a judicial, not an administrative, mechanism for this oversight." BA 5. Under incumbents' approach, the federal courts, on *de novo* review of state arbitration decisions, will decide the substance of the 1996 Act's federal requirements in a piecemeal fashion, over an extended period of time, and without the benefit of the views of the expert federal agency. But respondents offer no explanation why Congress would have wanted the federal courts and not the FCC to set national communications policy within the broad statutory framework. Moreover, as noted above, respondents' view that the Act contemplates a gradual unfolding of its key provisions is contrary to the numerous provisions of the Act that emphasize the need for rapid implementation, *see supra* p. 19, and would destroy the prospects for rapid competition in local markets, *see Local Competition Order* ¶ 618 (JA 131) ("such a process could delay competition for years"); *id.* ¶ 114, Pet. App. 212a ("Lack of national rules could . . . create great uncertainty for the industry, capital markets, regulators, and courts as to what pricing policies would be pursued by each of the individual states, frustrating the potential entrants' ability to raise capital.").

Respondents' invocation of "federalism" is similarly unavailing. BA 44-45, GTE 40-41. To be sure, the 1996 Act preserves a role for the state commissions if they choose

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uniformly refused to defer to the state commissions on the interpretation of the 1996 Act. *See, e.g., U S West Communications, Inc. v. Hix*, Civ. Act. No. 97-D-152, Memorandum Opinion and Order, at 9 (D. Colo. Dec. 5, 1997) (*Chevron* deference is inappropriate because state commissions "have little or no experience in implementing federal laws and policies and do not have the nationwide perspective characteristic of a federal agency."); *MCI Telecommunications Co. v. Bell Atlantic-Virginia Inc.*, Civ. Act. No. 3:97-CV-629, Order Ruling on the Commissioners' Motion for Partial Summary Judgment, at 3 (E.D. Va. filed Dec. 24, 1997) (no deference to state agency).

to accept it, but it is not a "State-centered scheme" that permits state commissions to act under state law with only limited federal constraints. Instead, the Act imposes federal standards interpreted at a general level by the expert federal agency, with state commissions having autonomy to apply these federal regulations to local conditions. This is not "patronizing rhetoric," GTE 38, and does not reduce the state commissions to the "ministerial" and discretionless task of implementing the FCC's methodology. *See* BA 7. To the contrary, as the FCC found, "state commissions will make critical decisions concerning a host of issues involving rates," *Local Competition Order* ¶ 137, Pet. App. 224a, including decisions about the prime components of rates, such as depreciation, joint and common costs, and profit. *See id.* ¶¶ 686, 696, 702 (JA 140-41, 143-44, 146-47). *See generally Louisiana Pub. Serv. Comm'n*, 476 U.S. at 364-65 ("depreciation practices contribute importantly to the calculation of both the carrier's investment and its expenses"). Regulations that promulgate broad ratemaking methodologies but leave open for state commission determination most of the critical inputs that go into a rate cannot be said impermissibly to establish the rate, to relegate state commissions to performing "ministerial" functions, or to deprive state commissions of their considerable discretion in carrying out federal law.

In a similar vein, respondents mistakenly trumpet the statement in the Conference Report that the 1996 Act produced a "pro-competitive, de-regulatory national policy framework." BA 4; *see also* GTE 11. The issue is not *whether* the Act will be interpreted and applied by regulators, but rather *which* regulatory agency (or agencies) will perform this task. Respondents never explain why "deregulation" counsels in favor of vesting rulemaking authority in 50 different state commissions rather than in the FCC. For national competitors such as MCI, respondents' interpretation of the Act—which subjects competitors to 50 different sets of regulations—is anything but "deregulatory." Moreover, the "deregulatory" nature of the 1996 Act surely stems in large part from its elimination

of anticompetitive *state* regulations which previously governed intrastate telephone markets. The Act's "deregulatory" nature thus cannot support the view that Congress intended for state commissions rather than the FCC to implement the Act's new federal standards.

In sum, respondents' State-centered vision of the Act is not only inconsistent with the vision of the Act they have put forth in § 252(e)(6) proceedings around the country, it is at odds with the language and purpose of the statute, ignores the extension of *federal* law to intrastate matters, and results in an irrational and unworkable scheme for local competition.

C. Section 2(b) Does Not Deprive the FCC of Jurisdiction to Implement the Federal Standards That Govern Rates.

In the 1996 Act, Congress took the extraordinary step of subjecting intrastate telephone markets to federal substantive law for the first time and (in § 253) gave the FCC unambiguous authority to preempt "*any* statute, regulation, or legal requirement" imposed by a State that "prohibits or has the effect of prohibiting" an entity from providing intrastate or interstate telephone service. In this context, it would be illogical to conclude that Congress nonetheless intended that state commissions—whose enabling acts, rules, and regulations were the very ones superseded by 1996 Act—have the *sole* authority to implement the key pricing provisions of the 1996 Act. *Cf. United Savs. Ass'n of Tex. v. Timbers of Inwood Forest Assoc.*, 484 U.S. 365, 371 (1988) ("A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law"). Nothing in § 2(b) requires this illogical result. First, even under respondents' mistaken understanding of § 2(b), § 2(b) erects no barrier to the FCC's implementation of the local competition provisions of the Act. Just as Congress provided in a straightforward and unambiguous manner for

the federal local competition provisions—including the pricing provisions—to *apply* to intrastate telephone services, Congress provided in a straightforward and unambiguous manner to *give the FCC jurisdiction* over those same services. Second, as MCI demonstrated in its opening briefs, § 2(b) was intended to limit only the FCC's *ancillary* jurisdiction over intrastate matters not governed by substantive federal law and has no application when, as here, federal law clearly applies to those matters.

As described above, *see supra* p. 34, in §§ 251(d)(1) and 201(b), Congress unambiguously gave the FCC authority to implement the local competition provisions of the 1996 Act. Respondents contend nonetheless that Congress' expression of its intent is insufficiently clear to satisfy § 2(b), on the theory that § 2(b) "precludes the FCC's assertion and exercise of authority over intrastate pricing and related matters without an *express* grant of jurisdiction over such matters." CA 33 (emphasis in original).[19]

That cannot be correct. The statement of congressional intent necessary to overcome § 2(b)'s presumption that the Communications Act does not "apply" to intrastate matters is the same as that necessary to overcome § 2(b)'s presumption that the Act does not "give the Commission jurisdiction" to regulate intrastate matters. Thus, if respondents are correct about what is necessary to overcome the § 2(b) presumption, then virtually *none* of the obligations in § 251 would even *apply* to intrastate communications. For virtually none of § 251's local competition provisions explicitly mentions intrastate matters or otherwise demonstrates the kind of "comparable language" that respondents assert is required. Respondents' § 2(b) argument would thus render the 1996 Act a nullity.

Uncomfortable with the implications of their argument, respondents simply ignore them, and blithely assert that

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[19] *See also* NARUC 33 ("The absence of an *explicit* grant of federal authority in sections 251 and 252 is fatal to the FCC's jurisdictional claim") (emphasis added)); BA 36; GTE 44.

Congress unambiguously intended for the pricing provisions of the Act to apply to intrastate matters but deny that Congress made sufficiently clear its intent that the FCC implement those provisions. But they cannot ignore that the applicability of § 251 to intrastate matters is just as "implicit" as—and is no more unambiguous than—the authority of the FCC to implement that section. Just as § 251(c) sets forth substantive federal requirements that all agree apply to intrastate matters, *see, e.g.*, GTE 11; *Local Competition Order* ¶ 71, Pet. App. 179a-180a ("None of the commenters appears to claim that section 251 addresses exclusively interstate matters"), § 251(d)(1) gives the FCC authority to implement those requirements.[20]

Moreover, this examination into whether Congress indicated its intent with sufficient clarity is unnecessary because § 2(b) limits only the FCC's *ancillary* jurisdiction. Thus, § 2(b) precludes the FCC from exercising jurisdiction over matters to which federal law does not unambiguously apply, *i.e.*, the sort of jurisdiction approved by this Court in *Shreveport*. Respondents' arguments to the contrary are unpersuasive. For example, respondents accuse petitioners of ignoring the term "or" and eliminating the second clause of § 2(b). BA 29; GTE 45. But this is simply incorrect. Petitioners merely disagree with respondents about the meaning of the second clause. As MCI indicated in its opening brief, the second clause of § 2(b) was intended to preclude the FCC from exer-

[20] Respondents also argue that § 251(d)(1) cannot grant the FCC jurisdiction to implement the pricing provisions because, in contrast to § 276 of the Act, which explicitly refers to "intrastate and interstate" calls, § 251(d)(1) makes no mention of intrastate matters. BA 36; GTE 44. In § 276, however, had Congress omitted the term "intrastate," it would have been unclear whether the payphone provisions applied at all to intrastate matters. With respect to the local competition provisions, all concede that the relevant provisions of the Act clearly apply to intrastate matters, so the added specificity that was critical in § 276 to ensure that the substantive provisions applied intrastate would have been completely redundant.

cising ancillary jurisdiction; there is simply no indication that the clause was intended to perform the quite different function of severing the jurisdiction of the FCC from the substantive reach of federal law.

Respondents' treatment of the interaction of § 2(b) with § 201(b) only highlights their insupportable approach to statutory interpretation. They argue that the plain language of § 201(b) cannot mean what it says because it is limited by "context," and that, even if it does, it is trumped by § 2(b). But respondents' approach, in addition to doing violence to the plain language of § 201(b), relies on an inconsistent approach to context, using it to limit the plain meaning of § 201(b) but ignoring it when deciding the meaning of § 2(b). Respondents are forced into this inconsistency because, under their erroneous understanding of § 2(b), the provisions are in irreconcilable conflict. But as MCI showed in its opening brief, that conflict is purely one of respondents' own creation. In fact, the provisions are complementary: § 201(b) gives the FCC authority over interstate and intrastate matters to the extent that federal law applies to those matters, and § 2(b)—which limits the FCC's ancillary jurisdiction—provides that the FCC may go no further. *See Louisiana Pub. Serv. Comm'n*, 476 U.S. at 370 ("where possible, provisions of a statute should be read so as not to create a conflict").

Similarly meritless is respondents' assertion that *Louisiana* resolved the question now before this Court. In *Louisiana*, the Court resolved two separate issues; first, whether § 220 of the Act, establishing a uniform system of accounts, itself preempted state law, and second, if it did not, whether the FCC nevertheless could exercise *ancillary* jurisdiction—*i.e.*, jurisdiction over matters to which the Act did not directly apply—to preempt state law concerning depreciation. In the instant case, however, the contested division of authority between the FCC and the state commissions has nothing to do with preemption because Congress has already made the decision to preempt state law. Whatever entity regulates will indis-

putably be implementing new provisions of *federal* law that now govern local (*i.e.*, intrastate) telephone markets. Nothing in the holding of *Louisiana* suggests that § 2(b) was intended to deny the FCC jurisdiction even when federal law clearly applies and preempts state law.

Respondents nevertheless suggest that the ancillary jurisdiction argument is untenable because the *Louisiana* Court rejected the argument that § 2(b) was intended solely to prevent application of the *Shreveport* doctrine. *See* BA 30; GTE 46. But the *Louisiana* Court rejected an entirely different argument based on *Shreveport*. Respondents there argued that because *Shreveport* applied only to "rates," § 2(b) also applied only to rates and not to the other intrastate matters such as depreciation. Thus, the Court noted that it was "certainly true" that § 2(b) was intended to prevent "excessive federal regulation of intrastate service such as was sanctioned by the *Shreveport Rate Case*," but found "no authority in the legislative history to support respondents' proposition that the sole concern of the state commissioners was with 'protection against federal preemption of the states' setting of *individual customer charges* for specific intrastate services.'" 476 U.S. at 372 (citation omitted) (emphasis added). The *Louisiana* decision thus was not a rejection of the contention that § 2(b) was intended to overturn the *Shreveport* ancillary jurisdiction principle, but rather was a rejection of respondents' overly restrictive characterization of what that principle was.

Finally, there is no merit to respondents' argument that the legislative history of the 1996 Act is inconsistent with petitioners' approach. GTE 42-43; BA 27-28. Respondents view the conference committee's decision not to amend § 2(b) as working a major substantive change, even though that change appeared nowhere in the conference report. As noted above, that inference is flatly inconsistent with the conference committee's own description of its actions. *See supra* pp. 37-38. Respondents' reading of the conference committee's actions is particularly inappropriate when there is a ready explanation for those

actions: because an amendment to § 2(b) would be redundant with respect to the FCC's authority over the substantive provisions of the 1996 Act, amending § 2(b) could be seen as giving the FCC the license to exercise precisely the sort of ancillary jurisdiction the 1934 Congress had intended to prevent—for example, jurisdiction over local *retail* rates and depreciation, which remain regulated by state law. In any event, given the uninterrupted congressional practice of the last century and given Congress' decision to displace state laws governing competition in local markets, something more than silence is required to justify the conclusion that Congress intended to sever the FCC's authority to regulate from the reach of federal communications law.[21]

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[21] California and NARUC suggest that the legislative silence supports their argument because § 2(b) has a 60-year history as a "universally understood reservation of State authority." CA 32; NARUC 36-37. But so far as petitioner is aware, § 2(b) has *never* been relied upon to deny the FCC jurisdiction to implement a federal provision that clearly applied to intrastate matters. Indeed, the state respondents' argument on this point serves only to underscore their inability to come to grips with the revolutionary aspect of the 1996 Act: Congress' decision to apply for the first time substantive *federal* law to intrastate matters.

CONCLUSION

The Eighth Circuit's decisions invalidating Rule 315(b) and stripping the FCC of plenary authority to implement the requirements of § 251 of the 1996 Act should be reversed, and its decision upholding the FCC's remaining unbundling rules should be affirmed.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1998

AT&T Corp., *et al.*,

Petitioners,

vs.

Iowa Utilities Board, *et al.*,

Respondents,

And Related Cases.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF AND SUPPLEMENTAL BRIEF OF COVAD COMMUNICATIONS COMPANY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA

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MOTION OF *AMICUS CURIAE* COVAD COMMUNICATIONS COMPANY FOR LEAVE TO FILE SUPPLEMENTAL BRIEF

Amicus curiae Covad Communications Company ("Covad") respectfully moves the Court for leave to file the accompanying supplemental brief. In support of this motion, Covad states as follows:

1. Covad is a Competitive Local Exchange Carrier ("CLEC") that provides high-speed, digital telecommunications services. Covad has created its network by leasing local loops, which are Unbundled Network Elements ("UNEs"), from Incumbent Local Exchange Carriers ("ILECs") and combining them with Digital Subscriber Line ("DSL") equipment. Many customers use Covad's advanced network to transport telecommunications traffic between the subscriber's premises and the subscriber's Internet Service Provider ("ISP").

2. On April 3, 1998 Covad, with the consent of the parties, filed a brief *amicus curiae* in support of petitioners Federal Communications Commission ("FCC") and the United States of America.* In its brief, Covad demonstrated that a significant portion of the traffic carried over its UNE-based network is jurisdictionally interstate. Covad therefore concluded that the Eighth Circuit erred when it held that the FCC lacks authority to establish a pricing methodology for UNEs because these facilities are "fundamentally intrastate in character."

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* *See* Brief of *Amicus Curiae* Covad Communications Company in Support of Petitioners Federal Communications Commission and the United States of America, *AT&T Corp. v. Iowa Utilities Bd.* (U.S. Apr. 2, 1998) (Nos. 97-826, 97-829, 97-830, 97-831, 97-1075, 97-1087, 97-1099 and 97-1411).

3. In the seven months since Covad filed its initial brief, two developments — one originating in the Eighth Circuit, the other from the ILECs — have occurred. These developments provide significant support for Covad's position.

4. First, on August 19, 1998, the Eighth Circuit — in an opinion by the same panel that authored the decision below — held that telecommunications traffic between subscribers and their ISPs is jurisdictionally mixed and cannot be separated into interstate and intrastate components. *See Southwestern Bell Telephone Company v. FCC*, No. 97-2618, slip op. at 41 (8th Cir. Aug. 19, 1998). Because Internet traffic constitutes a significant portion of the traffic carried over CLECs' UNE-based networks, this decision demonstrates that UNEs are not "fundamentally intrastate in character."

5. Second, in recent months, four major Incumbent Local Exchange Carriers (Bell Atlantic, BellSouth, GTE, and Pacific Bell) have voluntarily filed tariffs with the FCC for their new Digital Subscriber Line services, which are used primarily to transport local telecommunications traffic between subscribers and their ISPs. By filings these tariffs at the FCC, rather than with the state public utility commissions, the ILECs have recognized that a significant portion of the traffic carried over physically local telecommunications networks is jurisdictionally interstate.

6. As a Competitive Local Exchange Carrier that uses Unbundled Network Elements to provide Digital Subscriber Line service that enables small businesses and residential subscribers to have high-speed access to the Internet and other multi-state networks, Covad is able to provide this Court with a perspective on these new developments that, to the best of the Company's knowledge, will not be provided by any of the parties.

For the foregoing reasons, *amicus curiae* Covad Communications Company requests that the Court grant it leave to file this supplemental brief.

Respectfully submitted,

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SUPPLEMENTAL BRIEF OF *AMICUS CURIAE* COVAD COMMUNICATIONS COMPANY

Amicus curiae Covad Communications Company ("Covad") respectfully submits this supplemental brief.[1]

INTERESTS OF THE *AMICUS CURIAE*

Covad is a Competitive Local Exchange Carrier ("CLEC") that provides high-speed, digital telecommunications services. Covad has created its network by leasing local loops, which are Unbundled Network Elements ("UNEs"), from Incumbent Local Exchange Carriers ("ILECs") and combining them with Digital Subscriber Line ("DSL") equipment. Covad's advanced telecommunications network is used by small businesses and residential subscribers who seek affordable, high-speed access to the Internet in order to access information stored in computer servers anywhere in the world. The Covad telecommunications network also is used by employees who work at home and connect to their company's multi-state and multi-national computer networks.

INTRODUCTION

The decision below stripped the Federal Communications Commission ("FCC") of the express rulemaking authority granted by Congress, pursuant to which the agency established the pricing methodology for Unbundled Network Elements.[2] The court did

1. Counsel for a party did not author this brief in whole or in part, and no person or entity, other than *amicus curiae*, has made a monetary contribution to the preparation or submission of the brief.

2. Section 251(c)(3) of the Communications Act requires that UNE rates be "just, reasonable, and nondiscriminatory in accordance with the . . . requirements of this section and section 252." 47 U.S.C. § 251(c)(3). Section 251(d)(1), in turn, directs that the FCC is to adopt rules "necessary . . . to implement the requirements of this section." *Id.* at § 251(d)(1). Taken together, these provisions expressly grant the FCC rulemaking authority to promulgate a binding national methodology to guide the States in their adjudicative determination regarding UNE rates.

so because it assumed that UNEs are "fundamentally intrastate in character." As a result, each State is now exercising exclusive and unfettered authority to establish UNE prices. This decision has had an adverse impact on CLECs, such as Covad, that rely on UNEs to provide service.[3]

In its initial brief,[4] Covad demonstrated that the Court's decision is based on two fundamental errors. The court's initial mistake was to assume that UNEs are "fundamentally intrastate in character" because they are used almost exclusively to provide *intrastate* telecommunications service.[5] This is simply wrong. UNE-based networks often are used to provide jurisdictionally *interstate* service. For example, these networks increasingly transport telecommunications traffic between a subscriber and his or her ISP. The ISP, in turn, sends the traffic on to computer servers, which often are located outside the subscriber's home State.[6] The court compounded its mistake by holding that, even if UNEs are "sometimes" used to provide interstate service, the States have the exclusive and unfettered

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3. Some States have still not established UNE rates. Other States have set these rates at levels that appear to be substantially in excess of cost.

4. On April 3, 1998, Covad, with the consent of the parties, filed an *amicus* brief in this matter (the "Covad *Amicus* Brief"). *See* Brief of *Amicus Curiae* Covad Communications Company in Support of Petitioners Federal Communications Commission and the United States of America, *AT&T Corp. v. Iowa Utilities Bd.* (U.S. Apr. 2, 1998) (Nos. 97-826, 97-829, 97-830, 97-831, 97-1075, 97-1087, 97-1099, and 97-1411).

5. *Iowa Utilities Bd. v. FCC*, 120 F.3d 753, 796-99 (8th Cir. 1997), *cert. granted*, 66 U.S.L.W. 3484 (U.S. Jan. 26, 1998).

6. Covad *Amicus* Brief at 16-19.

right to set prices for those facilities.[7] This conflicts with well-established precedent. Because UNEs may be used to provide jurisdictionally interstate service, the FCC may regulate UNEs to the extent of their interstate use.[8]

SUMMARY OF ARGUMENT

In the seven months since Covad filed its brief, two significant developments — one originating from the Eighth Circuit, the other from the ILECs — have occurred. These developments relate to the use of the local telecommunications network to transport traffic between subscribers and their Internet Service Providers.

- First, on August 19, 1998, the United States Court of Appeals for the Eighth Circuit — in an opinion by the very same panel that authored the decision below – held that traffic between subscribers and their ISPs is jurisdictionally mixed, and that it is not feasible to separate this traffic into interstate and intrastate components. *See Southwestern Bell Telephone Company v. FCC*, No. 97-2618, slip op. at 41 (8th Cir. Aug. 19, 1998).

- Second, in recent months, four major Incumbent Local Exchange Carriers – Bell Atlantic, BellSouth, GTE, and Pacific Bell – have voluntarily filed tariffs with the FCC for their Digital Subscriber Line service. This service is used to transport traffic between subscribers and their ISPs. The ILECs stated that Federal tariffing is appropriate because, "at a minimum, a large portion of [this] traffic is interstate."

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7. *Iowa Utilities Bd. v. FCC*, 120 F.3d at 799.

8. Covad *Amicus* Brief at 19-24.

These developments demonstrate a clear recognition — by the court below and by the ILECs — that a significant, and rapidly growing, portion of the traffic carried over local telecommunications networks is jurisdictionally interstate. This is true for both ILEC and CLEC networks. Consequently, the court below erred when it assumed that the UNEs that CLECs use to provide service are "fundamentally intrastate in character." Because this assumption provided the basis for the court's conclusion that the FCC lacks authority to adopt a UNE pricing methodology, that decision must be reversed.

I.

THE EIGHTH CIRCUIT'S RECENT RECOGNITION THAT INTERNET TRAFFIC CARRIED ON LOCAL NETWORKS IS JURISDICTIONALLY MIXED DEMONSTRATES THAT THE LOCAL NETWORK FACILITIES THAT CLECs USE TO PROVIDE SERVICE ARE NOT "FUNDAMENTALLY INTRASTATE IN CHARACTER."

In its initial brief, Covad demonstrated that, in the decision below, the court focused on only one category of traffic carried over local telecommunications networks: traditional voice telephone calls.[9] As a result, the court assumed that the vast majority of *all* traffic carried over local telecommunications networks is jurisdictionally intrastate. The court further assumed that regulation of this traffic could readily be separated into interstate and intrastate components.[10] Based on these assumptions, the court concluded that the FCC lacks any authority to adopt a pricing methodology for Unbundled Network Elements, which are the local network facilities that CLECs use to transport telecommunications traffic.[11]

9. *Id.* at 16-19.

10. *See id.*

11. *See id.* at 19-24.

In the subsequent *Southwestern Bell* case, however, the same panel was required to consider the jurisdictional nature of a different — and rapidly growing — category of traffic carried over local networks: data communications between a subscriber and the subscriber's ISP. The court, quite properly, recognized that this data traffic is jurisdictionally mixed, and that it cannot feasibly be separated into interstate and intrastate components.

The specific issue before the court in *Southwestern Bell* was whether the FCC had properly exercised its authority when it required incumbent local exchange carriers to recover the cost of transporting traffic between subscribers and their ISPs using a combination of Federal and State charges. The court upheld the FCC's action.

In reaching this conclusion, the court observed that:

> [T]he services provided by ISPs may involve both an intrastate and an interstate component and it may be impractical if not impossible to separate the two elements. *See People of State of California v. FCC*, 905 F.2d 1217, 1243 (9th Cir. 1990). Consequently, the FCC has determined that the [local telecommunications] facilties used by ISPs are "jurisdictionally mixed," carrying both interstate and intrastate traffic. FCC Brief at 79. Because the FCC cannot reliably separate the two components involved in completing a particular call, or even determine what percentage of overall ISP traffic is interstate or intrastate . . . the Commission has appropriately exercised its discretion to require ISPs [to compensate the ILECs through a combination of Federal and State charges].

Southwestern Bell Telephone, slip op. at 41. The court went on to note, with apparent approval, that the FCC is considering the imposition of "additional [Federal] regulation" of this physically local traffic "under a scheme yet to be determined." *Id.* at 42.

The Eighth Circuit's belated recognition that communications between subscribers and their ISPs are jurisdictionally mixed requires reversal of the decision below. There is wide-spread agreement that communications between subscribers and their ISPs now constitutes a substantial — and growing — portion of the traffic carried over local telecommunications networks. Indeed, such communications account for the vast majority of traffic that Covad transports on its UNE-based network. Because a significant amount of traffic carried over CLECs' UNE-based networks is jurisdictionally interstate, the Eighth Circuit plainly erred when it assumed that UNEs are "fundamentally intrastate in character."

As Covad demonstrated in its initial brief,[12] under well-established jurisdictional principles, the FCC has the authority to regulate local telecommunications network facilties used to transport jurisdictionally mixed telecommunications traffic "to the extent of their interstate use." *National Association of Regulatory Utility Commissioners v. FCC*, 746 F.2d 1492, 1498 (D.C. Cir. 1984). Given the Eighth Circuit's recognition that traffic between subscribers and their ISPs is jurisdictionally mixed, the FCC — at a minimum — may regulate UNEs used to transport this traffic "to the extent of their interstate use." Indeed, given the Eighth Circuit's further finding that the FCC cannot separate the traffic between a subscriber and the subscriber's ISP into discrete interstate and intrastate components, the FCC may assert exclusive Federal authority

12. Covad *Amicus* Brief at 19-24.

over UNEs used to transport such traffic. *See Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 375 n.4 (1986) (FCC can preempt State regulation when it is "not possible to separate the interstate and intrastate components of . . . [an] FCC regulation.").

II.

THE ILECs' RECENT FCC TARIFF FILINGS RECOGNIZE THAT, AS A RESULT OF THE GROWTH OF THE INTERNET, A SIGNIFICANT PORTION OF THE TRAFFIC CARRIED OVER LOCAL TELECOMMUNICATIONS NETWORKS IS JURISDICTIONALLY INTERSTATE.

In the months since Covad filed its initial brief, four major Incumbent Local Exchange Carriers — Bell Atlantic, BellSouth, GTE, and Pacific Bell — have filed tariffs at the Federal Communications Commission for their new Digital Subscriber Line services.[13] The ILECs are deploying DSL service in order

13. *See* GTE Telephone Operating Companies, GTOC Tariff FCC No. 1, GTOC Transmittal No. 1148 (May 15, 1998); Pacific Bell Telephone Company, Pacific Bell Tariff FCC No. 128, Pacific Bell Transmittal No. 1986 (June 15, 1998); BellSouth Telecommunications, Inc., BellSouth Tariff FCC No. 1, BellSouth Transmittal No. 476 (Aug. 18, 1998); Bell Atlantic Telephone Companies, Bell Atlantic Tariff FCC No. 1, Bell Atlantic Transmittal No. 1076 (Sept. 1, 1998). After suspending each tariff for one day, the FCC allowed the tariffs to go into effect. The FCC is now conducting an investigation of the jurisdictional issues raised by each of these tariffs. *See GTE Telephone Operating Companies, GTOC Transmittal No.1148*, Order Designating Issues for Investigation, CC Docket No. 98-79 (Com. Car. Bur. Aug. 20, 1998); *Pacific Bell Telephone Company, Pacific Bell Transmittal No. 1986*, Order Designating Issues for Investigation, CC Docket 98-103 (Com. Car. Bur. Sept. 2, 1998); *BellSouth Telecommunications, Inc.*, (Cont'd)

to respond to the significant increase in ISP-bound traffic on their local networks.[14]

The ILECs' decision to file DSL tariffs at the FCC constitutes a significant departure from their established practice. The ILECs customarily have recovered most of the cost of carrying traditional voice traffic through tariffs filed with the State public utilities commissions. The ILECs, however, correctly recognize that ISP-bound traffic differs fundamentally from voice traffic. They have stated that Federal tariffing is appropriate because, while ISP-bound traffic cannot be separated into interstate and intrastate components,[15] "at a

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(Cont'd)
BellSouth Transmittal No. 476, Order Designating Issues for Investigation, CC Docket No. 98-161 (Com. Car. Bur. Sept. 1, 1998); *Bell Atlantic Telephone Companies, Bell Atlantic Transmittal No. 1076*, Order Suspending Tariff and Designating Issues for Investigation, CC Docket No. 98-168 (Com. Car. Bur. Sept. 15, 1998).

14. The ILECs claim that, as a result of the phenomenal growth of the Internet, this traffic has created significant network congestion. DSL service is designed to address that problem by diverting ISP-bound traffic off the ILECs' circuit-switched networks and on to packet networks. *See, e.g.*, GTE Telephone Operating Companies, GTOC Tariff FCC No. 1, GTOC Transmittal No. 1148, Description and Justification, at 1-2. *See generally* Covad *Amicus* Brief at 3-4 (describing the operation of DSL service).

15. *See, e.g.*, Direct Case of Pacific Bell, CC Docket No. 98-103, at 10-11 (Sept. 11, 1998) ("Although ISP traffic clearly involved interstate communications, Pacific is unaware of any technical way to determine the physical location of a destination point on the Internet. Internet addresses are assigned logically, not geographically like telephone numbers. . . . It is thus simply not possible to determine whether a communication is intrastate or interstate when the destination point is unknown." Moreover, a customer that uses DSL to access his or (Cont'd)

minimum, a large portion of [this] traffic" is jurisdictionally interstate.[16]

Like the ILECs, Covad has deployed DSL service to accommodate ISP-bound traffic. And, like the ILECs, Covad has determined that, at a minimum, a large portion of this traffic is jurisdictionally interstate. The Eighth Circuit's decision, however, has stripped the FCC of authority to establish the pricing methodology for the Unbundled Network Elements that CLECs such as Covad use to provide DSL service. This has divested the FCC of its authority to regulate facilties used to provide a jurisdictionally interstate telecommunications service. As Covad demonstrated in its initial brief, the Communications Act neither permits — much less requires — such a result.

(Cont'd)
her Internet Service Provider "may communicate simultaneously with multiple destinations around the world. . . . It is not possible to separate the intrastate and interstate portions [of the DSL service when the customer] is simultaneously engaged in intrastate and interstate communications over the Internet.").

16. *See, e.g.*, Direct Case of GTE, CC Docket No. 98-79, at 15-16 (Sept. 8, 1998) (quoting *ACLU v. Reno*, 929 F. Supp. 824, 830-49 (E.D. Pa. 1998), *aff'd*, 117 S. Ct. 2329 (1997)) ("The overwhelming weight of authority confirms that, at a minimum, a large portion of the Internet traffic carried over [Digital Subscriber Line services] is interstate in nature. The Internet is a 'global medium of communications' that 'links people, institutions, corporations, and governments around the world.' ").

CONCLUSION

For the foregoing reasons, and those contained in Covad's initial brief, the Court should reverse the decision of the Eighth Circuit insofar as it holds that the FCC may not establish the pricing methodology that the States must apply to set UNE prices. At a minimum, the Court should make clear that the FCC may mandate the application of its pricing methodology when UNEs are used to provide jurisdictionally interstate telecommunications services.

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And Related Cases.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF AMICUS CURIAE COVAD COMMUNICATIONS COMPANY IN SUPPORT OF PETITIONERS FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA

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CONSENT OF PARTIES

Pursuant to Rule 37 of the Rules of Court, all the parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of the Court.[1]

QUESTION PRESENTED

This brief addresses a single question raised by the Petitioners in this case: Whether the Federal Communications Commission has authority to adopt a national pricing methodology for Unbundled Network Elements.

INTEREST OF THE *AMICUS CURIAE*

Covad Communications Company ("Covad") is a Competitive Local Exchange Carrier ("CLEC") that provides high-speed, data-oriented telecommunications services. Covad was founded eight months after passage of the Telecommunications Act of 1996 in direct reliance on the Federal Communications Commission ("FCC") order at issue in this case. The Company's interests have been adversely affected by the decision of the court below.

Since its recent founding, Covad has built an all-digital,[2] all-packet[3] telecommunications network in the San Francisco Bay

1. Counsel for a party did not author this brief in whole or in part, and no person or entity, other than *amicus curiae*, has made a monetary contribution to the preparation or submission of the brief.

2. Digital technology uses electronic or optical "pulses" to represent the user's information. In contrast, traditional telephone networks, such as those deployed by the Incumbent Local Exchange Carriers ("ILECs"), rely on analog technology, which employs a continuous electrical signal that varies in frequency, to transmit information. The absence of frequency variations contributes to the superior quality of sound and video transmitted digitally.

3. A packet-switched network breaks user information into (Cont'd)

area that passes approximately one million homes and businesses. Covad has announced plans to expand its network to five other metropolitan areas in the coming year. Covad's advanced telecommunications network is used by small businesses and residential subscribers who seek affordable, high-speed access to the Internet in order to access information stored in computer servers anywhere in the world.[4] The Covad telecommunications network also is used by employees who work at home and connect to their company's multi-state and multi-national computer networks.

Covad's construction of its network would not have been possible without the provisions of the Telecommunications Act of 1996 that are under review in this case. In particular, Section 251(c)(3)[5] allows a CLEC, such as Covad, to enter the local telecommunications market by combining its own facilities with Unbundled Network Elements ("UNEs"). UNEs, which are leased from Incumbent Local Exchange Carriers ("ILECs"), are

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(Cont'd)
individuals "packets" (sometimes called "cells" or "frames"), routes each packet over one of many possible transmission paths, and reassembles the packets at the point of reception. Packet-switched networks differ from the ILECs' circuit-switched networks, which create a temporary dedicated physical connection between the caller and the recipient. Packet-switched networks are especially well suited for data communications.

4. A server is a computer that is used to store information, such as a World Wide Web home page, which can be retrieved by an interested party. *See, infra*, n.29 (describing the operation of the World Wide Web).

5. The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996), substantially amended the Communications Act of 1934, 47 U.S.C. §§ 151, *et seq*. For simplicity, all references to Sections are to the new sections of the Communications Act.

the physical "building blocks" of the ILECs' networks. Among the most critical of the UNEs is the "local loop," the wires running between almost every home and business in the United States and the ILEC "central office" that serves that customer. The Telecommunications Act directs the FCC to ensure that ILECs make UNEs available to CLECs at just and reasonable prices. *See* 47 U.S.C. §§ 251(c)(3), 251(d)(1).

Covad provides high-speed local telecommunications services by leasing the local loop from the ILEC in its service area and locating digital subscriber line ("DSL") equipment on the customer's premises and at the ILEC central office serving that customer.[6] From the central office, traffic is carried over high-capacity lines[7] to Covad's regional data aggregation center and, from there, to the user's Internet Service Provider ("ISP") or company computer network.

Covad's DSL network allows users to send and receive information over the existing local loop at much faster rates than conventional methods offered by the ILECs.[8] For example,

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6. The DSL equipment located at the subscriber's premises is referred to as a DSL modem. The DSL equipment located at the ILEC's central office is referred to as a Digital Subscriber Line Access Multiplexer ("DSLAM"). A diagram depicting the Covad network is attached to this brief as Appendix One.

7. These lines include T1 lines (which carry data at the rate of 1.544 million bits per second), DS3 lines (which carry data at the rate of 45 million bits per second), and OC3 lines (which carry data at the rate of 155.52 million bits per second).

8. There are a number of variants of DSL technology, including Asymmetric DSL ("ADSL"), High bit rate DSL ("HDSL"), ISDN DSL ("IDSL"), and Very high bit rate DSL ("VDSL"). Collectively, these technologies often are referred to as xDSL. From the customer's perspective, the most significant difference among these technologies is the speed at which they can transport information.

an ILEC customer that has a personal computer and a standard analog modem generally can receive information over the local telephone network at speeds no greater than *56 thousand* bits per second. Covad's DSL service, in contrast, allows the customer to receive information over the same facilities at speeds up to *1.5 million* bits per second.[9]

Because DSL technology uses the existing local loop infrastructure, Covad's prices are substantially lower than the prices that the ILECs charge for services that require the deployment of entirely new facilities (such as end-to-end fiber optic links) to provide transmission service at equivalent speeds. Thus, Covad has helped to fulfill one of the Telecommunications Act's main goals: promoting the rapid deployment of advanced telecommunications services at affordable prices. *See* 47 U.S.C. § 157 (statutory notes).

SUMMARY OF ARGUMENT

In the Telecommunications Act, Congress created a "pro-competitive, deregulatory, national policy framework" designed to replace State-created regulated monopolies with competitive markets. The decision of the court below, however, has radically altered the division of responsibility between the FCC and the States established in the Act. In particular, the court held that the FCC cannot require the States to implement a uniform national methodology designed to ensure that the prices ILECs charge for UNEs are just and reasonable. Rather, in the court's view, each State has exclusive and unfettered authority to establish UNE prices.

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9. By way of example, a user who seeks to download a 5 megabyte file — which is large enough to hold approximately 1 minute of video programming — would have to wait over *20 minutes* using traditional telephone technology. A user that obtained Covad's DSL service, in contrast, could download this information in just *27 seconds*.

The States' exercise of this judicially created authority has had a significant adverse effect on entrepreneurial companies, such as Covad, that are seeking to enter the local telecommunications market. Two years after adoption of the Act, many States have not issued a final order setting UNE prices. Where UNE prices have been set, they vary considerably — with some States mandating rates that plainly are not cost-based. For example, the price of an unbundled loop used to provide DSL service is *ten times higher* in Houston than in Chicago. Consequently, Covad has had to shelve plans to enter several significant markets. The end-result has been to deprive consumers of the benefits of the competitive local telecommunications market that Congress sought to create.

The conclusion of the court below that the FCC lacks any authority over UNE pricing is premised on two fundamental errors. First, the court erroneously concluded that Section 252 grants the States exclusive jurisdiction to set UNE prices. Second, the court wrongly held that, because UNEs are "fundamentally intrastate in character," Section 2(b) precludes the FCC from establishing a national pricing methodology for these facilities.

The court erred by finding that Section 252 — which provides that, in any arbitration, the State regulatory authority is to set UNE prices at a just and reasonable level — strips the FCC of authority to adopt a national pricing methodology for UNEs. In adopting the Telecommunications Act, Congress divided responsibilities between the FCC and the States. Section 251 unambiguously gives the FCC authority to adopt regulations necessary to implement the statutory requirement that ILEC rates for UNEs be just and reasonable. The court eviscerated this grant of authority by holding that Section 251 merely acts as a "time constraint" that gave the FCC six months to adopt regulations implementing a handful of statutory

provisions that *expressly* refer to FCC regulations. Rather than gutting the FCC's authority under Section 251, the court should have deferred to the FCC's reading of the statute. Under the FCC's approach, the agency may adopt a binding pricing methodology for UNEs, which the State regulatory authorities must apply in any arbitration to establish the specific rate that an ILEC is to charge.

The court also erred by finding that Section 2(b) — which limits the FCC's authority over facilities used to provide intrastate telecommunications services — prevents the FCC from adopting any pricing standards for UNEs. The court's first mistake was to assume that UNEs are used almost exclusively to provide intrastate telecommunications service. This is demonstrably incorrect. Covad's customers extensively use its UNE-based network to access information stored in computer servers outside their home State. The court further erred by holding that, even though UNEs are "sometimes" used to transport interstate traffic, the States have the exclusive and unfettered right to set UNE prices because those facilities are "fundamentally intrastate in character." This analysis is flatly inconsistent with the long-standing recognition, by numerous Courts of Appeals, that the FCC has authority to regulate physically intrastate facilities to the extent they are used to provide jurisdictionally interstate telecommunications services.

While the data communications carried over Covad's UNE-based network cannot readily be separated into interstate and intrastate categories, a very significant portion of this traffic plainly is jurisdictionally interstate. Consequently, the application of State pricing methodologies to the UNEs that Covad uses to provide service has prevented the FCC from applying its TELRIC methodology to facilities used to provide interstate telecommunications services. Such "reverse preemption" plainly violates the jurisdictional division of authority embodied in Section 2(b).

I.

THE EIGHTH CIRCUIT'S DECISION IS IMPEDING CONGRESS' EFFORTS TO CREATE A COMPETITIVE LOCAL TELECOMMUNICATIONS MARKET.

Historically, most States opposed competition in the local telecommunications market. Indeed, on the eve of the adoption of the Telecommunications Act, thirty-nine States had laws or regulations in effect that prohibited or restricted the competitive provision of telecommunications service.[10] In the Telecommunications Act, Congress created a "pro-competitive, deregulatory national policy framework"[11] designed to replace the State-created regulated monopolies with competitive markets.[12]

Congress crafted a two-pronged strategy to advance its pro-competitive national policy. As a start, Congress voided the legal restrictions on telecommunications competition adopted by the States.[13] Congress recognized, however, that eliminating legal

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10. *See* National Association of Regulatory Utility Commissioners, Report on the State of Competition in Intrastate Telecommunications 203-05 (Sept. 1, 1994) (listing states); *see also* H.R. REP. No. 104-204, at 50 (1995), *reprinted in* 1996 U.S.C.C.A.N. 10, 14 ("[T]he majority of States restrict full and fair competition in the local exchange, either by statute or through the public utility commission's regulations.").

11. CONF. REP. No. 104-458, 104th Cong. 2d Sess. 1 (1996).

12. *See* H.R. REP. No. 104-204, at 48, *reprinted in* 1996 U.S.C.C.A.N. 10, 11 ("Technological advances would be more rapid and services would be more widely available and at lower prices if telecommunications markets were competitive rather than regulated monopolies.").

13. *See* 47 U.S.C. § 253(a) ("No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.").

barriers to competition would not be sufficient: this would merely turn the ILECs' *de jure* monopolies into *de facto* monopolies, with little prospect that the American people would soon reap the benefits of competition. In order to "jump start" the competitive process, Congress also required the ILECs to break their networks into individual building blocks — UNEs — and to make those facilities available to new entrants at just and reasonable rates. *See* 47 U.S.C. §§ 251(c)(3), 251(d)(1).

Acting pursuant to an express grant of statutory authority, *see id.* § 251(d)(1), the FCC specified the network elements that the ILECs must unbundle.[14] The FCC further directed the States to apply a pricing methodology known as Total Element Long-Run Incremental Cost ("TELRIC"), which is intended to ensure that the rates that ILECs charge CLECs for UNEs are just and reasonable.[15] The TELRIC methodology seeks to estimate the prices that would exist for UNEs if they were sold in a competitive market.[16] The FCC concluded that setting prices in accordance with this methodology is essential to promote economically efficient entry into the local telecommunications market.[17]

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14. *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, 15683-775 (1996) ("*Local Competition Order*"), *aff'd in part and vacated in part sub nom. Competitive Telecommunications Ass'n v. FCC*, 117 F.3d 1068 (8th Cir. 1997), *aff'd in part and vacated in part sub nom. Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *cert. granted*, 66 U.S.L.W. 3484 (U.S. Jan. 26, 1998).

15. *Id.* at 15844-56; 47 C.F.R. §§ 51.503, 51.505.

16. *Local Competition Order*, 11 FCC Rcd at 15846.

17. *Id.*

Covad has used the statutory right to purchase UNEs to construct its state-of-the-art digital network.[18] However, the decision of the Eighth Circuit — which vacated the pro-competitive pricing rules adopted by the FCC, and held that the State regulatory authorities have exclusive and unfettered authority to set UNE prices — allows the States to set those prices at levels that create an insurmountable barrier for entrepreneurial companies such as Covad that seek to enter the local telecommunications market.

The prices that some State regulatory authorities have established for the local loop have been an especially serious obstacle to Covad's effort to bring the benefits of competition to additional markets.[19] Without a national standard, the price of these loops varies dramatically from State to State.[20] A comparison of loop prices in Illinois and Texas is illustrative. The Illinois Commerce Commission has set the monthly charge for loops at $3.72 in urban areas, $10.02 in suburban areas, and $11.53 in rural areas.[21] The State Commission has further

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18. Covad uses the same two-wire local loops that the ILECs use to provide analog service. Covad can use most of these loops "as is." However, approximately fifteen percent of the loops that the Company orders require minor "conditioning" to make them suitable for its digital service. Such conditioning is not substantially different from the conditioning that ILECs often perform in order to make these loops useable for their analog services.

19. A chart comparing loop costs in several States is attached as Appendix Two.

20. In many States, moreover, Covad is required to pay a premium for loops capable of carrying digital traffic.

21. *See AT&T Communications of Illinois, Inc. Petition for Arbitration of Interconnection Rates, Terms and Conditions and* (Cont'd)

determined that the price of loops certified to carry analog or digital traffic should be the same.[22] In Texas, by contrast, the Public Utility Commission has established prices for loops that are significantly higher than in Illinois. A CLEC that seeks to obtain loops certified to carry digital traffic in Texas must make a monthly payment of $34.91 in urban areas, $37.54 in suburban areas, and $46.09 in rural areas.[23] The end-result is that the price a CLEC must pay to obtain a loop certified to carry digital traffic is *ten times more* in Houston than in Chicago.

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Related Arrangements with Illinois Bell Telephone Company d/b/a/ Ameritech Illinois, Docket No. 96-AB-003 (Ill. Comm. Comm'n, Aug. 1, 1996); *Ameritech Illinois Petition for Arbitration of Interconnection Rates, Terms and Conditions and Related Arrangements with AT&T Communications of Illinois, Inc.*, Docket No. 96-AB-004 (Ill. Comm. Comm'n, Aug. 2, 1996).

22. *See id.* This approach is consistent with cost studies, prepared by the ILECs and filed at the FCC before the Telecommunications Act was passed, which show that the costs of loops certified to carry analog or digital traffic are virtually identical. *See Access Charge Reform*, First Report and Order, 12 FCC Rcd 15982, 16028-32 (1997) ("*Access Charge Order*") (comparing costs of analog-certified loops and loops which have been certified for Basic Rate Integrated Service Digital Network ("ISDN") service). Indeed, NYNEX submitted data showing that loops certified for digital traffic actually cost *less* than analog-certified loops because they can be tested and maintained remotely. *See id.* at 16197-99.

23. *See Petition of MFS Communications Company, Inc. for Arbitration of Pricing of Unbundled Loops*, Docket Nos. 16189, 16196, 16226, 16285, 16290, 16455, 17065, 17579, 17587, 17781, Arbitration Award (Tex. Public Utility Comm'n, Dec. 17, 1997). The monthly charge for an analog-certified loop in Texas is $12.14 in urban areas, $13.65 in suburban areas, and $18.98 in rural areas. *See id.* The State authorities thus have imposed a premium of nearly 200 percent for digital-certified loops.

The disproportionately high loop prices in some States cannot be based entirely on higher costs in those locations. Rather, these differentials must reflect a decision by the regulatory authorities in those States to price UNEs at levels well in excess of the level that would exist in a competitive market. For example, in one State, the Legislature apparently directed the regulatory authorities to set UNE prices based on historic cost. *See* Telecommunications Regulatory Reform Act of 1997, 1997 Ark. Acts 77, Section 9(E) (Feb. 4, 1997) (Arkansas).[24]

State regulatory decisions that set loop prices at levels far in excess of those that would exist in a competitive market have a significant adverse impact on Covad's ability to extend its network to additional States. There is broad consensus in the industry that the "price point" for mass-market acceptance of DSL service will be approximately $40 per month.[25] Indeed, U S WEST currently offers DSL service in several States at that price.[26] Plainly, Covad cannot profitably offer a competing DSL-based transport service if the cost of only one element of that service — the local loop — is close to, meets, or exceeds $40 per month. Consequently, Covad has had no choice but to

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24. In a competitive market, sellers do not base their prices on historic costs. Rather, they set prices at a level equal to the marginal cost of the most efficient provider. Firms that cannot profitably sell their goods or services at that price exit the market.

25. This is comparable to prices now being charged for equally high-speed access services provided over cable systems. Forrester Research, Inc., The Forrester Report, *Cable Modems Kick In*, Jan. 1997.

26. *See, e.g.*, U S WEST Communications Advanced Communications Services Tariff, New Mexico, issued Jan. 26, 1998, section 8, page 9, release 1; *see also 1500-kbps Modems for Christmas? Not for Most of Us*, PC World, Apr. 1998 at 64.

shelve its plans to provide service in Texas. Covad may have to do the same in other States. The loss of market opportunities as a result of State regulatory decisions obviously harms Covad. More importantly, however, the Eighth Circuit's decision to give the States free reign to set UNE prices plainly undermines Congress' goal of rapidly bringing the benefits of a competitive local telecommunications market to *all* Americans.

Unless this Court acts, there is little hope that this situation will soon improve. Many States — including Washington and California — have yet to adopt final prices for UNEs, despite the fact that the deadlines contained in Section 252 have long since passed. *See* 47 U.S.C. § 252(b)(4)(c) (requiring State regulatory authorities to resolve disputed issues within nine months after a CLEC makes an initial request to an ILEC). Until they do, it will not be possible to appeal their decisions to the Federal District Courts, as provided for in the statute. *See id.* § 252(e)(5). Even then, however, it may take years for a single national standard to emerge from case-by-case adjudications in courts throughout the country.

II.

IN DETERMINING THAT THE STATES HAVE EXCLUSIVE AND UNFETTERED AUTHORITY TO SET PRICES FOR UNBUNDLED NETWORK ELEMENTS, THE EIGHTH CIRCUIT MISREAD CLEAR STATUTORY PROVISIONS, MISUNDERSTOOD CRITICAL FACTS, AND MISAPPLIED WELL-SETTLED PRECEDENT.

As demonstrated above, the Eighth Circuit's decision to allow States to exercise exclusive and unfettered authority over UNE prices is depriving consumers of the benefits of a competitive market. This outcome is not mandated by the Telecommunications Act. Rather, it results from two fundamental errors made by the court. First, the court erroneously concluded

that Section 252 grants the States exclusive and unfettered jurisdiction to set UNE prices. Second, the court wrongly held that, because UNEs are "fundamentally intrastate in character," Section 2(b) precludes the FCC from adopting any pricing standards for these facilities.

A. Sections 251 and 252 Empower the Federal Communications Commission to Adopt a National Pricing Methodology, Which the States Must Implement.

In its decision, the Eighth Circuit held that Section 252 strips the FCC of authority to adopt a pricing methodology applicable to UNEs. Neither the words nor the legislative history of the Telecommunications Act support this conclusion. To the contrary, the Act expressly grants the FCC the authority to establish a pricing methodology for UNEs, which the States must use in any arbitration.

In adopting the Telecommunications Act, Congress divided responsibilities between the FCC and the States. Section 251 requires that UNE rates be "just, reasonable, and nondiscriminatory in accordance with the . . . requirements of this section and section 252." 47 U.S.C. § 251(c)(3). Section 251(d)(1), in turn, directs the FCC to adopt rules "necessary . . . to implement the requirements of this section." *Id.* § 251(d)(1). Taken together, these provisions unambiguously grant the FCC authority to adopt regulations governing UNE pricing. At the same time, Section 252 provides that, in any arbitration between an ILEC and a CLEC, "a State Commission shall . . . establish any rates . . . for network elements . . . [at] just and reasonable rate[s]." *Id.* §§ 252(c)(2), 252(d)(1).

The court below sought to reconcile Sections 251 and 252 by eviscerating the FCC's authority under Section 251. The court reasoned that the "plain language" of Section 252

"authorize[s] the State commissions to determine the prices an incumbent LEC may charge for [UNEs]." *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 794 (8th Cir. 1997). By contrast, the court read Section 251(d)(1) "primarily as a time constraint" that gave the FCC six months to adopt regulations to implement a handful of statutory provisions that *expressly* refer to FCC regulations. *Id.* By doing so, the Court violated a cardinal rule of statutory construction: wherever possible, different sections of a statute should be interpreted so as to give effect to each provision. *See, e.g., Walters v. Metro. Educ. Enters.*, 117 S. Ct. 660, 664 (1997) ("Statutes must be interpreted, if possible, to give each word some operative effect.") (citation omitted); *United States v. New York & Cuba Mail S.S. Co.*, 269 U.S. 304, 305-06 (1925) (recognizing "fundamental canon, that a statute must be construed, if possible, as a harmonious whole, and in such a way as to give effect to all its parts.").

Rather than gutting the FCC's statutory authority, the court should have deferred to the FCC's reading of the statute. In the *Local Competition Order*, the agency concluded that Congress intended for it to play a quasi-legislative role, while the State regulatory authorities are to play a quasi-judicial role. Under this approach, the FCC has authority to adopt a binding *methodology* designed to ensure that an ILEC fulfills its statutory obligation to make UNEs available at just and reasonable prices. At the same time, in any arbitration, the State regulatory authorities are to apply the Federal methodology to establish *specific rates*. This interpretation is consistent with the terms of Section 252(c), which directs the State commission to "ensure" that its decision in any arbitration meets "the requirements of Section 251, including the regulations prescribed by the [FCC] pursuant to section 251." 47 U.S.C. § 252(c)(1).

This interpretation also is consistent with the structure of the Telecommunications Act, which seeks to ensure

implementation of Congress' pro-competitive policy by imposing a series of Federal "checks" on the authority of the States. For example, Congress provided that if a State fails to carry out its Federal obligation under the Act, the FCC is to "preempt[] the State commission's jurisdiction" and fulfill the obligations itself. *Id.* § 252(e)(5). Similarly, Congress specified that any decision made by a State regulatory authority pursuant to this legislation is subject to judicial review by a Federal district court. *See id.* § 252(e)(6).

In each of these cases, the Federal entity (whether the FCC or the district court) must apply a *Federal* standard in order to fulfill its statutory obligation. This inevitably will require the FCC or the Federal courts to develop a *Federal* pricing methodology. It defies credulity to argue that the FCC was powerless to adopt a Federal pricing methodology at the outset of the process of opening-up the local market to competition, even though the agency and the courts will be required to develop such a methodology on a case-by-case basis over time.

B. Section 2(b) Does Not Preclude Federal Communications Commission Regulation of Unbundled Network Elements Used to Provide Interstate Services.

The Eighth Circuit also found that Section 2(b) of the Communications Act — which limits the FCC's ability to set "charges . . . for or in connection with intrastate telecommunications service" — precludes the FCC from adopting any pricing standards for UNEs. The court based this conclusion on two assumptions: (1) UNEs are almost always used to provide jursidictionally intrastate service, *Iowa Utils. Bd.*, 120 F.3d at 796, 799, and (2) limited use of UNEs to provide interstate service does not provide the FCC with *any* jurisdiction over these facilities because they are "fundamentally intrastate in character." *id.* Both of these assumptions are incorrect.

1. Unbundled Network Elements are used extensively to provide interstate services.

The court's first mistake was to assume that UNEs are used almost exclusively to provide intrastate telecommunications service. This is demonstrably incorrect. While UNEs are *physically* intrastate facilities, the Telecommunications Act does not restrict their use to the provision of *jurisdictionally* intrastate services. To the contrary, Section 251(c)(3) provides that ILECs must lease UNEs to "any requesting telecommunications carrier" for the provision of any "telecommunications service." 47 U.S.C. § 251(c)(3). Indeed, the Eighth Circuit recognized these facilities "sometimes" are used for the provision of interstate telecommunications services. *See Iowa Utils. Bd.*, 20 F.3d. at 799 & n.20. However, the court wrongly assumed that the amount of interstate traffic carried over the local network is relatively small and, therefore, that State regulation of these facilities would have only a "tangential impact on interstate services." *Id.* at 800.

The Eighth Circuit plainly focused on only one type of interstate use of the local network: the origination and termination of circuit-switched long-distance voice telephone calls. *See id.* at 799 n.20. The court ignored the fact that the local network increasingly is used to carry data traffic, such as data transmitted during lengthy on-line "sessions" in which a user "downloads" information from the Internet. Indeed, several of the Bell Operating Companies ("BOCs") have predicted that, by the year 2000, data traffic will account for between 25 to 30 percent of all traffic carried on the telephone network.[27] Such

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27. *See, e.g.*, Comments of U S WEST at 2-3 (filed May 8, 1996) ("Internet usage is growing exponentially .... [B]y the year 2000, as much as 30% of all local exchange traffic may be traffic which ultimately uses the Internet. A high percentage of this traffic will be (Cont'd)

traffic is far more likely than voice traffic to be interstate.[28]

Covad's experience provides clear evidence that a significant (and ever-increasing) portion of traffic carried over the physically intrastate network is jurisdictionally interstate. Covad's UNE-based network is extensively used by subscribers with personal computers seeking to access information located on the World Wide Web.[29] A subscriber who seeks to do so sends an information request over Covad's network to his or her information service provider. The subscriber's request is broken into numerous data packets, which are then routed to computer servers that contain the information requested by the user. During a single on-line session, the subscriber may receive information from computer servers located in several different

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(Cont'd)
interstate in nature — much more than the current interstate traffic percentages on the voice network."); Comments of Pacific Bell and Nevada Bell at 11 (filed May 8,1996) (estimating that on-line data calls could comprise up to 25% of Pacific Bell's traffic by the end of the decade), filed in *The Provision of Telecommunications Service via the "Internet" by Non-tariffed, Uncertified Entities*, RM No. 8775.

28. At the present time approximately 15 percent of circuit-switched voice traffic is jurisdictionally interstate. *See* Federal Communications Commission, Federal-State Joint Board, *Monitoring Report*, CC Docket No. 87-339 (May 1997) at Table 4.5.

29. The World Wide Web is a powerful method of accessing information through the Internet. Web "browsers" can combine text and graphical material into a standard interface. The Web also incorporates a "hypertext" system that allows direct links between Web "pages." *See* Federal Communications Commission, Office of Plans and Policy, OPP Working Paper No. 29, *Digital Tornado: The Internet and Telecommunications Policy*, at 20 (Mar. 1997).

States.[30] In most cases, neither the subscriber, nor the ISP, nor Covad knows the location of the servers.[31]

30. Popular content is often "cached" in computer servers located close to major metropolitan areas, while less-popular content may be stored in only one remote location. For example, when a subscriber calls up the box score from last night's basketball game between the Chicago Bulls and the Boston Celtics on the ESPNET SportsZone Web site, that request may be sent to an in-state computer server. However, when the subscriber clicks an icon on his computer screen to request the career statistics of Michael Jordan, who played in that game, that request may be sent to a server in another State. A computer in a third State may perform authorization and billing functions.

31. Because traffic between a subscriber and an ISP is jurisdictionally mixed, and because it often is not possible to determine the portion of this traffic that is jurisdictionally interstate, the FCC has allowed ISPs to use the same State-tariffed local telephone service as other business customers, rather than the federally tariffed interstate access services used by long-distance carriers. *See Access Charge Order*, 12 FCC Rcd at 16133-34. The FCC's decision to delegate regulatory authority to the States, however, does not alter the fact that a significant portion of the traffic that flows between ISPs and their subscribers is jurisdictionally interstate. Consistent with this view, several of the Bell Operating Companies have informed Covad that Sections 51.701 through 51.717 of the FCC's Rules — which require ILECs to compensate CLECs for terminating ILEC-originated intrastate traffic — are not applicable to the ILEC-originated traffic that the CLEC terminates at an ISP's premises. *See* Letter from Patrick Garzillo, Managing Director, Carrier Markets, NYNEX, to Dhruv Khanna, Convergence Law Group, Apr. 15, 1997 ("[T]raffic that is being delivered to Internet Service Providers . . . is interstate in nature and not eligible for reciprocal compensation under the FCC's rules."); Letter from P. Doug Garrett, Executive Director, Local Interconnection Industry Market Group, to Tom Regan, Covad Communications, June 16, 1997 (ISP "originating traffic does not become 'local traffic' simply because the FCC permits an ISP to use business local exchange service. . . .").

Covad's local network also is used by employees to "telecommute." In this application, an employee who is working at home sends information to, and receives information from, the computer network located in his or her company's office. These office-based computer networks often are referred to as Local Area Networks ("LANs"). Increasingly, companies with multiple offices located in different States are connecting their LANs together into Wide Area Networks ("WANs"). Thus, an employee working at home in San Francisco can use Covad's network to access information stored in a server in his company's New York office, while another Bay Area employee can use the network to send an e-mail message to her colleagues in the company's Los Angeles and Seattle offices. Because most companies now provide access through their corporate computer networks to the Internet, the employee can send a copy of the e-mail to a friend who lives in Chicago.

Given the significant amount of interstate traffic carried over local network facilities, it is clear that the Eighth Circuit erred when it concluded that State regulation of UNE pricing would have only "a tangential impact on interstate services." *Id.* at 800. To the contrary, State regulation of UNE pricing is having a direct, substantial, and growing effect on the provision of jurisdictionally interstate telecommunications services by CLECs.

2. The Federal Communications Commission has jurisdiction over physically intrastate facilities to the extent of their interstate use.

The Eighth Circuit compounded its factual error with legal error. The court assumed that the presence of "some" interstate traffic on the CLECs' networks did not provide the FCC with *any* authority over UNE pricing because the presence of this traffic did not alter the UNEs' "fundamentally intrastate . . .

character." *Id.* at 799. While the Eighth Circuit claimed that it was engaging in a "traditional analysis" of the jurisdictional issues, *id.*, the court's approach is at odds with nearly seventy years of consistent judicial precedent. These cases have consistently recognized that the FCC has authority to regulate local telecommunications facilities to the extent that they are used to provide jurisdictionally interstate services. *See generally,* J. Nadler, *Give Peace a Chance: FCC-State Relations After California III*, 47 Fed. Comm. L.J. 457, 493-501 (1995).

The origin of the established jurisdictional approach is this Court's decision in *Smith v. Illinois Telephone Company*, 282 U.S. 133 (1930). In that case, the Illinois Commerce Commission established the rates that the local telephone company, Illinois Bell, could charge for telephone service in Chicago. The record indicated that *99.5 percent* of the traffic carried over Illinois Bell's local facilities was jurisdictionally intrastate. In developing the rates, however, the State regulatory authorities allocated *100 percent* of the costs of those facilities to the intrastate jurisdiction. On appeal, the three-judge district court — much like the Court of Appeals in the present case — concluded that, because *most* of the traffic carried over the local network was jurisdictionally intrastate, the regulatory authorities could ignore the fact that a portion of the traffic carried over the network was jurisdictionally interstate. *See id.* at 147.

This Court reversed. The Court stressed that "[t]he proper regulation of rates can be had only by maintaining the limits of state and federal jurisdiction." *Id.* at 149. While the Court recognized the difficulty of making "an exact apportionment of the property" between the Federal and the State jurisdictions, it made clear that regulatory authorities may not "ignore altogether the actual uses to which the property is put." *Id.* at 150-51. Rather, to the extent that the local network is used to provide even the smallest amount of interstate service, the Federal

regulatory authorities have the right — and, indeed, the obligation — to see that those costs are recovered through federally regulated rates. *See id.* at 148-49.

In the present case, the portion of traffic carried over UNE-based local networks that is jurisdictionally interstate is far greater than it was in *Smith*. Yet, the court below concluded that the FCC lacks *any* authority to ensure that the rates charged for these facilities are just and reasonable because it believed that the amount of interstate traffic is not great enough to alter the "fundamentally intrastate character" of the local network. The Eighth Circuit's jurisdictional analysis plainly is at odds with this Court's decision in *Smith*.

Rather than using the "fundamental character" approach concocted by the Eighth Circuit, the Courts of Appeals have repeatedly held that the FCC has jurisdiction over a physically intrastate facility to the extent that the facility is used to provide interstate communications. As the D.C. Circuit explained in *National Association of Regulatory Utilility Commissioners v. FCC* ("*NARUC II*"):

> The dividing line between the regulatory jurisdictions of the FCC and the States depends on the nature of the communications that pass through the facilities [and not on] the physical location of the lines. *Thus, purely intrastate facilities . . . used to complete even a single interstate call may become subject to FCC regulation to the extent of their interstate use.* Every court that has considered the matter has emphasized that the nature of the communication is determinative rather than the physical location of the facilities used. . . .

746 F.2d 1492, 1498 (D.C. Cir. 1984) (Bork, J.) (emphasis added) (quotations and citations omitted). This approach, the

court made clear, is grounded firmly on the Supremacy Clause. Because virtually all telecommunications facilities are physically intrastate, the FCC simply could not exercise its plenary authority to regulate interstate communications if it "were barred from regulating any facility that carried interstate calls but was physically intrastate." *Id.* at 1499.

In a closely analogous case, *California v. FCC*, 4 F.3d 1505 (9th Cir. 1993) ("*California II*"), the Ninth Circuit affirmed the authority of the FCC to regulate the prices that the ILECs charge for a type of unbundled network elements used for interstate purposes. *California II* grew out of the FCC's decision, in the mid-1980s, to establish a regulatory regime known as Open Network Architecture ("ONA"). The FCC adopted ONA in order to facilitate competition in the market for interstate enhanced services.[32] Under ONA, the BOCs were to unbundle their local networks into basic service elements ("BSEs"), which are network features and functions that enhanced service providers obtain from the BOCs in order to deliver service to their customers. *See Filing and Review of Open Network Architecture Plans*, 4 FCC Rcd 1, 36 (1988) ("*ONA Order*").

In the *ONA Order*, the FCC required the BOCs to file a Federal tariff for any BSE that could be used to provide an interstate enhanced service. California objected, arguing that "because BSEs are . . . [physically] intrastate features and functions, the FCC lacked authority to regulate them." *California II*, 4 F.3d at 1514. The Ninth Circuit rejected this argument. The court explained that, to the extent that BSEs could be used

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32. Enhanced services are offerings — such as Internet access, electronic mail, access to on-line databases, and remote data processing — that combine telephone-company-provided transmission services with computer processing. *See* 47 C.F.R. § 64.702(a). The Telecommunications Act refers to these offerings as "information services." *See* 47 U.S.C. § 153(20).

to provide jurisdictionally interstate enhanced services, the FCC has the authority to regulate the price that the BOCs could charge for these network elements. *Id.* at 1515. The court observed that, in effect, "the state is seeking to preempt FCC regulation of [interstate] communication." This attempt at "reverse preemption," the court concluded, violates the division of Federal-State authority embodied in Section 2(b) of the Communications Act. *Id.*

The Eighth Circuit's decision in the present case cannot be reconciled with *Smith, NARUC II, California II,* or any of the numerous other cases that address the division of authority between the FCC and the States. Nor can the approach adopted by the court stand on its own merits. The fatal weakness in the court's approach is revealed in its discussion of the Federal access charge regime. The court recognized, as it must, that the FCC has jurisdiction to regulate the rates that the ILECs charge interexchange carriers ("IXCs") that use the ILECs' local facilities to originate and terminate interstate traffic. Yet, the court insisted that the FCC has no role in regulating the rates that the ILECs charge CLECs to lease the *identical* local facilities in order to provide the *identical* interstate service.

The only distinction that the court could muster is that an ILEC that provides interstate access service to an IXC is offering a "service," while an ILEC that leases a UNE to a CLEC is offering "a direct hookup" to the ILEC's network. *Iowa Utils. Bd.*, 120 F.3d at 799 n.20. This is a distinction without a difference. The extent of the FCC's jurisdiction plainly does not turn on whether the agency is seeking to regulate a telephone company service or whether it is seeking to regulate a telephone company facility used to provide that service. To the contrary, the FCC has authority to regulate both telephone company services and facilities to the extent of their interstate use. Were it otherwise, the FCC would be devoid of power to set depreciation

rates for local telephone company facilities to the extent that they are used to provide interstate services. This, of course, is plainly not the case. *See Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 375-76 (1986).

Because UNEs can be (and extensively are) used to provide jurisdictionally interstate service, they are subject to the jurisdiction of the FCC to the extent of their interstate use. While the data communications carried over Covad's UNE-based network cannot readily be separated into interstate and intrastate categories,[33] a very significant portion of this traffic plainly is jurisdictionally interstate. The application of State pricing methodologies to the UNEs that Covad uses to provide service has prevented the FCC from applying its TELRIC methodology to facilities used to provide interstate services. As a result, the FCC has been stripped of its plenary authority to regulate interstate telecommunications. Section 2(b) does not require this result. To the contrary, such "reverse preemption" plainly violates the jurisdictional division of authority embodied in that provision.

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33. *See, supra*, pp. 16-19.

CONCLUSION

By adopting the Telecommunications Act, Congress created a comprehensive Federal regime intended to rapidly replace State-created monopolies with competitive markets. The decision of the Eighth Circuit has effectively denied the American public the benefits that Congress sought to provide. Only this Court can set the matter straight.

Covad — on behalf of itself, its customers, and all those who believe in the benefits of competitive markets — respectfully asks this Court to reverse the decision of the Eighth Circuit insofar as it holds that the FCC may not establish the pricing methodology that the States must apply to set UNE prices. At a minimum, the Court should make clear that the FCC may mandate the application of its pricing methodology when UNEs are used to provide jurisdictionally interstate telecommunications services.

Respectfully submitted,

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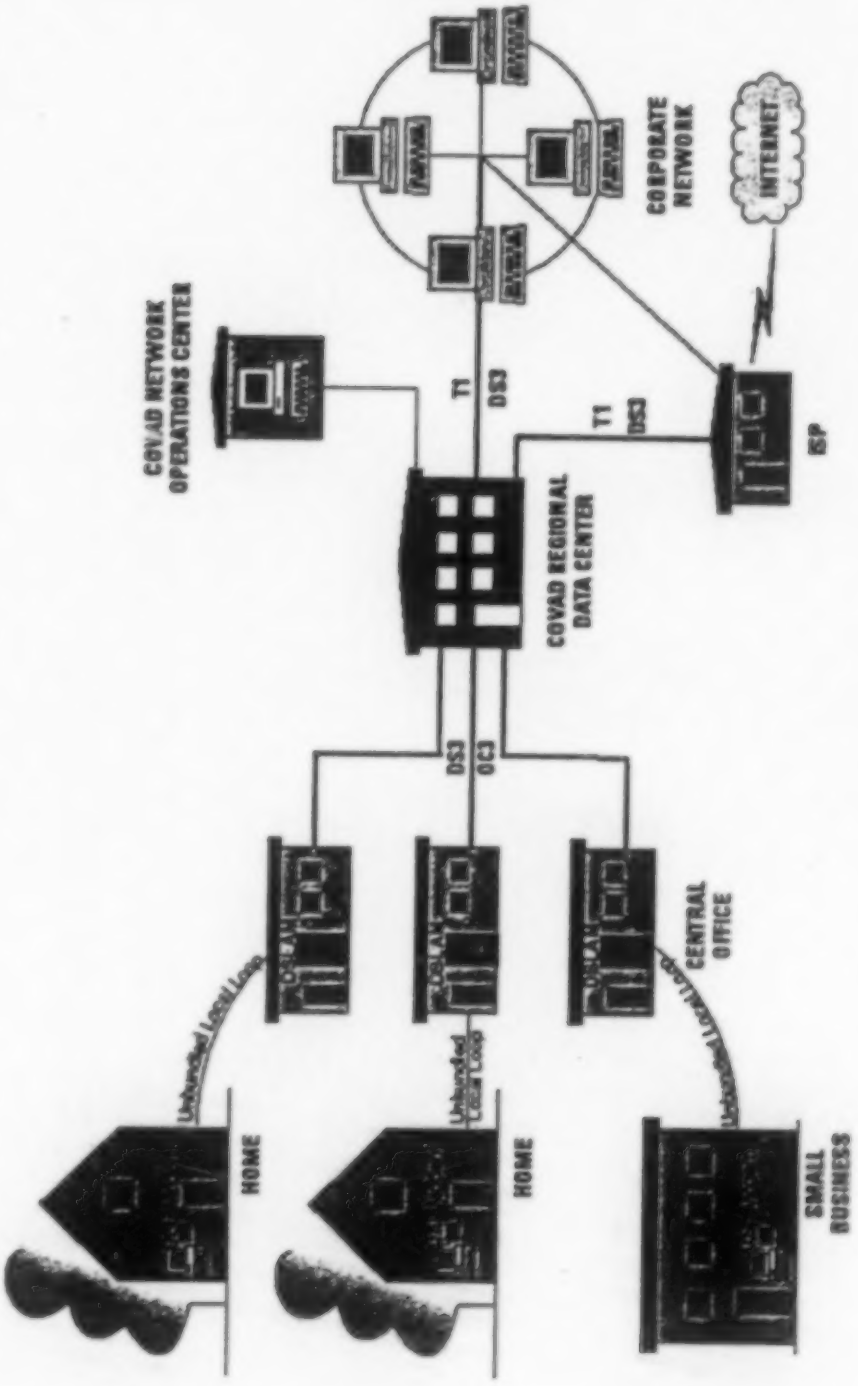
APPENDIX 1 — THE COVAD NETWORK



APPENDIX 2 — MONTHLY ANALOG AND DIGITAL LOOP PRICES

Illinois: AT&T Communications of Illinois, Inc. Petition for Arbitration of Interconnection Rates, Terms and Conditions and Related Arrangements with Illinois Bell Telephone Company d/b/a/ Ameritech Illinois, Docket No. 96-AB-003 (Ill. Comm. Comm'n, Aug. 1, 1996); Ameritech Illinois Petition for Arbitration of Interconnection Rates, Terms and Conditions and Related Arrangements with AT&T Communications of Illinois, Inc., Docket No. 96-AB-004 (Ill. Comm. Comm'n, Aug. 2, 1996).

Oregon: Agreement for Local Wireline Network Interconnection and Service Resale Between U S West Communications, Inc. and GST Telecom, Inc., Apr. 1, 1997. Order Approving Agreement: Docket No. ARB-18 (Or. Public Utility Commission, May 8, 1997).

Texas: Petition of MFS Communications Company, Inc. for Arbitration of Pricing of Unbundled Loops, Docket Nos. 16189, 16196, 16226, 16285, 16290, 16455, 17065, 17579, 17587, 17781, Arbitration Award (Tex. Public Utility Commission, Dec. 17, 1997).

Virginia: Agreement between Bell Atlantic-Virginia, Inc. and AT&T Communications of Virginia, Inc., Aug. 1, 1997. Order Approving Agreement: Case No. PUC960100 (Va. S.C.C. Sept. 4, 1997).